



■ March 2023

Review of Australia's Autonomous Sanctions Framework
Australian Sanctions Office
Department of Foreign Affairs and Trade
RG Casey Building
John McEwen Crescent
BARTON ACT 0221

Dear Sir/Madam,

Review of Australia's Autonomous Sanctions Framework

The Australian Financial Markets Association (AFMA) is the leading industry association promoting efficiency, integrity and professionalism in Australia's financial markets, including the capital, credit, derivatives, foreign exchange, energy, carbon, and other specialist markets. Our membership base is comprised of over 125 of Australia's leading financial market participants, including Australian and foreign banks, securities companies, state government treasury corporations, fund managers, energy firms, as well as other specialised markets and industry service providers.

AFMA is pleased to make a submission to the Department's review of Australia's Autonomous Sanctions Framework (**the Review**). The structure of our submission is aligned to the Discussion Questions set out in the Issues Paper.

Issue 1 – Streamlining the Legal Framework

A. How could the Autonomous Sanctions Framework be made more clear and easy to navigate?

AFMA supports the proposal in the Issues Paper of grouping together all of the relevant provisions unique to a particular country or thematic sanction in one instrument, which should enhance navigability. We also support the publication of Frequently Asked Questions and responses on the ASO website, in a manner consistent with OFAC or the EU.

B. What challenges have you experienced in navigating the Autonomous Sanctions Framework? How could these be addressed?

The current structure of the Autonomous Sanctions Framework is quite complex and required referring to multiple pieces of legislation in relation to a single sanctions regime. The grouping of provisions unique to a particular country or thematic sanction would assist.

AFMA would also support a clearer description of the commencement date of restrictions, as in some cases ascertaining the commencement date of restrictions is difficult.

Finally, AFMA suggests further clarification in the navigation between export controls and sanctions restrictions, such as through cross-referencing Australian Harmonised Export Commodity Classification (AHECC) codes.

C. How would reducing the pieces of legislation that apply sanctions measures better assist you? Could this help with managing your administrative burden?

AFMA's view is that reducing the number of pieces of legislation would reduce the administrative burden of time spent understanding obligations and mitigate the necessity to engage external legal counsel, thereby reducing costs while promoting more effective compliance. As an example, our members find it difficult to refer to multiple regulations and instruments to assess the impact of Regulation 13A on a particular matter.

Issue 2 – Scope of Sanctions Measures

A. Are the sanctions measures under the Autonomous Sanctions Framework fit-for-purpose? Are there other sanctions measures that would support Australia's foreign policy objectives?

We submit that the measures under the Autonomous Sanctions Framework are fit-for-purpose and would welcome enhanced enforcement in relation to breaches of sanctions law, to the extent that this would enhance the effectiveness of the measures and create a more robust framework. In this regard, greater clarity is sought on the enforcement roles and responsibilities of the various agencies, particularly ASO relative to the Australian Federal Police, the Commonwealth Department of Public Prosecutions and AUSTRAC.

B. Have the below terms, or any other terms, in the Autonomous Sanctions Framework presented you with any challenges in understanding whether an activity you wish to undertake is sanctioned:

- ***Directly or indirectly;***
- ***Assets; and***
- ***Controlled asset.***

Generally, our members have highlighted challenges determining whether a particular activity is sanctioned based on broadly worded regulations. This is in relation to the terms referred to above, but also "dealing," "using," "allowed to use or deal," "facilitating the use or dealing" and "holding."

AFMA seeks further clarity on the ambit of the term "indirectly", particularly whether this applies only where an asset is provided to a designated person through a third party or whether it extends to entities that are owned or controlled by a designated person. If "indirect" applies to

ownership/control, then specific clarity is required as to the threshold that is deemed to make an entity designated, i.e. whether it is aligned to the OFAC threshold of 50%. If this is the intended scope, we submit that DFAT must provide a list of entities that are in scope to allow for effective administration of the sanctions framework.

In terms of determining the scope of terms such as “directly”, “indirectly,” and “assets,” AFMA would favour consistency with the scope of equivalent terms within the Charter of the United Nations Act sanctions framework. Alignment with other jurisdictions and widely-adopted frameworks is important to safeguard Australia’s competitiveness.

