Implementing Targeted Sanctions in Australia: A Role for Procedural Fairness

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The Security Council may adopt economic measures targeted at specific individuals or entities. However, concerns have been expressed that their application must be accompanied by 'fair and clear' procedures including procedural fairness protections for those appearing on sanctions lists. In Australia, UN sanctions are implemented through proscriptive powers under the *Charter of the United Nations Act 1945* (Cth) against individuals or entities designated by either the Security Council or Australia. This article affirms an obligation upon the relevant Minister to accord procedural fairness when exercising proscriptive powers against individuals or entities in respect of Security Council sanctions which Australia is obliged to observe. This obligation is greatest where Australia is responsible for designation rather than the Security Council. The range of procedural fairness protections will be elicited from the legislative framework during administrative law proceedings challenging inclusion on sanctions lists or the application of asset freezes.

1. Introduction

Australia has introduced regulatory measures for freezing the assets of proscribed individuals or entities as a means of implementing economic sanctions regimes adopted by the United Nations Security Council. This article predicts that such measures will become subject to judicial review on administrative law grounds and, more particularly, are susceptible to challenge on procedural fairness grounds. Part One introduces the concept of sanctions 'targeted' against specific individuals or entities and traces international efforts to ensure that their implementation is accompanied by fair and clear procedures including affording procedural fairness protections. Part Two outlines the contemporary regime in Australia for implementing targeted sanctions, with a particular focus upon Security Council Resolutions which require freezing the assets of listed individuals or entities. In anticipation of litigation from affected individuals or entities challenging inclusion on sanctions lists, Part Three identifies several questions of construction arising from the statutory framework and explores the nature and scope of a duty to afford procedural fairness when proscriptive powers are exercised.

2. Targeted UN sanctions and 'fair and clear' procedures

United Nations (UN) member states party to the *Charter of the United Nations* ('*Charter*') have agreed to accept and carry out 'decisions' of the Security Council in light of the purposes and principles of that instrument.[1] These 'decisions' are binding upon states under international law and are made under Chapter VII of the *Charter* following a determination by the Security Council of a threat to the peace, breach of the peace or act of aggression.[2] The Council also determines what measures not involving the use of force are to be employed to give effect to its decisions.[3]

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[1] *Charter of the United Nations (UN Charter)*, opened for signature 26 June 1945, ATS No 1, art 25 (entered into force 24 October 1945).

[2] *UN Charter* art 39.

[3] *UN Charter* art 41 provides 'illustrative examples which obviously do not exclude other measures': International Criminal Tribunal for Yugoslavia, *Prosecutor v Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (1995) 35. See generally Vera Gowland-Debbas, 'Sanctions Regimes under Article 41 of the Charter' in V. Gowland-Debbas (ed) *National Implementation of United Nations Sanctions: A Comparative Study* (Leiden: Martinus Nijhoff, 2004) 3.

Economic measures or 'sanctions' are classically imposed against States. As they tend to have unintended consequences, including collateral impacts upon civilian populations rather than governmental elites, a 'targeted and flexible response' was considered desirable.[4] Iraq's manipulation of the oil-for-food humanitarian programme had also eroded the Security Council's credibility.[5] Furthermore, the effectiveness of sanctions and temporarily-disrupted economic relations had to be balanced against promoting justice and the rule of international law.[6]

Targeted sanctions, also known as 'smart' or 'designer' sanctions,[7] are imposed against specifically-identifiable individuals or entities designated by the Security Council or sanctions committees established by it and appearing in consolidated sanctions lists annexed to Security Council resolutions. They are 'open-ended' since individuals or entities need not be connected with any particular State. They signal a qualitative change in Security Council practice, shifting the focus to non-State 'decision-makers' consistent with increasing attention to the roles and responsibilities of such actors within the international system. Targeted sanctions include asset freezes. These typically require States to prevent any move, transfer, alteration, use or dealing in funds, financial assets or economic resources whose value, amount, location, ownership, possession or character will be changed. Other measures include suspending credit or aid, limiting access to financial markets, imposing trade embargoes on armaments, goods or services and denying international travel, visas or educational opportunities.

Notwithstanding their utility, targeted sanctions have given rise to several concerns. In particular, listing procedures and the opportunity for review by wrongly-designated individuals or entities raise 'serious accountability issues and possibly violate fundamental human rights norms and conventions'.[8] UN sanctions committees have been dismissive of procedural fairness concerns. For example, the Al-Qaida/Taliban Sanctions Committee described procedural fairness as 'just that: a process'.[9] Its Monitoring Team considered that procedural fairness standards could be adopted 'at minimal bother to the Committee' and a 'simple piece of paper could help to assuage critics' since 'courts and civil libertarians would know that everyone has received at least some form of process'.[10]

The Security Council was called upon to ensure that 'fair and clear procedures' exist for listing individuals or entities and removing them, in addition to granting humanitarian exemptions.[11]

[4] Security Council, Chairmen of the Sanctions Committees, Issues Paper Concerning Sanctions Imposed by the Security Council, UN Non-Paper (1998) 13.
[5] Jeffrey Meyer and Mark Califano, *Good Intentions Corrupted: The Oil-for-Food Scandal and the Threat to the UN* (New York: Public Affairs, 2006) Ch 5.
[6] Security Council, Presidential Statement, UN Doc S/PRST/2006/28 (2006).
[7] See generally Peter Wallensteen (ed), *Making Targeted Sanctions Effective-Guidelines for the Implementation of UN Policy Options* (New York: Coronet Books, 2003).
[8] UN High-Level Panel on Threats, Challenges, and Change, A More Secure World, Our Shared Responsibility, UN Doc A/59/656 (2004) 152.
[9] Security Council, *Third Report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to resolution 1526 (2004) concerning Al-Qaida and the Taliban and associated individuals and entities*, UN Doc S/2005/572 (2005) 54.
[10] Security Council, *Second report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to resolution 1526 (2004) concerning Al-Qaida and the Taliban and associated individuals and entities*, UN Doc S/2005/83 (2005) 53-59.
[11] *2005 World Summit Outcome*, GA Res 60/1, UN GAOR, 60th sess, 8th plen mtg, UN Doc A/Res/60/1 (2005) 109.

Some 65 States indicated that implementing targeted sanctions required sufficient identifying information and more than 50 called for enhanced procedural fairness and transparency in listing and de-listing procedures.[12] These States included Australia and who, together with Canada and New Zealand, indicated that procedural fairness guarantees were essential to the credibility of targeted sanctions.[13]

To addresses these concerns the UN Office of Legal Affairs was commissioned to develop appropriate proposals.[14] One study concluded that there were 'legitimate expectations that the UN itself, when its action has a direct impact on the rights and freedoms of an individual, observes standards of due process...on which the person concerned can rely'.[15] Due process required the impartial and proportional application of sanctions; proper, adequate and comprehensible notification to affected parties, including giving the reasons for designation as soon as possible without thwarting their purpose; affording opportunities to be heard, including access within a reasonable period to independent and impartial bodies empowered to review measures in a decisive fashion; and access to effective remedies with legal representation, including opportunities to access or provide information justifying delisting.

