Submission to the Australian Sanctions Office Review of Australia's Autonomous Sanctions Framework

5 March 2023

1 Introduction

Thank you for the opportunity to make this submission in response to the Australian Sanctions Office (**ASO**)'s review of Australia's Autonomous Sanctions Framework.

Allens has a long history of representing many of Australia's largest companies in regulatory investigations, civil penalty proceedings and criminal prosecutions. We also have extensive experience advising domestic and international clients on the effect of Australia's trade and financial sanctions and export control regimes in compliance, transactional and investigations contexts. We are also familiar with foreign sanctions regimes, including those of the United Kingdom, European Union and the United States.

We therefore consider that we are well positioned to provide valuable insight into some of the key challenges of Australia's Autonomous Sanctions Framework and welcome the chance to contribute to its continuing development.

Allens views the ASO's review of Australia's Autonomous Sanctions Framework as an opportunity to provide necessary certainty to the existing laws and for Australia to more closely align itself with comparable foreign regimes, such as the United States, the United Kingdom and the European Union. We consider this alignment to be appropriate because the vast majority of sanctions are now issued by national governments and regional bodies (rather than by the United Nations Security Council).[1] Where there is misalignment between aspects of the United States, United Kingdom and European Union sanctions, we consider it would be appropriate to align Australia's Autonomous Sanctions Framework with the international highwater mark to reduce compliance friction for Australian companies and further the objects of the sanctions.

2 Streamlining the legal framework

Allens considers it appropriate to streamline and rationalise the Autonomous Sanctions Framework. Allens therefore supports the ASO's proposed two-tiered solution for the Autonomous Sanctions Framework as the most efficient and effective model to do so.

Australia's current three-tier autonomous sanctions regime comprises the *Autonomous Sanctions Act 2011* (Cth) (***Act***), the *Autonomous Sanctions Regulations 2011* (Cth) (***Regulations***), and then numerous further instruments that support the primary two tiers. In our view and experience, the dissipated nature of this legislative framework creates unnecessary complexity and uncertainty when navigating sanctions obligations. This has been exacerbated in recent times by rapid developments and additions to country-specific regimes, especially following Russia's invasion of Ukraine.

By way of example, at present, to understand the full scope of the Russian sanctions regime, one must review and cross-refer between at least the following eight legislative instruments:

- The Act
- The Regulations
- *Autonomous Sanctions (Russia, Crimea and Sevastopol) Specification 2015* (Cth)
- *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Russia and Ukraine) List 2014* (Cth)
- *Autonomous Sanctions (Import Sanctioned Goods—Russia) Designation 2022* (Cth)
- *Autonomous Sanctions (Export Sanctioned Goods—Russia) Designation 2022* (Cth)

[1] A recent report, Refinitiv identified that 98% of global sanctions imposed in 2022 were issue by national governments and regional bodies, and only 2% of global sanctions were issued by the United Nations Security Council.

- *Customs (Prohibited Exports) Regulations 1958* (Cth)
- *Customs (Prohibited Imports) Regulations 1956* (Cth)

Moving various provisions currently contained in the Regulations, including the offence provisions, to the Act and consolidating country specific regimes into each of their own dedicated instruments, would aid in simplifying the regime and reduce the compliance burden on parties seeking to understand their obligations.

3 Scope of sanctions measures

3.1 Defined terms

Allens considers that clarifying and defining a range of terms in the Act and the Regulations is an essential area of uplift to Australia's Autonomous Sanctions Framework. At present, several terms are either defined too broadly (without the benefit of regulatory guidance) or are not defined in any meaningful way. The ASO's review therefore represents an opportunity to provide much needed certainty to these terms by embedding clear definitions into the legislative framework.

We consider that the following terms lack clear parameters and create challenges for businesses in understanding and complying with sanctions compliance obligations.

