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Review of Australia's Autonomous Sanctions Framework - Submission in response to Issues (1), (2) and (5)

1 Executive Summary

1.1 We refer to the *Issues Paper - Review of Australia's Autonomous Sanctions Framework* released by the Department of Foreign Affairs and Trade (DFAT) on 30 January 2023 (**Issues Paper**) in relation to Australia's Autonomous Sanctions Framework (**Framework**) consisting of the *Autonomous Sanctions Act 2011* (**Act**), the *Autonomous Sanctions Regulations 2011* (**Regulations**) and subordinate instruments.

1.2 We welcome the opportunity to make submissions in relation to Issues (1), (2) and (5) identified in the Issues Paper.

2 Issue 1: Streamlining the legal framework

Country-specific regulations

2.1 We submit that the multiple subordinate legislative instruments that currently exist for a specific country should be consolidated into one instrument for each country for the reasons identified by DFAT in the Issues Paper.

Structure of offences within the Framework

2.2 We submit that:

(a) the offence of contravening a sanctions law as currently set out in section 16 of the Act should be removed and replaced with the specific 'sanctions laws' contained in Part 3 of the Regulations; and

(b) any defined terms used in the specific 'sanctions laws' should be reviewed, and consideration given to whether these may be incorporated directly into the offence provisions rather than being separately defined. For example, rather than defining the term '*controlled asset*', regulation 15 of the Regulations (*prohibition on dealing with controlled assets*) could prohibit holding and dealing with or using assets owned or controlled by a designated person.

We make these submissions for the reasons set out below.

This approach would reduce complexity and compliance costs

2.3 As DFAT has identified, the current structure creates unnecessary complexity for the public, who must navigate multiple legislative instruments to determine what activities constitute an offence under the Act. Reducing the number of legislative instruments in which various elements of an offence are contained and reducing the need to refer back to definitions contained in different parts of an instrument or a separate instrument would reduce compliance costs and enhance compliance with the Act.

This approach would make it easier to apply the extended geographical jurisdiction test

2.4 Currently under section 16 of the Act:

'A body corporate commits an offence if

(a) the body corporate engages in conduct; and

(b) *the conduct contravenes a sanction law.*'[1]

An equivalent offence exists for individuals.[2]

2.5 A person or entity will commit an offence under the Act if the conduct constituting the offence:

(a) occurs wholly or partly in Australia;

(b) occurs outside of Australia where a result of that conduct occurs wholly or partly in Australia (unless the conduct occurs wholly outside Australia and is conduct that would not constitute a breach of foreign law in the jurisdiction in which it occurred);[3] or

(c) occurs outside of Australia by an Australian citizen or body corporate incorporated in Australia.[4]

2.6 If an Australian individual or body corporate contravenes a sanctions law, then it is clear they have committed an offence.

2.7 Foreign individuals and entities must identify whether **the conduct constituting the offence, or a result of that conduct, has occurred (partly or wholly) in Australia**. Further, if only the result of conduct occurred in Australia, the entity may have a defence under section 15(2) of the Criminal Code if their conduct would not constitute a breach of law in the jurisdiction in which it occurred.[5]

2.8 The current structure of the Act and Regulations means that rather than determining where the conduct and result of that conduct occurred for the purposes of assessing whether a particular sanctions law has been contravened (e.g. providing a sanctioned service), regard must be had to where the conduct and result of that conduct occurs for the purposes of assessing whether the offence created by section 16 of the Act has been committed.

2.9 Determining the location where the 'conduct' and 'result of conduct' elements of the section 16 offence occurred is particularly complex. This is because:

(a) The offence under section 16 of the Act consists of at least two elements:

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1 Act, section 16(5).

2 Act, section 16(1).

3 *Criminal Code Act 1995* (Cth) sch '**Criminal Code**', section 15.1(2).

4 Criminal Code, section 15.1(1).

5 Criminal Code, section 15.1(2)(c). The foreign entity bears an evidential burden in relation to proving that no corresponding offence exists in relation to the conduct in question in that foreign jurisdiction.

(i) A conduct element - '*the body corporate engages in conduct*' - that is satisfied if the entity performs or omits to perform an act;[6] and

(ii) A 'result of conduct' element - '*the conduct contravenes a sanction law*' - that is satisfied if the conduct referred to in (a) results in a contravention of a sanctions law.

(b) However, the following matters are unclear:

(i) What is the 'conduct' the person or body corporate must engage in to satisfy element (a)(i)? For example, if the offence consists of providing a 'sanctioned service', is the relevant conduct limited to provision of the service (e.g. financial assistance) by the entity, or does it also include the fact that the financial assistance must assist a sanctioned import? This creates an issue where these elements occur in different jurisdictions.