Other prominent actors have identified the minimum standards necessary to ensure that listing and delisting procedures are 'fair and clear'. This includes, for example, the UN Secretary-General.[16] Academic institutions, supported by several States, have also developed reform proposals. For example, the 'Interlaken Process' concluded that listed individuals or entities should be permitted to petition the Security Council for removal.[17] The 'Bonn-Berlin Process' concluded that, although the Security Council's political functions cannot be impaired, individuals and entities should also be able to contest listing because their home States may be unwilling or unable to do so.[18] Finally, the 'Stockholm Process' concluded that listed individuals or entities should enjoy 'the strictest protection and observance of their due process rights', including the right to be informed of reasons, prepare a defense, be heard, view evidence and obtain review by an independent body.[19]

[12] Security Council, Letter dated 1 December 2005 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities addressed to the President of the Security Council, UN Doc S/2005/761 (2005) 37.
[13] Security Council, Strengthening international law: rule of law and maintenance of international peace and security, UN Doc S/PV.5474 (2006) 8.
[14] Secretary General, Report on Implementation of Decisions from the 2005 World Summit Outcome for action by the Secretary-General, UN Doc A/60/430 (2005) 20.
[15] Bardo Fassbender, 'Targeted Sanctions and Due Process: The responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter', Institute of Public International Law, Humboldt University (Berlin, 2006).
[16] Letter dated 15 June 2006 from the UN Secretary-General to the President of the Security Council, unpublished, cited by UN Legal Counsel in UN Doc S/PV.5474 (2006) 5.
[17] Swiss Confederation/United Nations Secretariat/Watson Institute for International Studies, Contributions from the Interlaken Process: Targeted Financial Sanctions - A Manual for Design and Implementation (Washington DC, 2001) 28.
[18] Michael Brzoska/Bonn International Center for Conversion/German Foreign Office/UN Secretariat, *Design and Implementation of Arms Embargoes and Travel and Aviation Related Sanctions: Results of the 'Bonn-Berlin Process'* (Bonn: Bonn International Center for Conversion, 2001) 56-59.
[19] Peter Wallensteen, Carina Staibano and Mikael Eriksson (eds), *Making Targeted Sanctions Effective: Guidelines for the Implementation of UN Policy Options, Results from the Stockholm Process on the Implementation of Targeted Sanctions,* (Uppsala: Department of Peace and Conflict Research, Uppsala University, 2003) 37, 50, 284.

The Security Council ultimately resolved to 'ensure that sanctions are carefully targeted in support of clear objectives and are implemented in ways that balance effectiveness against possible adverse consequences'.[20] A Working Group was established to improve the effectiveness of targeted sanctions, including listing and delisting procedures and their legal consequences.[21] It recommended greater reliance upon independently-verifiable information and offering opportunities for review, comment and response within specified deadlines.[22] However, rather than enhancing procedural fairness, these proposals sought to safeguard the working methods of UN sanctions committees and fell short of anticipated reforms. Nonetheless, the Security Council commended them as best practice.[23] A procedure was also established whereby 'petitioners' could request de-listing either through their State of residence or citizenship or using a novel 'focal point' process.[24] The focal point receives de-listing requests, rejects repeated ones as spurious and forwards petitions to States and UN sanctions committees for consideration.

The Security Council's targeted sanctions regimes also assume two forms: those managed by the Council and those managed by States. The former entail country-specific sanctions regimes obliging States to adopt certain measures including imposing asset freezes upon individuals or entities appearing on sanctions lists designated by the Security Council or its sanctions committees. By contrast, the Security Council's general terrorist asset freezing regimes oblige States to freeze without delay the funds, financial assets and other economic resources of persons committing, attempting, participating or facilitating terrorist acts, entities owned or controlled by them and persons or entities acting on their behalf or direction.[25] For this form, individual States designate persons or entities on a case-by-case basis when satisfying that definition.[26] However, in respect of both forms, these economic measures do not have any 'direct effect' upon designated individuals or entities[27] and continue to depend for their effectiveness upon implementation by States through national law. Attention will now turn to the manner by which

[20] Security Council, Statement by the President, Strengthening international law: rule of law and maintenance of international peace and security, UN Doc S/PRST/2006/28 (2006) 2.
[21] Note by the President of the Security Council, UN Doc S/2005/841 (2005).
[22] UN Security Council, Report of the Informal Working Group on General Issues of Sanctions, Best Practices and Recommendations for Improving the Effectiveness of United Nations Sanctions, UN Doc. S/2006/997 (2006), 9, 16, 19, 21-23, 28.
[23] UN Security Council Res 1732 (2006) on the Informal Working Group on General Issues of Sanctions.
[24] Security Council Resolution 1730 (2006). The Security Council's Subsidiary Organs Branch is entrusted with this task: Letter dated 29 March 2007 from the UN Secretary-General addressed to the President of the Security Council, UN Doc S/2007/178 (2007).
[25] SC Res 1373, UN SCOR 4385th mtg at [1(c)], UN Doc S/Res/1373 (2001). Resolution 1373 (2001) establishes 'unequivocally a duty on states, at the very least, to cooperate to the fullest extent possible in combating terrorism': Chris Moraitis, 'Countering Terrorism, International Law and the Use of Force', Paper presented at National Security Law Symposium, Sydney, 12 March 2005) 4 <http://www.alrc.gov.au/events/events/securitysymposium/Moraitis.pdf> at 29 June 2009. See generally Andrea Bianchi, 'Security Council's Anti-Terror Resolutions and their Implementation by Member States' (2006) 4 *Journal of International Criminal Justice* 1044, 1061–3.
[26] The listing of Jemaah Islamiyah after the 2002 Bali bombings encouraged Australia to enact legislation 'to enable us to list terrorist organisations based on our national interest and security needs, without relying on the UN to list an organisation before we do': Phillip Ruddock, 'National Security and Human Rights' [2004] *Deakin Law Review* 14.
[27] Thomas Walde, 'Managing the Risk of Sanctions in the Global Oil and Gas Industry: Corporate Response under Political, Legal and Commercial Pressures' (2001) 36 *Texas International Law Journal*, 183.

Australia implements sanctions lists formulated by the Security Council and, as an example of the second form, pursuant to Resolution 1373 (2001).

3. The implementation of targeted sanctions regimes in Australia

Security Council resolutions, like treaty instruments, must first be implemented into Australian law before they are capable of conferring rights or establishing obligations. The Council's sanctions regimes are implemented through the *Charter of the United Nations Act 1945* (Cth) ('*UN Charter Act*') and country-specific regulations made under that Act. The *UN Charter Act* intends 'to approve the *Charter of the United Nations*, and to enable Australia to apply sanctions giving effect to certain decisions of the Security Council'.[28] The regulations are intended to give effect to Security Council decisions made under Chapter VII and not involving the use of force which Article 25 requires Australia to carry out.[29] These regulations, among other purposes, proscribe persons or entities and restrict or prevent the use of, dealings with or the making available of assets.[30]

Part Four of the *UN Charter Act* addresses Security Council decisions concerning terrorism and asset dealing.[31] 'Asset' is broadly defined,[32] with a 'freezable asset' being an asset 'owned or controlled' by a 'proscribed person or entity'[33], a 'listed asset'[34] or 'derived or generated' therefrom.[35] The Minister for Foreign Affairs ('the Minister') 'must' list persons or entities and 'may' list assets or classes of asset by Gazette notice if satisfied of certain prescribed matters.[36] The Minister 'may' revoke a listing, either at their own instigation or upon application, where satisfied that listing is no longer necessary to give effect to a Security Council decision made under Chapter VII which Article 25 requires Australia to carry out and 'relates to terrorism and dealings with assets'.[37] Listed persons or entities may apply in writing to the Minister for their listing to be revoked, setting out the circumstances relied upon as justification.[38]

Regulations may be made proscribing particular persons or entities through the incorporation of a sanctions list. This approach gives effect to a Security Council decision under Chapter VII

[28] *Charter of the United Nations Act 1945* (Cth) ('*UN Charter Act*'). The *UN Charter* is scheduled to the *UN Charter Act* and 'approved' in s 5.

[29] *UN Charter Act*, s 6. Subsection 6(3) 'provides for incorporation by reference to capture UN Security Council decisions as they exist from time to time': Explanatory Memorandum, International Trade Integrity Bill 2007 (Cth) 4.

[30] The regulations have extraterritorial effect (*UN Charter Act*, s 7), prescribe penalties (s 12), contemplate injunctions (s 13) and cease to have effect in certain circumstances (s 8).

[31] Part Five creates offences for individuals and corporate bodies contravening (s 27) or giving false or misleading information (s 28) in connection with a 'UN sanction enforcement law' as defined in s 2B. The Commonwealth legal provisions specified by legislative instrument giving effect to Security Council decisions under Chapter VII not involving armed force which Article 25 requires Australia to carry out are listed in *Charter of the UN (UN Sanction Enforcement Law) Declaration 2008* (Cth), sch one.