- ***Indirect / indirectly*** – Under the current regime, it is an offence to *indirectly* make an asset available to, or for the benefit of, a designated person or entity, however, the term 'indirectly' is not defined by either the Act or the Regulations. As such, it can be unclear in some circumstances the degree to which a nexus to a designated person or entity in the context of a transaction with a third party will breach this prohibition. To the extent any guidance can be provided (such as the guidance from the U.S. Office of Foreign Assets Control (***OFAC***) on the '50% rule'[2] which is applicable in the United States), that would be of assistance to business.

  Additionally, it is an offence to *indirectly* supply, sell or transfer goods to or for the use or benefit of a sanctioned country or region. Because the term 'indirectly' is not defined, whether a company is liable for the resale of its goods to or for the benefit or use of a sanctioned country or region can in some circumstances be unclear. We submit that the scope of this prohibition should be clarified.

- ***For the benefit of –*** the Act and the Regulations do not define the term 'for the benefit of' which can create similar interpretive challenges to the term 'indirectly', particularly in relation to dealings with designated persons or entities. For example, it is unclear whether a transaction involving a non-designated entity would be prohibited in circumstances where a designated person holds some form of executive or managerial role in the entity. On one view, if it were the intention of the Australian Government to prohibit such transactions then it would designate the entity itself. However, a technical reading of the term 'for the benefit of' could capture any dealing in which a designated person could conceivably stand to gain (e.g. via a salary, a bonus, or dividends from shareholding). Taken together with the concept of 'indirectly', there is therefore significant uncertainty in relation to the scope of the prohibition regulation 14 of the Regulations in some circumstances.

- ***Sanctioned Service*** – The current definition of a 'sanctioned service' prohibits not only technical advice, financial assistance or a financial service, but also the provision of 'another service' if it assists with, or is provided in relation to, a sanctioned supply or an

[2] See '50% rule' in the Frequently Asked Questions | U.S. Department of the Treasury

activity mentioned in an item under regulation 5(4) of the Regulations. Given the broad drafting of this definition, it is unclear how far reaching the concept of 'another service' is intended to be. Similarly, there is no guidance as to when a sanctioned service is provided 'in relation to' a sanctioned supply, sanctioned import, sanctioned commercial activity or sanctioned activity. This creates significant challenges, particularly when interpreted broadly alongside the concept of 'another service', as it could conceptually include anything even tangentially related to the sanctioned conduct. While Allens does not consider that such a reading would be taken by a Court, it would be helpful to provide clarity over the scope of this definition.

- ***Intangible Asset*** – The current definition of ‘asset’ includes ‘an asset of any kind’. As acknowledged by the ASO in the Issues paper, the definition of 'asset' is fundamental to understanding the scope of targeted financial sanctions and therefore Allens agrees that it requires clarification. At present, given there is no guidance in relation to the term, interpretation may require consideration of unrelated areas such as tax law and accounting best practice. We submit that the outer bounds of the term ‘asset’ should be clearer. For instance, the Act or Regulations should clarify whether *insurance products* and *proprietary information* (e.g. customer lists, databases, trade secrets) amount to assets. We would also appreciate clarification in relation to whether the provision of a service would fall under the definition of an intangible asset.
- ***Controlled asset*** – A 'controlled asset' is defined by the Regulations as meaning an 'asset owned or controlled by a designated person or entity'. This definition has created numerous challenges given that the concepts of *ownership* and *control* are not separately defined and no guidance has been published by the ASO as to their meaning. This sits in contrast to sanctions regime in the United States of America, the United Kingdom and the European Union which all provide for their own variations of a '50% Rule' (i.e. the thing will be a controlled asset if it is owned 50% or more by a designated person or entity). Until this issue is clarified, there will be significant uncertainty in respect of whether, and when, minority ownership interests of a designated person or entity will trigger the 'ownership and control' requirements under the definition of a 'controlled asset'.
- ***Designated person*** – An adjacent issue to the definition of 'controlled asset', is the scope of application of targeted financial sanctions to a 'designated person'. At present, it is unclear in some circumstances whether an entity will be subject to targeted tinancial sanctions where that entity is not itself listed as a designated entity, but a shareholder of the entity is a designated person. In the absence of a definition or ASO guidance, it remains unsettled whether some version of the 50% Rule (discussed above) will apply to prohibit dealings with entities with a shareholding over 50% or more by a designated person.
- ***Import sanctioned good*** – The current definition of 'import sanctioned good' provides that a sanctioned import will be made where the goods are exported from, or *originate in* the relevant sanctioned country. However, the Act and Regulations do not identify the rules of origin to be applied to determine the nationality or origin of goods. This creates particular complexity where goods exported from a sanctioned country are incorporated into manufactured goods, or co-mingled with goods of the same specification, in a non-sanctioned third country. We consider that the Act or Regulations should clearly identify the rules of origin to be applied under Australia’s sanctions laws. We further consider that the Act or Regulations should specify that manufactured or co-mingled goods that contain a *de minimis* amount (by volume or value) of import sanctioned goods are not themselves import sanctioned.

