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Review of Australia's Autonomous Sanctions Framework
Australian Sanctions Office
Department of Foreign Affairs and Trade
RG Casey Building
John McEwen Crescent
BARTON ACT 2600

Dear Australian Sanctions Office

Review of Australia's Autonomous Sanctions Framework ("Framework") – Issues Paper

1. The Australian Sanctions Office (**ASO**) has invited submissions in response to the Issues Paper – Review of Australia's Autonomous Sanctions Framework (**the Issues Paper**), in line with the Terms of Reference prepared by the Department of Foreign Affairs and Trade (**DFAT**). The context for this review is that the Autonomous Sanctions Regulations 2011 (Cth) (**the Regulations**) will automatically expire on 1 April 2024.

2. Clifford Chance welcomes the opportunity to comment on the Issues Paper. Our firm has significant experience assisting clients domestically and internationally in relation to the Framework. Our clients are also able to draw on the extensive experience of our sanctions experts in jurisdictions such the United State, the United Kingdon, the European Union, Singapore and Japan to advise on the sanctions regimes of those jurisdictions.

3. We welcome consideration of amendments to further legislation aimed at providing greater clarity and certainty to individuals and corporations in relation to the Framework. Any amendments or streamlining of the Framework should be accompanied by detailed guidance regarding the obligations imposed by it.

4. Our comments below are based on the experience of lawyers in our Regulatory Investigations and Financial Crime team. However, the comments in this submission do not necessarily represent the views of every Clifford Chance lawyer, nor do they purport to represent the views of our clients.

Clifford Chance

5. Clifford Chance is one of the world's pre-eminent law firms, with more than 3,300 lawyers across five continents led by a single integrated partnership. The firm and its lawyers are consistently highly ranked in international publications such as Chambers and Partners and Australian legal rankings.

Issues Paper submissions

6. Our views and recommendations expressed below are confined to the Australian commercial and jurisprudential context. Further, the content of our submission is not intended to be exhaustive, nor does it constitute legal advice.

7. We do not intend to cover each of the Issues or Stakeholder questions raised in the Issues Paper but seek to highlight certain areas of the Framework that in our experience have caused difficulty or uncertainty for our clients to navigate. This often arises because of the complexity of the legislation that makes up the Framework and the fact, as acknowledged in the Issues Paper, that the Framework is contained across three layers and multiple pieces of legislation (Issues Paper, [38]).

8. Whilst law firms are, by their nature, available to advise on these areas of the Framework, making the Framework clearer and more accessible will have advantages to the public, and the legal profession, in general. To that end, any streamlining or simplifying of the Framework should also have regard to the developed and mature regimes that can be found in other jurisdictions, particularly those of Australia's allies. Given that many international businesses need to comply with the sanctions regimes of multiple jurisdictions, the greater the degree of consistency between the various regimes, the less will be the administrative and financial burden imposed on those the subject of them.

Terms used in the legislation (Issue 2)

9. The relevant legislation is, of course, the *Autonomous Sanctions Act 2011* (Cth) (**the Act**) and the Regulations, together with the numerous instruments (specifications and designations) made under them.

10. Issue 2 discusses the scope of sanctions measures and poses the question – *have the [terms directly or indirectly, assets and controlled assets] or any other terms… presented you with any challenges in understanding whether an activity you wish to undertake is sanctioned?*

11. As highlighted by the matters discussed below, the Framework currently uses terms or phrases, some which are defined in the Act or the Regulations, which are, in some instances, vague, non-specific and lead to uncertainty for those seeking to navigate the Framework.

They have presented numerous challenges in understanding whether an activity a client may wish to undertake is sanctioned.

Regulation 14

12. For example, Regulation 14 (extract below) sets out the prohibition of dealing with a designated person or entity. To date there has been no judicial consideration of this regulation that we are aware of, and no detailed public guidance published by the ASO.

> (*1) A person contravenes this regulation if:*
>
> *(a) the person directly or indirectly makes an asset available to, or for the benefit of, a designated person or entity; and*
>
> *(b) the making available of the asset is not authorised by a permit granted under regulation 18.*

13. The phrase "directly or indirectly" may be subject to inconsistent interpretation. In particular, as acknowledged in the Issues Paper (at [49]), the meaning of "indirectly" is less clear than "directly". While in our view it is the better interpretation of the term, it is certainly not clear "that the policy intention of the prohibition is to capture the conduct of persons who provide assets to designated persons or entities through the intervening agency of a third-party, rather than to apply to the indirect and unintended results of an individual's or body corporate's conduct." (Issues Paper, [49]) For example, another alternative interpretation would be that Regulation 14 is to be construed as to apply to a person making an asset available to a 'designated person or entity *indirectly*' (e.g. by providing an asset to a third party controlled by a designated entity). Given the lack of regulatory guidance in relation to the Framework (discussed further below), the acknowledgment in the Issues Paper of the policy intention and intended meaning of "indirectly" is of itself welcome.