[32] *UN Charter Act* s 2.

[33] That is, persons or entities listed by the Minister under *UN Charter Act* s 15 or proscribed by regulation under s 18.

[34] That is, listed by the Minister under *UN Charter Act* s 15.

[35] *UN Charter Act* s 14. 'Owned or controlled' is undefined.

[36] *UN Charter Act* s 15. The Minister must be satisfied that persons or entities, or assets or classes of asset, are persons or entities, or owned or controlled by them, as identified by SC Res 1373 (2001) [1(c)]: *Charter of the UN (Dealing with Assets) Regulations 2008* (Cth) reg 20.

[37] *UN Charter Act*, s 16.

[38] *UN Charter Act* s 17.

which 'relates to terrorism and dealings with assets' and identifies specific persons or entities, either in the decision itself or through a 'mechanism established under the decision'.[39] The effect of this arrangement is to incorporate by reference those persons or entities periodically designated in consolidated sanctions lists maintained by the Security Council or one of its Sanctions Committees. A listing is revoked when Article 25 ceases to require Australia to carry out a Security Council decision.[40]

The *UN Charter Act* also identifies certain offences relating to UN sanctions and Security Council decisions concerning terrorism and asset dealing. The Act was amended by the *International Trade Integrity Act 2007* (Cth) ('*Trade Integrity Act'*) to implement recommendations from the Cole Commission of Inquiry[41] and affirm Australia's reputation as 'an important participant in enforcing UN sanctions'.[42] However, the *Trade Integrity Act* made no substantive changes to the process by which Australia implemented UN sanctions. It only established a new offence structure within the *UN Charter Act* (in effect, transplanted from the regulations) to permit higher penalties, including strict liability offences for corporate bodies, and introduced novel information sharing powers.

Offences also exist, some since 2001, for individuals and corporate bodies (including strict liability) acting without authorisation.[43] One offence is where they hold and use or deal with, or allow or facilitate the use or dealing with, freezable assets.[44] By way of defence individuals and corporate bodies may demonstrate that the use or dealing was solely to preserve the asset's value. Corporate bodies can also argue that they adopted reasonable precautions and exercised due diligence to avoid contraventions. Another offence occurs where an individual or corporate body directly or indirectly 'makes an asset available' to proscribed persons or entities. Whereas individuals may employ a standard *mens rea* defence in these circumstances, corporate bodies may demonstrate that they took reasonable precautions and exercised due diligence.[45]

Due authorisation occurs where owners or holders of freezable assets apply for Ministerial permission to use or deal with an asset or make it available to proscribed persons or entities in specified ways.[46] Additional regulations can be made concerning procedures applicable to assets that are or may become freezable assets.[47] Asset holders are indemnified for actions or omissions

[39] *UN Charter Act* s 18. A 'mechanism established under the decision' is a UN Sanctions Committee established by Security Council resolution and responsible for administering listing and delisting procedures.
[40] *UN Charter Act* s 19. Regulations proscribing individuals or entities also cease. Decisions made under Article 25 generally cease to have effect when declared inoperative by the Security Council.
[41] Commonwealth of Australia, Inquiry into Certain Australian Companies in relation to the UN Oil-For-Food Programme, *Final Report* (Canberra, 2006). See especially the discussion of procedural fairness at Vol 1, 7.77-7.91.
[42] International Trade Integrity Bill 2007 (Cth); Commonwealth, Second Reading Speech, House of Representatives (14 June 2007) 4-6 (Phillip Ruddock, Attorney General). See also Australian Government, 'Response to the Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme' (Canberra, 3 May 2007).
[43] On strict liability, see *Criminal Code Act 1995* (Cth) sch one, art 6(1).
[44] *UN Charter Act*, s 20.
[45] *UN Charter Act* s 21.
[46] *UN Charter Act* s 22. The Minister may authorise a 'basic', 'contractual' or 'extraordinary' expense dealing: *Charter of the UN (Dealing with Assets) Regulations 2008* (Cth) reg 31. The information upon which notices are based cannot be false or misleading in a material particular: *UN Charter Act* s 22B.
[47] *UN Charter Act* s 22A.

done in good faith and without negligence 'in compliance or purported compliance' with these arrangements.[48] The Commonwealth will also compensate an owner of an asset which is not a freezable asset who suffers loss where the holder of that asset refuses to comply with instructions from its owner or controller to use or deal with that asset.[49] Injunctions can be granted where persons have or propose to engage in contraventions.[50]

Australia's regulatory arrangements also include a series of 'Sanctions Regulations'.[51] Most notable among them, the *Charter of the United Nations (Dealing with Assets) Regulations 2008* (Cth) specifies various permissible dealings concerning payments made to designated persons, persons or entities acting on their behalf or direction and entities owned or controlled by them, in addition to the use or dealing of 'controlled assets'.[52] To implement specific provisions from Security Council resolutions, a 'dealing' may involve a 'basic expense dealing'[53], a 'legally required dealing'[54], a 'contractual dealing'[55], a 'required payment dealing'[56] or an 'extraordinary expense dealing'.[57] Dealing permits are in effect exceptions made available under the Sanctions Regulations which precisely correspond with exemptions allowed under relevant Security Council resolutions. Persons holding 'controlled assets' or assets suspected to be such are not required to produce documents or divulge any matter or thing in court unless complying with

[48] *UN Charter Act* s 24.
[49] *UN Charter Act* s 25. Claims are lodged by statutory declaration to the Department of Foreign Affairs and Trade (DFAT).
[50] *UN Charter Act* s 26.
[51] Made under the *UN Charter Act*, these country-specific *Charter of the UN (Sanctions) Regulations* (Cth) concern the Côte d'Ivoire, the Democratic People's Republic of Korea, the Democratic Republic of the Congo, Iran, Iraq, Lebanon, Liberia, Sierra Leone, Somalia and Sudan. Each is a 'UN sanction enforcement law' for the purposes of the *Charter of the UN (UN Sanction Enforcement Law) Declaration 2008* (Cth). These Regulations typically envisage the export and import of sanctioned goods and services, 'permissible' goods, 'sanctioned supply', dealings with designated persons or entities and 'controlled assets'.
[52] *Charter of the UN (Dealing with Assets) Regulations 2008* (Cth) reg 5. A 'controlled asset' is defined by reg 4. The dealings seek to cover all payment types referred to by relevant Security Council resolutions: Explanatory Statement, Charter of the UN (Sanctions) Amendment Regulations 2008 (Cth). The Regulations intend 'to implement Australia's obligations to freeze assets and prevent assets being made available to all persons and entities designated by the UN Security Council as being subject to such measures': Explanatory Statement, Charter of the UN (Dealing with Assets) Regulations 2008 (Cth). They are 'deliberately drafted' to allow the insertion of further regulations and repeal the *Charter of the UN (Terrorism and Dealings with Assets) Regulations 2002* (Cth) which previously implemented SC Res 1373 (2001): see further Explanatory Statement, Charter of the UN (Terrorism and Dealings with Assets) Regulations 2002 (Cth).
[53] Necessary for basic expenses including food, rent, medicines, taxes, insurance, public utility charges, professional fees, legal costs and service charges for maintaining frozen assets. The Minister must notify the relevant UN Sanctions Committee and allow five working days for a negative decision before granting such a permit.
[54] Necessary to satisfy judicial, administrative or arbitral liens or judgments made prior to designation and not benefiting designated persons or entities. The Minister must notify the relevant UN Sanctions Committee before granting such a permit.
[55] Payments to apply interest earnings due on accounts holding controlled assets or required under contracts made before that holding.
[56] Payments required under contract made before designation and not received by designated persons or entities. The Minister must notify the relevant UN Sanctions Committee and wait ten working days before granting such a permit.
[57] Payments for extraordinary expenses. The Minister must notify and obtain the approval of the relevant UN Sanctions Committee.

these arrangements.[58] Nor are they or the Commonwealth liable in proceedings for anything done or omitted to be done in good faith and without negligence.[59]