- ***Transport / transfer -*** There is no definition of 'transport' or 'transfer' in the Australian Autonomous Sanctions Framework. Although definitions can be read in light of related legislation like the *Customs Act 1901* (Cth*), Excise Act 1901* (Cth) and transport law generally, there is still ambiguity regarding the permitted range of commercial activity under the current sanctions framework. For example, it is unclear whether the 'transport' of goods, as referenced under the definition of 'sanctioned import' in regulation 4A of the Regulations captures the facilitation of transporting goods for import, and peripheral activities such as the storage of goods, and unloading or offloading of goods for import. Similarly, the same question can be asked of 'transfer' in the context of exports under the 'sanctioned supply' definition in regulation 4.

3.2 Would having a uniform concept of sanctioned commercial activity assist in understanding sanctions obligations?

While Allens agrees that the sanctions measures for 'sanctioned commercial activity' can be difficult to navigate, we submit that it is not necessary to adopt a uniform concept to be applied to all regimes. Indeed, conceptually Allens considers it would ultimately prove difficult to have an appropriately targeted approach which would meet the policy goals of sanctions if 'sanctioned commercial activity' was uniform across country-specific regimes.

As noted under section 2 above, Allens supports a two-tier regime to streamline the Autonomous Sanctions Framework. On the basis that such a framework is adopted, Allens submits that the most coherent approach would be to incorporate country-specific parameters for 'sanctioned commercial activity' within each country-specific instrument. This approach would mitigate the current issues relating to navigating the 'sanctioned commercial activity' provisions set out in the Regulations while also providing appropriate flexibility to apply tailored country-specific measures.

4 Permit Power

4.1 Are there situations which you think would warrant a standing general permit being issued? If so, what is the justification?

Allens considers that a standing general permit should be issued authorising legal practitioners to provide legal advice to a person or entity subject to targeted financial sanctions or specified by the Minister in connection with a commercial activity, in relation to the application of such sanctions. Alternatively, an exemption could be incorporated into the Act or Regulations.

At present, absent such a permit or exemption, it is conceivable that a legal practitioner might breach a targeted financial sanction in the course of advising a person subject to targeted financial sanctions or commercial activity sanctions on their application. The existence of this risk has the potential to impair a designated person or entity's capacity to understand the implications of Australian targeted financial sanctions for them, and/or to challenge a designation. It also has the potential to impair an associate of a designated person or entity's capacity to understand the extent to which another's designation might 'flow through' to them.

As such, the absence of a standard permit or exemption has a potentially adverse human rights impact, in that it limits the capacity of individuals who are or may be subject to targeted financial sanctions from calling upon the assistance of a lawyer to protect and establish their rights. It also has potentially adverse commercial implications, in that it limits the capacity of entities who are, or may be, subject to targeted financial sanctions or commercial activity sanctions from understanding their position and managing their stakeholder relationships.