(ii) In what location a contravention of a sanctions law described in element (a)(ii) would be deemed to occur. Would the contravention of sanctions law always occur in the same place as the conduct that causes that contravention? Or could there be circumstances where the contravention could be taken to occur in a separate jurisdiction (e.g. on the basis that regard should be had to the physical elements of the underlying prohibition to determine what constitutes the relevant 'conduct' and 'result')?

2.10 If the broad offence in section 16 of the Act was replaced by each 'sanctions law' contained in Part 3 of the Regulations, then this would make it easier to identify where each element of the offence occurred. For example:

(a) if the offence committed under the Act was provision of a '*sanctioned service*', then the offence clearly consists of both a 'conduct' element (i.e. providing a service e.g. financial assistance) and a 'result of conduct' element (i.e. the service assists with a '*sanctioned import*' or '*sanctioned supply*');

(b) if the 'conduct' element is the provision of financial assistance to an entity, then it would most likely occur where funds are advanced by the lender or received by the borrower; and

(c) if the 'result of conduct' element is that the financial assistance assists with a sanctioned import, then it would most likely occur in the jurisdiction to which the relevant goods are imported.

3 Issue 2: Scope of sanctions measures

Removal of 'directly or indirectly' in Regulation 14

3.1 Regulation 14 currently prohibits a person from directly or indirectly making an asset available to, or for the benefit of, a designated person or entity.[7] We submit that the words 'directly or indirectly' should be removed from this prohibition as they are unnecessarily broad and do not add any value to the operation of the prohibition.

3.2 As DFAT identified in the Issues Paper, these words were included in regulation 14 to capture persons who provide assets to designated persons or entities through the intervening agency of a third party. However, the inclusion of 'indirectly' may be taken to suggest that regulation 14 is contravened wherever a person transfers an asset to another person and ultimately that asset is

6 Criminal Code, section 16(10).

7 Regulations, regulation 14.

received by a designated person, even in circumstances where the person making the original transfer was not aware of anything to suggest that the asset might be passed on to a designated person and where there are multiple intermediaries involved. As DFAT has indicated, this seems to extend beyond the original policy intention.[8] Alternatively it may be taken to suggest that regulation 14 is contravened where a person engages in conduct that assists with, or facilitates, the transfer of an asset to a designated person. This is also inconsistent with the policy intention suggested by DFAT.[9]

3.3 In our opinion, the policy concerns noted by DFAT are already adequately addressed by the ancillary liability regime. For example, if Person A makes an asset available to Person B (who is not designated, and is not owned, controlled or acting at the direction of a designated person), in circumstances where Person A intends or knows that ultimately Person B will make the asset available to a designated person, then Person A has likely aided, abetted, counselled or procured a breach of regulation 14 by Person B.[10]

3.4 The use of 'indirectly' may also have been intended to capture circumstances where an asset is made available to a designated person or entity via a subsidiary (or an entity otherwise acting under their direction or control). If this is the case, then this could be made clearer by amending the prohibition in regulation 14(1) to align with the wording contained in regulations[11] under the *Charter of the United Nations Act 1945* (Cth):

'A person contravenes this regulation if:

(a) the person makes an asset available to, or for the benefit of:

(i) a designated person or entity; or

(ii) *a person or entity acting on behalf of or at the direction of a designated person or entity; or*

(iii) *an entity owned or controlled by a designated person or entity;* and

(b) the making available of the asset is not authorised by a permit granted under regulation 18.'

Making an asset available in Regulation 14

3.5 There is currently no guidance around how to interpret the phrase '*make an asset available*' in regulation 14. We submit that the Act or Regulations (if the Regulations are retained) should provide a non-exhaustive list that sets out examples of actions that constitute and do not constitute 'making an asset available'.

3.6 Any examples in the Act or Regulations could also be supplemented by regulatory guidance. For example, the *Sanctions and Anti-Money Laundering Act 2018* (UK) allows regulations to be passed '*preventing funds or economic resources from being made available to, or for the benefit of, designated persons…*'.[12] The UK's Office of Financial Sanctions Implementation (**OFSI**) has issued guidance confirming that this provision also prohibits making funds or economic resources '*available*

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8 Paragraph 49, Issues Paper.

9 Paragraph 49, Issues Paper.

10 Criminal Code, section 11.2.

11 See for example, *Charter of the United Nations (Sanctions – Iran) Regulation 2016*, regulation 16(1); *Charter of the United Nations (Sanctions – Sudan) Regulations 2008*, regulation 12; *Charter of the United Nations (Sanctions – Democratic People's Republic of Korea) Regulations 2008*, regulation 12.