Responsibility for monitoring and ensuring compliance rests with Commonwealth agencies under a 'whole-of-government' approach.[60] For example, the Department of Foreign Affairs and Trade may provide advance notice of Ministerial decisions to list persons, entities, assets or asset classes to those persons engaged in the business of holding, dealing in, or facilitating dealing in, assets.[61] It must also maintain records identifying all currently designated persons or entities and all currently listed assets or asset classes.[62] A publicly-accessible electronic version enables computerised searches to which asset holders can subscribe through email alert services and utilise list matching software ('LinkMatchLite') to cross-check databases against sanctions lists. Persons holding controlled assets can request the Australian Federal Police (AFP) to determine whether these assets are owned or controlled by designated persons or entities.[63] Persons having a 'notifiable opinion' that assets are or were controlled are required to inform the AFP as soon as possible about known owners or controllers.[64]

The implementation of sanctions regimes targeted at specific States, individuals and entities can be illustrated by reference to North Korea, Usama Bin Laden, Al-Qaida and the Taliban. For example, an asset freeze was envisaged for persons and entities designated by a UN sanctions committee as engaged in or providing support for North Korea's nuclear, ballistic missile and weapons-related programmes.[65] Travel bans were also to be imposed upon designated persons and family members. States were authorised to inspect cargos for listed items, materials, equipment, goods and technology concerning weapons of mass destruction.[66] A 'designated person or entity' was defined to be those persons or entities identified by the Security Council or the relevant Sanctions Committee.[67] Persons must not directly or indirectly make assets available to or for the benefit of these designated persons or entities or to act on their behalf or direction without authorisation.[68] Furthermore, persons are prohibited from holding, using or dealing, or allowing or facilitating the use or dealing with, 'controlled assets'[69] without authorisation.[70]

[58] *Charter of the UN (Dealing with Assets) Regulations 2008* (Cth) reg 43.
[59] *Charter of the UN (Dealing with Assets) Regulations 2008* (Cth) reg 44.
[60] Explanatory Memorandum, International Trade Integrity Bill 2007 (Cth) 2.
[61] *Charter of the UN (Dealing with Assets) Regulations 2008* (Cth) reg 21.
[62] *Charter of the UN (Dealing with Assets) Regulations 2008* (Cth) reg 40.
[63] *Charter of the UN (Dealing with Assets) Regulations 2008* (Cth) reg 41. A referral mechanism exists between DFAT, the Australian Federal Police, major banks and the Australian Bankers' Association.
[64] *Charter of the UN (Dealing with Assets) Regulations 2008* (Cth) reg 42. Certain information protection measures apply unless necessary for compliance: reg 43.
[65] SC Res 1718, UN SCOR 5551st mtg, [8]-[9], UN Doc S/Res/1718 (2006).
[66] Security Council, *Letter dated 1 November 2006 from the Chairman of the Security Council Committee established pursuant to Res 1718 (2006) concerning the Democratic People's Republic of Korea addressed to the President of the Security Council*, UN Doc S/2006/853 (2006).
[67] A 'designated person or entity' is a person or entity designated by the Security Council under SC Res 1718 (2006) or the UN Sanctions Committee established thereunder: *Charter of the UN (Sanctions-Democratic People's Republic of Korea) Regulations 2008* (Cth) reg 4. The Regulation 'aligns' Australian law with SC Res 1718 (2006): Explanatory Statement, Charter of the UN (Sanctions-Democratic People's Republic of Korea) Regulations 2008 (Cth). No persons or entities were in fact designated by the Security Council.
[68] *Charter of the UN (Sanctions-Democratic People's Republic of Korea) Regulations 2008* (Cth) reg 12.
[69] *Charter of the UN (Sanctions-Democratic People's Republic of Korea) Regulations 2008* (Cth) reg 4.
[70] *Charter of the UN (Sanctions-Democratic People's Republic of Korea) Regulations 2008* (Cth) reg 13.

However, applications can be made for permits covering basic expense, legally required or extraordinary expense dealings.[71] Similar measures have been adopted targeting Usama bin Laden, Al-Qaida, the Taliban and any person or entity designated by Security Council Resolution 1735 (2006) or the UN Committee established under Resolution 1267 (1999). Persons or corporate bodies in Australia are prohibited from making a 'sanctioned supply' of arms or related material, providing a 'sanctioned service' involving military training, dealing with designated persons or entities or using or dealing with controlled assets without a permit.[72] Such schemes, reflecting international trends, also raise significant procedural fairness concerns to which this article now turns.

4. Sanctions implementation and procedural fairness in Australia

This Part considers how an Australian court might approach listing and asset freezing decisions were they to be challenged on administrative law grounds. Individuals and entities designated for the application of targeted sanctions have challenged listing decisions before other national and regional courts. For example, one UN sanctions committee reported that thirteen proceedings had commenced by 2004[73] and by 2007 the number had risen to nine before the European Court of First Instance and sixteen within individual States.[74] Within the US, for example, one listed organization asserted that a government decision to impose an asset freeze was arbitrary, unsubstantiated by evidence, violated several due process rights and condoned unreasonable search and seizure.[75] Although US courts have generally upheld asset blocking legislation, including against charitable organizations,[76] designated entities have challenged listing until attaining revocation by the US government.[77]

Admittedly, examples of State practice, including legislation on financial dealings[78] and national judicial decisions,[79] only offers limited guidance. Australia instituted sui generis regulatory arrangements following considerable public consultation.[80] However, litigation can be predicted to occur locally given questions of construction arising from the uncertain scope and application

[71] *Charter of the UN (Sanctions-Democratic People's Republic of Korea) Regulations 2008* (Cth) reg 14.
[72] *Charter of the United Nations (Sanctions – Al-Qaida and the Taliban) Regulations 2008* (SLI 2008 No 41).
[73] Security Council, *Second Report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to Res 1526 (2004) concerning Al-Qaida and the Taliban and associated individuals and entities*, UN Doc S/2005/83 (2004) 50.
[74] Security Council, *Sixth Report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to Res 1526 (2004) and 1617 (2005) concerning al Qaeda and the Taliban and associated individuals and entities*, UN Doc S/2007/132 (2007), annex one. For more recent data, see Security Council, *Report of the Analytical Support and Sanctions Monitoring Team*, UN Doc S/2008/324 (2008).
[75] *Al-Haramain Islamic Foundation v George W Bush* (unreported, Dist Ct ND Cal) and (US CA 9th Cir, 2007) (Case No. 06-36083).
[76] *Holy Land Foundation for Relief and Development v Ashcroft*, 333 F.3d 156 (DC Cir, 2003) cert denied 72 USLW 3551 (2004); *Benevolence International Foundation v Ashcroft*, 200 F Supp 2d 935 (ND Ill 2002) and (ND Ill, 2003) (Case No 02-CV-763).
[77] *Aaran Money Wire Service v US*, US Dist LEXIS 16190 (D Minn, 2003) (Case No 02-CV-789); *Global Relief Foundation v O'Neill*, 315 F 3d 748 (7th Cir, 2002) cert denied 124 S Ct 531 (2003); 207 F Supp 2d 779 (ND Ill, 2002).
[78] See, for example, the definition of dealing under *Terrorism (UN Measures) Order 2006 (No.2657)* (UK) art 7(6).
[79] For example, on the degree of knowledge required to establish individual criminal responsibility for making assets available to designated persons, see *A, K, M, Q & G v H.M. Treasury* [2008] EWHC 869 at 46.
[80] Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the International Trade Integrity Bill 2007, Hansard (Canberra, 2007) 3.

of the legislative scheme and whether sanctions administration is amenable to procedural fairness considerations.