To the extent that a general permit is issued on the above matter, or any other, we consider that it would be beneficial to make its terms and conditions publicly available. This will serve to assist

commercial efficiencies and also reduce the burden on the ASO to respond to individual enquiries or applications. By way of example, to the best of our knowledge, the precise terms and conditions attached the recent general permit authorising the provision of certain services relating to Russian oil have only been made available to persons who have specifically requested a copy of the permit. This process is unnecessarily burdensome and in our view there is no reason why the ASO could not publish the general permit publicly. This again would align Australia with the approach taken by the United Kingdom and United States which make their equivalent general licenses publicly available.[3]

4.2 Are there other permit-related matters you wish to raise?

National Interest

The power of the Minister for Foreign Affairs and Trade (***Minister***) to grant a permit under regulation 18 of the Regulations requires clarification. At present, the Minister must be satisfied that it would be in the 'national interest' to grant a permit before doing so. 'National interest', however, is left undefined and is not supported by regulatory guidance. Allens submits that the 'national interest' criteria should be updated to provide circumstances in which it might apply (e.g. to clarify that the alleviation of unintended consequences of a sanction may be in the national interest).

Permits for assets and controlled assets

Under regulation 20 of the Regulations, additional permit criteria, specific to targeted financial sanctions, are set out which must be read in conjunction to the 'national interest' criteria (which is applied to all permits). In our view, this multi-levelled framework creates confusion and contradictions within the legislative apparatus as to what the necessary criteria are to grant a permit authorising dealings with designated persons and controlled assets.

Regulation 20 provides that an application for a permit authorising making available an asset to a designated person or dealing with a controlled asset *must* be for: (a) a basic expense dealing; (b) a legally required dealing; or (c) a contractual dealing. As such, if these criteria are not satisfied, the Minister would not be permitted to grant a permit even if it was considered to be in the 'national interest' to do so. This creates an obvious question and contradiction in the legislation insofar as how a permit can be in the 'national interest' but not be available to the Minister.

In view of the above, Allens submits that the additional criteria in relation to permits for assets and controlled assets under regulation 20 should be removed from the Autonomous Sanctions Framework. This submission is conditioned on the proposal that an exemption is embedded into the framework to ensure that persons impacted by sanctions have access to Australian legal advice.

Scope of permits

At present, under regulation 18 of the Regulations, the Minister may grant a person a permit authorising certain otherwise prohibited conduct on either the Minister's initiative or on application. In our experience, these authorisations are limited in scope to the applicant's conduct or the specific activity that the Minister is seeking to authorise. While Allens cannot comment exhaustively on all permits that have been granted, we have not seen a permit to date which broadens the scope of the authorisation to include services provided in relation to the conduct the permit relates to. This is significant as it may result in a technical breach of sanctions laws by third parties providing a service related to a sanctioned import, commercial activity or service relating to a particular country / activity, notwithstanding that the primary conduct has been

[3] See e.g. General License No. 56A (U.S.); General Licence – Oil Price Cap Int/2022/2469656 (U.K.)

authorised. Interestingly, the only exception to this is in respect of services provided in relation to an authorised supply under regulation 13(1)(c). It is unclear whether there is a policy basis behind this carve out.

Allens submits that the authorisation provisions in the Autonomous Sanctions Framework embed a 'catchall' which expands all permits to include services provided in relation to the relevant conduct so as to avoid inadvertent technical breaches.

Decision-making

Allens recognises that the volume of applications that the ASO and the Minister receives will have grown significantly over the course of the last 12-months due to Russia's invasion of Ukraine and the expansion of the Russian sanctions regime as a consequence. It is therefore understandable that the expediency with which those applications can be processed has been adversely impacted. However, in Allens' experience, the nature of permit applications generally involve some degree of commercial time-sensitivity. This can be caused by a range of factors including contractual milestones, urgent business requirements and the need for specialised goods. Consequently, we consider that it should be a priority for the ASO to streamline its permit process to allow for decisions to be made within a commercial timeframe.