14. Similar issues arise with the use of the phrase "for the benefit of". In a scenario where an entity (first entity) makes an asset available to another entity (second entity) for the second entity's own use, but the second entity in fact intends to make the asset available to a sanctioned entity, the first entity may arguably be making an asset available "for the benefit of" the sanctioned entity. In this regard, the strict liability nature of sanctions offences for body corporates (see s 16(8) of the Act) means that the first entity cannot rely on an absence of intention to benefit the sanctioned entity. While reasonable precautions could be undertaken, and due diligence exercised (in line with the defence available to corporate entities set out in s 16(7) of the Act, discussed further below), in circumstances where strict liability applies, greater clarity of the scope of these requirements would assist the public in applying the law.

15. If, on the other hand, the policy intention of the prohibition is to capture the conduct of persons or entities who provide assets to entities controlled by designated persons or entities, or in which a designated person or entity has a particular ownership stake, but the controlled entity is not itself designated, then clarity (either through legislative amendment or published guidance) would be welcome as to the circumstances in which it will be considered that an asset is being provided "for the benefit" of a designated person or entity.

16. In this regard, other jurisdictions have issued guidance in relation to the circumstances when making funds or economic resource to a non-designated entity will be presumed as making them *indirectly* available to a designated person or entity (which appears to be akin to the "for the benefit" prohibition in Australia). For example, the Council of the EU has issued guidance in the form of its "EU Best Practices for the effective implementation of restrictive measures"[1] which states that if a non-designated entity is 50% or more owned or controlled by a designated person, there is a presumption that the making available of funds or economic resources to that non-designated person will in principle be considered as making them indirectly available to the designated person. The EU Guidance sets out criteria to be considered when assessing whether a person is owned or controlled by a designated person for these purposes and, therefore, whether the presumption applies. This includes if a designated person is able to, and effectively asserts a decisive influence over, the conduct of a non-designated entity.

Regulation 15

17. Regulation 15, which sets out the prohibition of dealing with controlled assets (extract below), also presents challenges:

> *(1) A person contravenes this regulation if:*
> *(a) the person holds a controlled asset; and*
> *(b) the person:*
> *(i) uses or deals with the asset; or*
> *(ii) allows the asset to be used or dealt with; or*
> *(iii) facilitates the use of the asset or dealing with the asset; and*
> *(c) the use or dealing is not authorised by a permit granted under regulation 18.*

18. The term "controlled asset" is defined as being an asset owned or controlled by a designated person or entity. Unlike other federal legislation (see for example, s 50AA(1) *Corporations Act 2001* (Cth)) "controlled" or "control" is not defined in the legislation. A lack of

[1] Available online here: https://data.consilium.europa.eu/doc/document/ST-8519-2018-INIT/en/pdf

definition in the Framework or published guidance, together with the absence of any cases on point, is apt to cause uncertainty.

General terms

19. The intended scope of other prohibitions in the Framework is also not assisted by the way certain very general terms are used (c.f. Issues Paper, [45]). For example, in Regulation 5(1) the phrase "another service" is used in relation to the concept of a *sanctioned service*. And in Regulation 5B(1) a *sanctioned commercial activity* includes "any other dealing with" various financial instruments beyond the direct or indirect purchase or sale of them. Further consideration regarding the use of such terms in the streamlining or simplification of the Framework would be appropriate.

Reasonable precautions and due diligence defence

20. Section 16(7) of the Act is highly relevant to body corporates, particularly given that strict liability applies to offences by body corporates (see s 16(8) of the Act), as it provides a defence to sanctions offences. A body corporate, who bears the relevant legal burden, can rely on this defence if it proves "that it took reasonable precautions, and exercised due diligence, to avoid" committing relevant sanctions offences.

21. Despite the possible importance of this provision, the Act does not define the concepts "reasonable precautions" or "due diligence". Body corporates would likely benefit from additional clarify being provided in relation to the concepts, either by way of articulation in the Act or, as discussed below, by guidance published by the ASO regarding the concepts in circumstances where there is presently none.

Permit Powers – contractual dealings (Issue 3)

22. In relation to "other permitted-related matters" (Stakeholder question 3(B)), we highlight a possible shortcoming in relation to the grant of permits that seek to rely on a *contractual dealing* for the purpose of making an asset available to a designated person or entity.

23. In particular, Regulation 20 provides that an application for a permit authorising the making available of an asset to a person or entity that would otherwise contravene Regulation 14, or for a permit authorising a use of, or a dealing with, a controlled asset, must be for (amongst other things) a *contractual dealing*. However, as drafted, Regulation 20(5), which sets out what a *contractual dealing* is, effectively limits *contractual dealings* to dealings involving controlled assets (and not to any dealings with the assets of a designated person or entity).