There is nothing within the regulatory framework for implementing Security Council resolutions which apply targeted sanctions against listed Australian individuals or entities which precludes judicial review by Australian courts. Judicial review is the means by which executive action is prevented from exceeding the powers and functions assigned to it by law and to protect the interests of individuals.[81] It does not extend to reviewing the merits of a decision.[82] In other words, judicial review entails reviewing the legality of the process involved in decision-making rather than evaluating the substance of that decision. Aggrieved person whose rights or interests are affected by a decision of an administrative character under an enactment, whether or not in the exercise of a discretion, may apply for judicial review.[83] The well-established grounds include breaching the rules of procedural fairness and where the decision was induced or affected by fraud, was unreasonable or there was no evidence to justify it. A decision may result from an improper exercise of power because an irrelevant consideration was taken into account, was exercised in bad faith or overlooked a relevant consideration.[84] In respect of the last-mentioned, decision-makers are bound to consider matters that the legislation expressly or by implication from the subject matter, scope or purpose of the legislation are required to be taken into account.[85] The repository of an administrative power may also misinterpret or misdirect itself on the applicable law or question to be determined, fail to form the requisite opinion, satisfaction or belief that certain facts exist or not comply with mandatory procedural requirements.

Australia's regulatory framework clearly carries the potential to affect the rights, interests or legitimate expectations of individuals and entities. The scheme envisages penalties in the event of committing specified offences including unauthorised asset dealings with proscribed persons or entities (Part 4) and contravening UN sanction enforcement laws (Part 5). Listing by the Security Council emanates from a political decision that a particular individual or entity, and their supporters or those associated with them in a tangible way, constitute a threat to international peace and security. However, targeted financial sanctions are intended to be preventative, temporary and reversible rather than punitive or permanent. Further, asset freezes, travel prohibitions and arms embargoes are essentially administrative rather than criminal in nature.[86] Thus a criminal burden of proof is inappropriate and prior prosecutorial investigation unnecessary. However, listing is frequently the precursor to such steps, suggests participation in questionable activity and curtails the ability to freely deal with proprietary interests.

[81] *Church of Scientology v Woodward* (1982) 154 CLR 25 at 70.
[82] *Attorney General (NSW) v Quin* (1990) 170 CLR 1 at 35-6.
[83] *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 3, 5, 6. See also *Judiciary Act 1903* (Cth) s 39B.
[84] A relevant consideration is to be differentiated from a fact, a factual assertion or evidence put forward to support a factual assertion: *Abebe v The Commonwealth of Australia* (1999) 197 CLR 510 at 579-80 [195]. Relevant considerations may be identified in the legislation: *MIMA v Yusuf* (2001) 206 CLR 323 at 348 [74]. A failure to take into account a relevant consideration will not invalidate a decision if the consideration was so insignificant that it could not have materially affected the decision: *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24 at 40.
[85] *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24 at 39-40.
[86] See, eg, the Procedural Guidelines of the '1267 Committee' for the Conduct of its Work (12 February 2007) 6.

For the reasons given below, it is argued that Australia's regulatory arrangements for implementing targeted sanctions regimes raise several concerns in relation to procedural fairness.[87] Where administrative powers are exercised adversely to the rights, interests or legitimate expectations of individuals, Australian courts will presume that Parliament intends the exercise of that power to be subject to the rules of procedural fairness.[88] The presumption is only overruled by a 'clear manifestation of a contrary statutory intention'[89] or 'plain words of necessary intendment'.[90] In other words, the legislative intention to exclude the rules of procedural fairness must be unambiguously clear.[91] That conclusion will not be implied from indirect references, uncertain inferences, equivocal considerations or the presence in the legislation of rights which are commensurate with some procedural fairness rules.[92]

Australia's legislative scheme for implementing sanctions does not displace the common law rules of procedural fairness. It cannot be concluded that there is a 'clear manifestation' or 'plain rules of necessary intendment' that the *UN Charter Act* purports to do so. Therefore, the exercise by the Governor General to make regulations proscribing persons or entities, the obligation of the Minister to list persons or entities and his or her discretion to list assets, or classes of asset, where satisfied of certain prescribed matters, are subject to the common law rules of procedural fairness where the rights, interests or legitimate expectations of Australian individuals or entities are adversely affected.[93]

The nature and scope of the common law duty of procedural fairness to be observed by administrative decision-makers is controlled by any relevant statutory provisions and varies according to the circumstances.[94] The circumstances include the nature of the enquiry, the subject matter, the rules under which the decision-maker is acting, individual interests and the interests and purposes, whether public or private, which the legislation seeks to advance or protect.[95] The critical question is generally not whether principles of procedural fairness apply but what the duty to act fairly requires in the particular circumstances.[96]

The regulatory regime for implementing targeted sanctions in Australia reviewed in Part 2 yields several conclusions as far as the nature and scope of the common law duty of procedural fairness is concerned. The *UN Charter Act* is an Act 'to enable Australia to apply sanctions giving effect to certain decisions of the Security Council'. Such a purpose may be complicated or temporarily impeded by individuals or entities asserting their rights, interests or legitimate expectations. However, affording opportunities consistent with procedural fairness would not necessarily frustrate the application of sanctions.

[87] Also known as the principles of natural justice: *Kioa v West* (1985) 159 CLR 550 at 583.
[88] *FAI v Winneke* (1982) 51 CLR 342 at 360; *Kioa v West* (1985) 159 CLR 550 at 585.
[89] *Kioa v West* (1985) 159 CLR 550 at 584.
[90] *Annetts v McCann* (1990) 170 CLR 596 at 598.
[91] *Twist v Council of Municipality of Randwick* (1976) 136 CLR 106 at 109.
[92] *Annetts v McCann* (1990) 170 CLR 596 at 598-9. On inferring a legislative intention to exclude procedural fairness, see *Leghaei v Director-General of Security* [2005] FCA 1576.
[93] The effect given to regulations made under the *UN Charter Act* only applies to prior or later Commonwealth, State or Territory Acts or instruments: *UN Charter Act* ss 9, 10.
[94] *Kioa v West* (1985) 159 CLR 550 at 584, 633.
[95] *Kioa v West* (1985) 159 CLR 550 at 583-5.
[96] *Kioa v West* (1985) 159 CLR 550 at 584-5, 612.

The 'rules under which the decision-maker is acting' include a number of cumulative considerations. Proscription must 'give effect'[97] to a decision that (i) the Security Council has made under Chapter VII of the UN Charter, (ii) Article 25 of the Charter requires Australia to carry out; and (iii) 'relates to' terrorism and dealings with assets. The *UN Charter Act* indicates that regulations 'give effect' to a Security Council decision 'by any or all of the following means': proscribing persons or entities, restricting or preventing uses of, dealings with, and making available, assets; restricting or preventing the supply, sale or transfer of goods or services; and restricting or preventing the procurement of goods or services.

Australian courts may be called upon to determine whether the Security Council has made a 'decision' under Chapter VII of the UN Charter. It may be noted that the Council adopts resolutions which are not legally-binding 'decisions'. Nor should Security Council resolutions be presumed valid.[98] These resolutions must be consistent with the *Charter* and general international law including human rights norms.[99]. It has been judicially noted that, under Article 25, States 'agree to carry out only those decisions of the Security Council made '"in accordance with the present Charter"' and that Security Council resolutions are 'subject always, within Australia, to any relevant limitations or restrictions of the Australian Constitution'.[100] However, Australian courts are likely to conclude that the Security Council's decisions under Article 25, as well as its determinations under Article 39, are more appropriately reviewed, if at all, by the International Court of Justice.[101] Such an approach avoids directly challenging the Security Council's authority and the credibility of its sanctions regimes, a course bristling with problems for Australian courts.