In this respect, we suggest that the Autonomous Sanctions Framework be amended to:

- provide for consultation with potentially affected industries prior to the adoption of new sanctions, so potentially unintended consequences of new sanctions may be considered prior to their adoption;
- allow a delegate of the Minister within the ASO, rather than the Minister herself, to issue permits; and
- more clearly allow for the grant of general licences where multiple companies are applying for similar permits, where a particular activity may not pose a sanctions risk or where a grace period is required before certain sanctions restrictions come into effect. We note the U.S. Office of Foreign Assets Control takes this approach, and U.S. legislation provides for the granting of such general licenses.

5 Humanitarian Exemption

Allens supports the introduction of a humanitarian exemption to the Autonomous Sanctions Framework with the aim of ensuring that sanctions do not have the inadvertent effect of hindering or otherwise impacting the delivery of humanitarian assistance. As noted by the ASO, such exemptions exist in comparable jurisdictions, including the United Kingdom, with whom Australia should seek to align its regime with to the extent possible.[4]

Allens defers to expertise of experts working in the humanitarian space to advise on the parameters of what any exemption should look like.

6 Sanctions offences and enforcement

Currently the Australian sanctions regime only provides for criminal liability in the case of a sanctions breach. Allens considers that there would be benefit in expanding the regime to provide for civil consequences in particular circumstances, especially in relation to corporate liability.

While we agree that enforcement is a necessary deterrent, we consider that, consistent with the recommendation of the ALRC in its *Review into Australia's Corporate Criminal Responsibility Regime*, corporate criminal offences should be reserved for only the most egregious conduct,

[4] The Russia (Sanctions) (EU Exit) (Amendment) (No. 13) Regulations 2022.

where the deterrent characteristics of a civil penalty would be insufficient and it would be in the public interest to prosecute the corporation.[5]

The current Australian sanctions offence is one of strict liability (ie, a no fault offence) and accordingly could be triggered in the case of a minor one-off breach or an isolated incident where an automated system or process inadvertently fails. We do not consider that in such a case the public interest would warrant a criminal referral of the corporation to the CDPP. The situation described above is in contrast to the situation in which there is intentional or knowing breach of the law by the corporation (or an officer of the corporation), in which denunciation of that conduct to a criminal standard may be warranted.

In a sanctions context, we consider that a risk management failure is the most likely circumstance in which a corporate entity may breach the regime, and so we consider the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (***AML/CTF Act***) is an apt comparator. Other, less serious types of civil consequences could also be considered for more minor one off, or non-systemic breaches, such as infringement notices or remedial directions. Any criminal offence can then be left for conduct which involves an element of intent.

Allens also considers that introducing a civil penalty regime would bring Australia in line with its key foreign counterparts. For example:

- The US imposes criminal penalties for 'wilfully' violating US sanctions, and has a civil penalty regime for other types of breach which do not involve that element of intent;
- Similarly in the UK there is a criminal offence available where there is some element of intent, but there are also civil enforcement powers which are available in other circumstances.

We caveat these comments by submitting that the introduction of a civil penalty regime should include a defence of reasonable precautions and adequate due diligence, and an inbuilt mechanism similar to section 70.5B of the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019* (Cth) or section 9 of the *Bribery Act 2010* (UK), which would require that the Minister publish and regularly update:

- compliance guidance, setting out the ASO's compliance expectations (see section 8.2 below); and
- enforcement guidelines, equivalent to those maintained by OFAC, setting out enforcement responses available to the ASO (e.g., no action, requests for further information, cautionary letters, findings of violations, civil monetary penalties, criminal referrals) and when these will be applied.[6]

7 Regulatory function of the ASO

7.1 Suggestions for reducing costs associated with compliance with autonomous sanctions laws

Allens submits that it would be of material assistance for the ASO to issue more detailed and iterative guidance to decrease the compliance burden. For instance, the ASO could publish responses to FAQs, as does OFAC, based on analysis it completes in relation to applications for indicative assessments and permits.

[5] ALRC Review Into Australia's Corporate Criminal Responsibility Regime Recommendations | ALRC (Recommendation 2).
[6] OFAC, Economic Sanctions Enforcement Guidelines (9 November 2009), available at https://home.treasury.gov/system/files/126/fr74_57593.pdf.