24. This arises because Regulation 20(5)(b) (set out below, emphasis added), which must be satisfied for a dealing to be a contractual dealing, is confined to matters involving controlled assets. This would make it impossible, in theory at least, for a permit to be granted for a contractual dealing involving the assets of a designated person or entity.

> *(5) A dealing is a contractual dealing if:*
>
> *(a) … ; and*
>
> *(b) the dealing is a payment:*
>
> *(i) to apply interest or other earnings due on accounts holding* ***controlled assets****; or*
>
> *(ii) required under contracts, agreements or obligations made before the date on which those accounts became accounts holding* ***controlled assets****.*

Lack of Regulatory Guidance (Issue 1)

25. There is very little detailed or formal guidance provided by the ASO or DFAT regarding the Framework. This stands in stark contrast to the position in other jurisdictions. In addition, due to limitations identified in the Issues Paper, very few matters make their way to the courts, resulting in a lack of judicial interpretation of the Framework. In this circumstance, the lack of detailed guidance stands out as a barrier to an effective, streamlined approach to sanctions regulation.

26. It would be an advantage for individuals and companies alike to have the benefit of detailed guidance, which would likely lead to a reduced need for regulatory involvement or for individuals or companies to seek indicative assessments. It would also likely lead to a more uniform approach to sanctions matters. In relation to uniformity, and by way of example, we are aware of a divergence in market practice regarding the prohibition on making a *sanctioned import.* For instance, we understand that certain market participants take the view that a *sanctioned import* requires a connection to Australia. That is, that the necessary import or purchase of goods from another person or transport of goods that constitute a *sanctioned import* (see Regulation 4A(1)) must be to, for or somehow related to Australia as a destination for the goods. In this regard, we observe that the definition of *sanctioned import* and the relevant prohibition against making a *sanctioned import* in Regulation 12A make no reference to an Australian geographical connection. A similar analysis would apply in relation to the prohibition against making a *sanctioned supply* (see Regulations 4 and 12) (c.f. provisions of the sanctions law requiring an Australian geographic nexus, such as Regulations 5A(2), (3), 5B(4) and 5CA(2)).

27. In relation to guidance in other jurisdictions, the Office of Financial Sanctions Implementation in the United Kingdom provides several general, and country specific,

guidance documents to assist individuals and companies in navigating the sanctions regime in the UK. This includes a 46 page "general guidance for financial sanctions under the Sanctions and Anti-Money Laundering Act 2018" document, which provides more granular information on key definitions, each department's role in administering the regime and cross referencing to other relevant legislation. The OFSI has also released specific guidance in relation to Russia, for example.

28. Similarly, the EU provides specific guidance in the form of "frequently asked questions" on sanctions against certain countries or in relation to certain sectors and topic, such as oil imports and asset freezes. The EU guidance on best practices for the effective implementation of restrictive measures is referred to above.

29. The Office of Foreign Assets Control in the United States also provides guidance documents in relation to certain sanctioned topics, including leaflet type documents on topics such as how differing types of instant payment systems will be regarded as higher or lower sanctions risks. OFAC also have frequently asked questions on a variety of topics on their website.

30. While the ASO provides some limited guidance, or explanation on the introduction of new sanctions measures, this lacks the substance of regulatory guidance provided in other jurisdictions or published in relation to other Australian legislation. In relation to the latter, guidance such as the *Commonwealth Modern Slavery Act 2018 – Guidance for Reporting Entities* (Department of Home Affairs) would likely be useful to the public if provided in relation to the Framework. In relation to the absence of guidance regarding the the concepts "reasonable precautions" or "due diligence" as used in s 16(7) of the Act noted above, a publication like the *Draft guidance on the steps a body can take to prevent an associate from bribing foreign officials* (Attorney-General's Department, November 2019)[2] would likely be useful in providing guidance to the public and legal professionals alike on the concepts.

31. While the ASO invites questions via the online portal, Pax, which can assist on an individual, ad hoc basis, this does not provide for more wide-reaching information. In circumstances where individuals or companies may wish to seek information on a no risk, totally confidential basis, they are unlikely to wish to reach out via an online portal. Put simply, detailed publicly available guidance would assist with "administrative and

[2] While this was only a Consultation Draft developed for the purposes of s 70.5B of the Combatting Corporate Crime Bill 2019, which was never passed into legislation, in our view it is still a helpful example as to the nature of the guidance that body corporates would benefit from.

regulatory efficiencies for government and the public", something the review process sets out to achieve (Issues Paper, [5]).

..*

We thank you for the opportunity to comment on various parts of the Issues Paper. We look forward to further consultation with the ASO regarding the review of the Framework.

If you wish to discuss our submission, please do not hesitate to contact us.

Yours faithfully
Clifford Chance

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