As a matter of international law, it may not be self-evident that, in the absence of any express invocation by the Security Council, a 'decision' has been made under Article 41 of the *Charter* which Australia is required to implement under Article 25.[102] It has been suggested that Security Council resolutions calling upon States to adopt 'all necessary steps' to prevent a particular situation, without identifying specific measures and being aspirational in nature, does not qualify as a 'decision'.[103] However, such a resolution is considered to impose duties comparable to treaty obligations, notwithstanding the use of hortatory language.[104] That language is relevant in determining whether a 'decision' has been made, with the word 'decides' typically being

[97] Regulations purporting to 'give effect' to Australia's treaty obligations were declared invalid in *R v Burgess; ex parte Henry* (1936) 55 CLR 608 because they did not carry out that instrument.
[98] For example, where conflicting with jus cogens norms: *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda) (Merits)* [2006] ICJ Rep at [8] (Separate Opinion of Judge Dugard).
[99] Erika de Wet and André Nollkaemper, 'Review of Security Council Decisions by National Courts' (2002) 45 *German Yearbook of International Law* 166, 171-5.
[100] *Thomas v Mowbray* (2007) HCA 33 at 281-282.
[101] John Dugard, 'Judicial Review of Sanctions' in V. Gowlland-Debbas (ed), *United Nations Sanctions and International Law* (The Hague: Kluwer Law International, 2001) 83, 86.
[102] See, eg, Erika De Wet, *The Chapter VII Powers of the United Nations Security Council* (Oxford: Hart Publishing, 2004) 375-8.
[103] Transcript of Proceedings, *Thomas v Mowbray* (High Court of Australia, Ms K Walker, 6 December 2006).
[104] Transcript of Proceedings, *Thomas v Mowbray* (High Court of Australia, Mr H Burmester QC, 21 February 2007).

decisive, in addition to prior discussions, the surrounding circumstances[105] and any Security Council intention to bind all States.[106] Measured can also be adopted under Chapter VII without invoking a particular provision (particularly Articles 25, 39 or 41) by employing mandatory terms.[107]

The further question whether the Security Council resolution in question 'relates to' terrorism and asset dealing raises questions of interpretation. Security Council resolutions should be interpreted in good faith in accordance with the ordinary meaning to be given to their terms in their context and in the light of their object and purpose.[108] They cannot be interpreted in a manner 'tantamount to imposing conditions on the implementation of a UN Security Council resolution which were not provided for in the text of the resolution itself'.[109] In particular, careful attention should be given to a resolution's language to discern the extent of residual discretion left by the Security Council to States.

By way of footnote, a peripheral issue of some constitutional interest is the suggestion that implementing Security Council resolutions could constitute a novel source of Commonwealth legislative power. For example, Resolution 1373 (2001) called upon States to adopt 'the necessary steps to prevent the commission of terrorist acts'. However, that language may not impose an obligation of 'sufficient specificity'.[110] Such a 'phrase of almost limitless reach' omits common treaty definitions, provides no judicial guidance, lacks a specific Constitutional basis, is unsupported by Parliamentary intention and could be given effect to by many different means.[111]

The degree to which Australia can ensure procedural fairness to Australian individuals or entities also turns upon the nature of the decision in question. As noted above, a distinction must be drawn on the one hand between country-specific sanctions regimes obliging Australia to adopt measures against individuals or entities designated on sanctions lists maintained by the Security Council or its sanctions committee and on the other the general terrorist asset freezing regimes obliging Australia to adopt measures against individuals or entities designated by it where they meet definitions indicated in the Security Council Resolution.

Section 18 of the *UN Charter Act* reflects the former regime by empowering the Governor General to make regulations proscribing persons or entities to give effect to a Security Council decision under Chapter VII which Article 25 requires Australia to carry out, relates to terrorism and dealings with assets and 'under which the person or entity is identified (whether in the decision or using a mechanism established under the decision) as a person or entity to which the decision relates'. In circumstances where the Security Council has designated Australian

[105] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding SC Res 276 (1970) (Advisory Opinion)* [1974] ICJ Rep 4 at 52-3. See, eg, in Australia, reference to invoking Chapter VII and mandatory language: *Thomas v Mowbray* (2007) HCA 33 at 282.
[106] Rosalyn Higgins, 'The Advisory Opinion on Namibia: Which UN Resolutions are binding under Article 25 of the UN Charter?' (1972) 21 *International and Comparative Law Quarterly* 270, 280.
[107] Eg SC Res 827, UN SCOR 3217th mtg, UN Doc S/Res/827 (1993) implies an Article 39 determination and invokes Chapter VII generally.
[108] *Vienna Convention on the Law of Treaties* [1974] Aust TS No 2, art 31(1).
[109] *Beharani and Saramati v France* (2007) Eur Court HR at [149] (Case 71412/01 and 78166/01).
[110] *Industrial Relations Act Case* (1996) 187 CLR 416 at 486.
[111] *Thomas v Mowbray* (2007) HCA 33 at 284-290.

individuals or entities, the scope for Australia to afford procedural fairness to them may be very limited. Indeed, it has been suggested that:

> These are binding obligations imposed by the Security Council which do not allow for the member states to make any kind of allowances in terms of the question of procedural fairness. In other words, we do not have either the opportunity or the right, under the operation of the *Charter of the United Nations*, to provide for any deferral of the registration, under the Australian law, of individuals named by the Security Council as being individuals to whom sanctions ought to be applied.[112]

The importance of Australia adhering to its international treaty obligations, and the supremacy of Security Council resolutions under Article 103 of the *Charter*, cannot be doubted. However, as noted in Part 1 above, individuals and entities proscribed by UN sanctions regimes may be unable to effectively secure procedural fairness at the international level. For example, the procedural guidelines concerning delisting employed by one UN sanctions committee does not 'begin to achieve fairness' for listed persons.[113] The avenues available to designated Australian individuals or entities are largely limited to submitting delisting petitions through the focal point process. Although non-State actors do not have the right to a hearing before the Security Council, communications from them relating to Security Council matters can be circulated.[114] This 'Arria-formula' allows individuals or organizations to enrich Security Council deliberations in a flexible and informal manner. Furthermore, the Security Council may invite 'persons' to brief it 'on a case-by-case basis'.[115] Listed entities are therefore expected to petition sanctions committees through their home State. States could also consult with the Security Council on behalf of their nationals where sanctions give rise to 'special economic problems'.[116]

Any inability to ensure procedural fairness guarantees at the national level where proscription occurs by reference through incorporating UN sanctions lists into Australian law may prompt Australian courts to consider other remedies. This includes judicial orders for Australia to pursue delisting applications before the Security Council on their behalf. Ordering States to do so offers 'a real practical benefit' to listed individuals and entities given the binding quality of Article 25 decisions and the procedural shortcomings of UN sanctions committees.[117] For example, Sweden successfully petitioned the Security Council to delist certain individuals following guarantees from them to desist from objectionable conduct.[118] Delisting decisions are made in the light of prevailing political conditions, what international peace and security require and the terminology of relevant resolutions. Notably, the regulations proscribing persons or entities under s.18 of the *UN Charter Act* do not revive when the Security Council resolution ceases to bind Australia, even where Australia is subsequently required to carry out the decision.[119]

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[112] Senate Standing Committee on Legal and Constitutional Affairs, Commonwealth Parliament, *Report of the Inquiry into the International Trade Integrity Bill 2007* (Canberra, 2007) 3.7.
[113] *A, K, M, Q & G v HM Treasury* [2008] EWHC 869 at 18.
[114] Security Council, Provisional Rules of Procedure, UN Doc S/96/Rev.7 (1996), Provisional Procedure for Dealing with Communications from Private Individuals and Non Governmental Bodies.
[115] Security Council, Annex of the Informal Working Group on Documentation and Other Procedural Questions containing a concise and user-friendly list of recent practices and newly agreed measures to serve as guidance for the Council's work, UN Doc S/2006/507 (2006) 35, 54.
[116] *UN Charter* art 50.
[117] *A, K, M, Q & G v H.M. Treasury* [2008] EWHC 869 at [36].
[118] Security Council, Press Release, UN Doc SC/7490 (2002).
[119] *UN Charter Act* s 19(2).