The cost of compliance is further compounded by the fact that guidance received from the ASO via the PAX portal is not legally binding. This creates commercial uncertainty which in turn leads to the incursion of further costs in organisations seeking to ensure that existing or proposed conduct will not lead to a breach of autonomous sanctions laws.

In addition, the process of submitting a question regarding the sanctions framework through Pax requires clarity. For example, the Pax portal should explicitly outline the timeframes for reply and the type of guidance that can be provided by DFAT when a question is submitted.

7.2 Experience navigating the DFAT Consolidated List

Allens welcomes and commends the regular email notifications that the ASO issues upon any update to the DFAT Consolidated List.

As an observation of its maintenance, however, Allens notes that it is common for many names on the Consolidated List to be English transliterations of languages other than English. As such, there may often be multiple variations as to how a name might be spelt when translated into English (e.g. Alexei, Aleksey, Alexey). While we appreciate that there are numerous date fields which help to narrow down potential individuals, where possible it would assist to provide such variations.

8 Other matters

8.1 Application of sanctions laws for Australian expatriate employees of foreign corporations

Allens has received a considerable number of enquiries concerning the application of Australian sanctions to expatriate Australian persons who are employees of foreign companies that are outside Australian jurisdiction.

The primary issue is whether an Australian employee who contributes to a corporate action that might breach an Australian sanction were the foreign corporation within Australian jurisdiction themselves risks breaching that sanction. The issue is highly significant in circumstances where the home jurisdiction of the foreign corporation and/or the jurisdiction in which the Australian expatriate employee is based does not have in place sanctions that are equivalent to an Australian sanction.

At present, there is no direct statutory or regulatory indication of the level of employee involvement in a corporate action that might amount to a breach. As a consequence, to shield Australian expatriate employees from potential exposure to criminal liability, some foreign companies have restructured or reduced Australian expatriate employees' roles. Such compliance measures can have significant personal and professional implications for individuals.

As such, clear guidance on whether and when an employee's contribution to a corporate transaction rises to the level that they themselves will be said to have engaged in relevant conduct would be helpful. In our view, a standard based on the identification doctrine should be applied. That is, an Australian expatriate employee should not be liable for the conduct of a foreign corporation outside Australian jurisdiction unless the employee is acting as the directing mind and will of the corporation.

8.2 Regulatory guidance on the 'reasonable precautions and due diligence' defence

Allens has also received a considerable number of enquiries regarding the scope and application of the 'reasonable precautions and due diligence' defence to the corporate sanctions offence.

Allens considers that further and more detailed regulatory guidance on what the ASO considers to constitute reasonable precautions and due diligence should be published. This includes circumstances where a civil penalty regime is ultimately introduced. The US Department of the Treasury's Office of Foreign Asset Control's *Framework for OFAC Compliance Commitments*, its *Frequently Asked Questions* webpage, and the Commonwealth Attorney General's Department's *Draft guidance on adequate procedures to prevent the commission of foreign bribery* are examples of compliance guidance that we and our clients have found particularly helpful in considering what may be involved in a sanctions context.

8.3 Liability for the activities of foreign subsidiaries

Presently, the prohibitions relating to sanctioned supplies, imports, services and commercial activities deem bodies corporate liable for the contravening conduct of foreign corporations over which they have effective control. However those same prohibitions are not in place regarding dealings with designated persons and entities and controlled assets. In addition, the principles of corporate criminal responsibility for the conduct of agents (as set out in Chapter 2 of the *Criminal Code* (Cth) (as they apply to strict liability offences)) apply to corporate entities for the sanctions offences.

As a consequence of the deeming provisions relating to sanctioned supplies, imports, services and commercial activities, circumstances could conceivably arise where a foreign subsidiary of an Australian corporation must comply with supply, import, service and commercial activity sanctions, but not targeted financial sanctions. In our view, to reduce the compliance burden on Australian multinational companies, the application of Australian sanctions laws to foreign subsidiaries should be clearly articulated and consistent across all categories of sanctions.