In determining scope, AFMA would seek particular clarity as to whether primary or secondary trading in financial instruments issued by a designated entity is prohibited by Regulation 14 or 15. Further, we would welcome clarity on the scope of the term “sanctioned import” and particularly whether this term extends to imports anywhere in the world.

Our members have noted that the approach in New Zealand’s *Russia Sanctions Regulations 2022* is a good approach, given that the prohibition on the acquisition of securities of a sanctioned narrower but still effective.

C. Would having a uniform concept of sanctioned commercial activity assist you in understanding sanctions obligations for this measure? If not, what might?

AFMA supports a uniform and simplified concept of “sanctioned activity.”

The term “sanctioned commercial activity” relating to 5B of the Autonomous Sanctions Regulations requires further clarity in relation to the commencement date and the scope of the restrictions. In particular, we submit that there is an inconsistency in the application of sanctions commercial activity under Regulation 5B(1) for equity instruments given that the regulation places a condition of a maturity date which is inappropriate for equity instruments which, by their very nature, do not have maturity dates.

With regards to Regulation 5B, AFMA also seeks clarity on:

- Whether restrictions under Regulation 5B apply to both primary and secondary trading in securities/financial instruments; and
- The distinction between the restrictions in trading securities/financial instruments listed in Regulation 5B relative to the trading of securities/financial instruments for designated entities.

Issue 3 – Permit Powers

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

AFMA believes that there are situations that would warrant a standing general permit being issued, with an example being the recent Russian oil price cap permit. This general permit should be publicly

available on the DFAT website, consistent with the approach adopted by OFAC. A publicly available general permit would reduce the administrative burden and duplication associated with applying for a permit bilaterally and would enhance regulatory transparency. Generally, a scenario that has broad application should be suitable for a general permit.

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

Feedback from our members for permit-related matters includes:

- That the timeframe to obtain a permit/indicative assessment may, in circumstances, be too long to be practical;
- The “national interest” condition may be restrictive and that exemptions should be able to be issued by AOS in a manner similar to those issued by OFAC and in the EU;
- AFMA would support a general custody exemption similar in effect to s8(4) of the Security of Critical Infrastructure Act 2018;
- All permits and guidance should be readily accessible to promote transparency and to assist with interpretation and the assessment of the likelihood of obtaining a permit.

Issue 4 – Humanitarian Exemption

A. In what circumstance would you support the introduction of a humanitarian exemption for a set group of humanitarian actors?

AFMA’s response is to support the introduction of a humanitarian exemption.

Issue 6 – Review Mechanism for Designations and Declarations

A. What risks or benefits do you see in replacing the relisting mechanism with a requirement that every five years the ASO undertakes a public notification process that would provide listees with the opportunity to make submissions that the Minister would be required to consider?

AFMA’s view is that there would be substantial benefits associated with this approach with a reduction in administrative burden associated with less frequent changes to the consolidated list.

Issue 7 – Regulatory Functions of the ASO

B. How could changes to the Autonomous Sanctions Framework better assist you in applying for an indicative assessment or a permit through Pax, the Australian Sanctions Portal?

AFMA supports the introduction of FAQs and publicly available general permits to potentially mitigate the need for indicative assessments or permit requests through Pax and would assist in reducing complexity/administrative burden.

We would also encourage ASO to conduct more industry outreach through industry associations such as AFMA and our peer associations to ensure consistency of regulatory expectations.

C. What costs, financial or otherwise, that are outside of ordinary business-as-usual costs, have you incurred in complying with Australian autonomous sanctions (in particular, in seeking an indicative assessment or permit through Pax)? How many times a year do you seek an indicative assessment or permit?

AFMA's members report that most costs arise due to the complexity of determining how to comply given the interpretative nature of the regulations and the relative lack of guidance. This gives rise to significant external legal costs.

E. What is your experience navigating the DFAT consolidated list?

The view of AFMA's members is that the experience is largely a positive one, with the list being clear and able to be sorted. Our members have noted discrepancies in the names of designated persons/sanctioned vessels contained in the instruments and those that appear in the consolidated list and this impacts on reliability.

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AFMA would welcome the opportunity to discuss our submission and the Autonomous Sanctions Framework. Please contact me on [REDACTED] or by email at [REDACTED]

Yours sincerely

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Rob Colquhoun
Policy Director