Returning to the distinction between Security Council-determined listings and State-determined ones, whereas Australian individuals or entities may be unlikely to secure delisting where proscribed by the Security Council under its country-specific measures, their prospects may be relatively more favourable where designated by Australia under Resolution 1373 (2001) in respect of terrorist activity. The opportunity for the Minister to afford procedural fairness consistent with the requirements of the common law is greater where Australia designates persons or entities under s.15 of the *UN Charter Act* if satisfied of certain prescribed matters. The executive can nevertheless be expected to call for judicial restraint: enhanced procedural fairness protections could complicate effective sanctions implementation by rendering enforcement more onerous; Australia may be deterred from nominating individuals or entities for listing; and the judiciary should avoid second-guessing UN sanctions committees by conducting their own independent evidentiary review. Individuals or entities may also encounter practical difficulties in accessing adverse information, even in redacted form, to establish that Ministerial powers have been improperly exercised, and Australian courts may defer to executive opinion on questions of national security.[120]

It is moreover true that there is greater scope for affording procedural fairness to listed individuals or entities during revocation applications than initial listing. Whereas the Minister is obliged to list under s.15 of the *UN Charter Act* where satisfied of prescribed matters as identified under the *Charter of the United Nations (Dealing with Assets) Regulations 2008* (Cth), he or she has a discretion to revoke listing under s.16. Listed individuals and entities may apply for revocation by setting out the circumstances relied upon to justify an application. The *UN Charter Act* does not clearly specify the circumstances upon which a Minister could be satisfied that listing is no longer warranted. The Act does address the circumstance where Article 25 'ceases to require Australia to carry out that decision' in which case the listing is revoked.[121] The procedural fairness claims of listed persons or entities is particularly strong in such circumstances since they should not be rendered potentially liable where the Security Council resolution ceases to bind Australia. However, the Minister may only revoke a listing where satisfied that listing 'is no longer necessary to give effect' to a Security Council decision made under Article 25 which relates to terrorism and dealings with assets. The scope for Ministerial action under s.16 is ambiguous. On one view, where the decision continues to apply, the Minister will be unable to revoke listing, even if sympathetic to the individual's or entity's position and irrespective of the merits of their application or offer of appropriate behavioral undertakings. On another, effect can be given to Security Council decisions through means other than listing. Asset freezes, for example, are capable of implementation in several different ways.[122] Alternatively, s.16 might permit the Minister to conclude that the binding decision in question does not 'relate' to terrorism 'and' asset dealing.

[120] But see Attorney General's Department, Practitioners Guide to the National Security Information (Canberra, 2008).
[121] *UN Charter Act* s 19(1).
[122] Security Council, *Seventh Report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to SC Res 1617 (2005) and 1735 (2006) concerning Al Qaida and the Taliban and associated individuals and entities*, UN Doc S/2007/677 (2007) 56-62.

The procedural entitlements accompanying listing and revocation by the Minister under the *UN Charter Act* are very limited. For example, the Act does not expressly suggest conformity with the requirements of the common law 'hearing rule'. This rule envisages that a statutory authority having power to affect a person's rights is bound to afford that person a hearing before exercising that power.[123] The essential rationale is that affected persons are entitled to know the case sought to be made against them.[124] Decision-makers are required to disclose any credible, relevant and significant adverse information before them[125] with affected persons entitled to have an opportunity to reply.[126] The *UN Charter Act* does not envisage any opportunity for individuals or entities to make submissions prior to proscription or to challenge the factual foundation for imposing asset freezing orders. However, advance notification of a proposed decision may not be required under the common law in certain circumstances, including where affected persons are a serious flight risk[127] or to avoid frustrating the purpose of a power.[128] It could be argued that prior warning of an impending listing and an opportunity to oppose proscription may frustrate the purpose of that power. However, the deterrent effect should not be underestimated. Alternatively, the urgency of exercising an administrative power in the circumstances may also reduce the content of the duty to provide a hearing to affected organisations or individuals. Providing the material upon which a case is grounded could adversely affect operational effectiveness, need not contribute to greater transparency and could lead to confusion. Indeed, there may be nothing for individuals or organisations to respond to.[129] The legislative scheme contemplates persons or entities applying for revocation 'in writing' after listing and the Minister is not obliged to consider applications where they applied within one year before.[130] Although the 'hearing rule' could only be creatively construed from such a provision, the exercise of the revocation power could provide relatively greater opportunity to ensure procedural fairness.

The procedural fairness protections available to individuals or entities where designated by Australia should be consistent with international benchmarks. Australian courts may properly have regard to the expectations prevailing within the broader international community when considering contemporary Australian values.[131] The Security Council's 'blacklisting' methodology is assessable against familiar administrative law considerations.[132] Admittedly, there is no clear international consensus as to what procedural fairness, typically referred to as due process in this context, actually requires. 'Due process' has been defined as normative standards for measures affecting individual rights.[133] This means that opportunities for review

[123] *Twist v Council of the Municipality of Randwick* (1976) 136 CLR 106 at 110.
[124] *Kioa v West* (1985) 159 CLR 550 at 582.
[125] *Kioa v West* (1985) 159 CLR 550 at 629. See also *Applicant VEAL of 2002 v MIMIA* (2005) 225 CLR 88.
[126] *Kioa v West* (1985) 159 CLR 550 at 582.
[127] *Kioa v West* (1985) 159 CLR 550 at 586, 615.
[128] Where a statute is silent, the observance of natural justice principles 'may be diminished (even to nothingness)': *Kioa v West* (1985) 159 CLR 550 at 615.
[129] *Kioa v West* (1985) 159 CLR 550 at 588, 601-2, 628, 634.
[130] *UN Charter Act* ss 17(2)(a), (3).
[131] *Mabo v Queensland (No 2)* [1992] HCA 23 at [42]; *MIEA v Teoh* (1995) 183 CLR 273 at 6.
[132] Benedict Kingsbury, Nico Krisch and Richard Stewart, 'The Emergence of Global Administrative Law' (2005) *Law & Contemporary Problems* 32.
[133] Michael Bothe, Targeted Sanctions and Due Process Initiative, 'Discussion Paper on Supplementary Guidelines for the Review of Sanctions Committee's Listing Decisions', Explanatory Memorandum (2007)

should be consistent with international standards concerning 'fair and clear' procedures.[134] 'Fair and clear' procedures can include the impartial application of sanctions, coupled with adequate notification and hearing opportunities; and effective remedies for wrongly listed parties.[135] 'Due process' entitles entities to be properly notified of sanctions adopted against them as soon as possible without thwarting their purpose, to be heard within a reasonable time, to receive legal advice and representation and to access an effective remedy. It also entails being informed of the reasons for listing and opportunities to justify delisting. Effective remedies require affected individuals and entities to be notified of sanctions applied against them in a comprehensible manner and the opportunity to appeal to an independent and impartial body empowered to review sanctions in a decisive and not merely advisory way. Impartiality requires the non-arbitrary and non-discriminatory application of sanctions, proportionality (that is, not unduly interfering with existing rights) and amenability to hardship through exemptions.

The nature and scope of the Ministerial duty to afford procedural fairness self-evidently warrants further legislative or judicial clarification. Procedural fairness entitlements can be clarified through the *UN Charter Act*.[136] This can be achieved in conjunction with additional clarification in respect of undefined terms or legal concepts arising from the legislative framework. This includes the elements of 'asset dealing', that is, the actions of holding, controlling, owning, using, allowing or facilitating use and making available. For example, 'acting on behalf or at the direction of' could undermine the principle of legal certainty if it is difficult for individuals or entities to determine if violations could be committed such that dealing permits are required. Additional questions, such as whether an available defence (preserving asset value, adopting reasonable precautions or exercising due diligence) is satisfied, whether corporate executives are held accountable in preference to corporate bodies, how 'purported compliance' with regulatory arrangements is construed and whether compensation is payable for incorrect designation, are left to be resolved through litigation. Additional parliamentary oversight might also be desirable.[137]

Calls for enhancing procedural fairness have already been articulated in the specific context of implementing Security Council resolutions concerning counter-terrorist measures.[138] Asset freezes and listing procedures are 'an important tool in the application of international

<http://www.liechtenstein.li/pdf-fl-aussenstelle-newyork-explanatory-memorandum-prof-bothe-delisting-workshop-2007-11-8.pdf> at 29 June 2009.

[134] Michael Bothe, Targeted Sanctions and Due Process Initiative, 'On Supplementary Guidelines for the Review of Sanctions Committee's Listing Decisions', Discussion Paper (2007) <http://www.liechtenstein.li/pdf-fl-aussenstelle-newyork-discussionpaper-delisting-workshop-2007-11-8.pdf> at 29 June 2009.

[135] Thomas Biersteker and Sue Eckert (eds), Watson Institute for International Studies Targeted Sanctions Project, 'White Paper on Strengthening Targeted Sanctions Through Fair and Clear Procedures', 30 March 2006, annexed to Letter dated 19 May 2006 from Germany, Sweden and Switzerland to the UN addressed to the President of the Security Council, UN Doc S/2006/331 (2006).

[136] For example, the Governor General may make regulations relating to procedures concerning freezable assets (s 22A) and in respect of matters necessary or convenient to be prescribed for carrying out or giving effect to the *UN Charter Act* (s 39).

[137] Commonwealth, *Report on Scrutiny by the Committee of Regulations Imposing UN Sanctions*, Parl Paper No (Canberra, 1992) 513.

[138] Evidence to the Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, 12 July 2007 (Sydney Centre for International and Global Law) 1.

sanctions'.[139] Financial institutions are obliged to conform to the regulatory requirements imposing such measures.[140] Financial institutions risk facilitating dealings with controlled assets by proscribed persons or entities. A suite of legislative measures have also been enacted to address anti-money laundering and counter-terrorist financing.[141] These measures include additional reporting obligations for the financial services sector.[142] For example, 'reporting entities' must verify a customer's identity when providing 'designated services' and adhere to compliance programmes.[143] Cash dealers such as banks must also report suspicious transactions to the Australian Transaction Reports and Analysis Centre[144], including where they reasonably suspect that transfers are preparatory to a 'financing of terrorism' offence, or where they have information relevant to investigating or prosecuting such conduct.[145] Since the Commonwealth Attorney-General's discretion to proscribe a group as a terrorist organization could be exercised arbitrarily, procedural fairness obligations in favour of affected individuals or groups would not prejudice national security nor undermine operational effectiveness but rather increase transparency and accountability.[146] Significantly, counter-terrorism laws do not override Constitutional provisions or well-established administrative law principles.[147]

Procedural fairness concerns have also been highlighted in the context of the Commonwealth's power to proscribe and delist under federal criminal law.[148] Again, the absence of clear criteria for exercising such powers and the absence of merits review or other opportunity for affected parties to oppose proposed measures could encourage arbitrary and disproportionate decision-making contrary to the interests of individuals.[149] Transparent listing processes, prior notification

[139] Commonwealth of Australia, *Transnational Terrorism: The Threat to Australia* (Canberra, 2004) 81-2.
[140] Security Council Committee established pursuant to Res 1718 (2006) concerning the Democratic People's Republic of Korea, *Note verbale dated 10 November 2006 from Australia to the UN addressed to the Chairman*, UN Doc S/AC.49/2006/1 (2006) 32; Security Council Committee established pursuant to Res 1267 (1999), *Note verbale dated 15 April 2003 from Australia to the UN addressed to the Chairman*, UN Doc S/AC.37/2003/(1455)/13 (2003) 38.
[141] The *Suppression of the Financing of Terrorism Act 2002* (Cth) created an offence of providing or collecting, or being reckless as to, funds used to facilitate or engage in a 'terrorist act' even if that act does not occur. See generally Ilias Bantekas, 'The International Law of Terrorist Financing' (2003) 97 *American Journal of International Law* 315.
[142] The *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (Cth) implements recommendations from the Financial Action Task Force, *Report on an Evaluation of Australia's Anti-Money Laundering and Counter-Terrorism Financing System* (2005).
[143] *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth).
[144] The Australian Transaction Reports and Analysis Centre distributes lists of designated persons and entities annexed to SC resolutions: see, eg, AUSTRAC, 'UN SC Res 1803 Regarding Iran's Nuclear Activities', Information Circular No. 57 (2008).
[145] *Financial Transaction Reports Act 1988* (Cth) s 16(1A).
[146] Nicola McGarrity, 'Review of the Prescription of Terrorist Organisations: What Role for Procedural Fairness?' (2008) 16 *Australian Journal of Administrative Law* 45.
[147] The Hon Justice Michael Kirby, 'National Security: Proportionality, Restraint and Commonsense' (Paper presented at National Security Law Symposium, Sydney, 12 March 2005) 22-3 <http://www.alrc.gov.au/events/events/securitysymposium/Kirby.pdf> at 29 June 2009.
[148] See further Henry Jackson, 'The power to proscribe terrorist organisations under the Commonwealth Criminal Code: Is it open to abuse?' (2005) 16 *Public Law Review* 134; Parliamentary Joint Committee on Intelligence and Security, Commonwealth Parliament, *Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code Act 1995* (Canberra, 2007) ch 5.
[149] Evidence to the Parliamentary Joint Committee on Intelligence and Security Review of the Power to Proscribe Terrorist Organisations, Parliament of Australia (Canberra, 2007) [28] (Human Rights and Equal Opportunity

and hearing opportunities have been proposed.[150] Finally, procedural fairness concerns have also arisen in the context of national security exceptions to information disclosure requirements so that those individuals subject to control orders can effectively respond to the case against them.[151]

So too should the implementation within Australia of the Security Council's targeted sanctions regimes be construed consistently with the common law principles of procedural fairness. It remains unclear how the Minister will exercise his or her powers in practice to list[152]or revoke listing, what factors are relevant,[153] whether designation is based upon publicly-accessible information and if reasons are provided. Affording procedural fairness offers practical benefits including improving the accuracy and logic of decision-making, assists objectivity and impartiality, affords access to additional or better information, contributes to participation in decision-making, enables parties to accept unfavourable decisions, permits the legitimacy of authoritative standards to be disputed and enhances the rule of law in Australia.[154]

5. Conclusions

Australia's regulatory arrangements for administering sanctions regimes is a reasonably complex latticework embracing the *UN Charter*, Security Council decisions, the procedural guidelines of UN sanctions committees, legislation contemplating the exercise of proscriptive powers and regulations listing individuals, entities or goods and services.[155] Within that framework several questions remain unresolved, particularly in respect of the nature and scope of a duty to afford procedural fairness when proscriptive powers are being exercised against Australian individuals or entities, including prior notification of prospective listing, accessing evidence and requesting revocation. The ambit of these protections is likely to be resolved by the judiciary in the context of administrative law proceedings challenging the application of asset freezes. However, it is clear that, in the interests of accountable and transparent decision-making, procedural fairness is a properly applicable legal constraint on the exercise of Ministerial power to list and revoke the listing of individuals or entities pursuant to UN sanctions regimes in Australia.

Commission). See generally Sarah Joseph, 'Australian Counter-Terrorism Legislation and the International Human Rights Framework' (2004) 27(2) *University of NSW Law Journal* 428.

[150] Security Legislation Review Committee, Commonwealth Parliament, *Report of the Security Legislation Review Committee* (Canberra, 2006).

[151] Procedural fairness 'will be decided in the light of the facts and circumstances of individual cases': *Thomas v Mowbray* (2007) HCA 33 at 31. Procedural fairness was identified but not discussed by Crennan and Gummow JJ at [122]. Hayne J at 510-512 identified evidentiary difficulties for courts and plaintiffs alike when accessing information which contradicts the Commonwealth's position.

[152] Listing is mandatory for persons or entities identified under SC Res 1373 (2001) and discretionary for assets or asset classes.

[153] In the UK, proscriptive powers consider the nature and scale of organisational activity, specific threats posed and the extent of the presence: UK, *Parliamentary Debates*, House of Commons, 13 March 2001, 483-4 (Jack Straw, Home Secretary).

[154] M. Barnett, 'Dobbing in and the High Court – Veal refines Procedural Fairness' (2007) 30(1) *New South Wales Law Journal* 127, 129.

[155] Eg *Charter of the United Nations (Sanctions - Iran) (Export Sanctioned Goods) List Determination 2008* (Cth) made under *Charter of the United Nations (Sanctions - Iran) Regulations 2008* (Cth) r 5(2).