12 *Sanctions and Anti-Money Laundering Act 2018* (UK), section 3(d).

to an entity who is owned, or controlled, directly or indirectly, by the designated person'.[13] The guidance lists circumstances where the ownership and control requirement is satisfied (including where the designated person or entity holds more than 50% of the shares in the entity or that it is reasonable to expect that the designated person or entity would be able to ensure the affairs of the entity are conducted in accordance with the designated person or entity's wishes).[14]

3.7 Similarly, the European Commission has issued opinions confirming that '*making funds or economic resources available*' has a wide meaning and can include the '*gift, sale, barter or return of funds held or controlled by a third party to a designated owner'*.[15] The European Commission has suggested a presumption should be applied that if an asset is made available to a particular entity, it is also made available to any entity that owns or controls the first entity (although this presumption can be rebutted). However, an economic resource is not made available for the benefit of a listed person or entity merely because it is used by a non-listed person or entity to generate profits which might be in part distributed to a listed shareholder.[16] The Commission has also listed criteria that should be considered when determining whether an entity is owned or controlled by another including sharing a business address and having influence with regards to corporate strategy, operational policy, business plans etc.[17]

3.8 It would be useful if a similarly detailed level of guidance could be provided as to what constitutes 'making an asset available' for the purposes of the Australian regime.

General guidance for sanctions laws contained in the Regulations

3.9 We would also be grateful for more guidance (whether formal or informal) on various other phrases contained in the Regulations. These include (but are not limited to):

(a) **The definition of 'sanctioned service'**. A sanctioned service includes '*another service'* if it '*assists with, or is provided in relation to*' a sanctioned supply or another activity specified in the Regulations.[18] This prohibition can be difficult to apply to practical examples. For example, would the publisher of a journal provide a sanctioned service if they were to publish research that was then used to enhance efficiency in the manufacture of export sanctioned goods for Russia? Consideration should be given as to whether the current definition of 'sanctioned service' could be refined in any way in order to provide greater certainty as to its scope, or supplemented with guidance or examples of what '*another service*' might include, and in what circumstances a service might be taken to '*assist*' with a specified activity.

(b) **The meaning of the word 'deals' in the prohibition on '*dealing with a controlled asset'*.**[19] Other legislation includes definition of '*dealing*' (for example, section 766C of the

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13 Office of Financial Sanctions Implementation HM Treasury, 'UK Financial Sanctions – General guidance for financial sanctions under the Sanctions and Anti-Money Laundering Act 2018', dated August 2022 (accessible at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1100991/General_Guidance_-_UK_Financial_Sanctions__Aug_2022_.pdf), page 17.

14 Ibid.

15 European Commission, 'Commission Notice – Commission Frequently Asked Questions on EU Restrictive Measures in Syria', dated 1 September 2017 (accessible at: https://finance.ec.europa.eu/system/files/2020-01/170901-faqs-restrictive-measures-syria_en.pdf), page 7.

16 Ibid, page 9; Council of the European Union, 'Restrictive measures (Sanctions) – Update of the EU Best Practices for the effective implementation of restrictive measures', dated 27 June 2022 (accessible at https://data.consilium.europa.eu/doc/document/ST-10572-2022-INIT/en/pdf), page 25.

17 European Commission, 'Commission Opinion on Article 2 of Council Regulation (EU) No 269/2014', dated 19 June 2020 (accessible at https://finance.ec.europa.eu/system/files/2020-06/200619-opinion-financial-sanctions_en.pdf) at page 3.

18 Regulations, regulations 5(1)(d) and 5(4)(d).

19 Regulations, regulation 15.

Corporations Act defines when a person deals with a financial product). It would be useful to either include a definition of *'dealing'* in the Act or to provide a non-exhaustive list of activities that constitute and do not constitute dealing with an asset. For example, that dealing included disposing of an asset but did not include accepting loan repayments from a designated person, crediting interest to an account held by a designated person and receiving payments from a financial instrument issued by a designated person (such as a bond or share).

(c) **The reference to 'all goods' in the definition of 'sanctioned imports'**.[20] Similar to how the definition of 'asset' in the Act includes 'tangible or intangible' assets,[21] guidance on whether 'goods' is limited to tangible items or extends beyond this would be beneficial. For example, the OFSI has issued guidance confirming that goods generally refer to 'items, materials and equipment',[22] suggesting that it may not extend to intangible goods.

4 Issue 5: Sanctions offences and enforcement

4.1 There is a risk that introducing a civil pecuniary penalty regime could result in reduced transparency between industry and the Australian Sanctions Office (**ASO**). As civil penalties have a lower standard of proof than criminal penalties, the public may be deterred from providing information to the ASO or from requesting an indicative assessment because of the increased risk that they may face enforcement action for any potential breach.

4.2 If civil pecuniary penalties are to be introduced, we suggest that DFAT also consider whether other civil and administrative compliance options should also be available (such as infringement notices, enforceable undertakings and remedial directions). Having a wide range of options allows for effective enforcement by the regulator and ensures that the tool used is appropriately proportionate to the type of breach and entity involved.[23] In particular, infringement notices have a variety of proven benefits including being less costly for regulators to issue as no court proceedings are required, targeting less serious contraventions and improving voluntary compliance as the publicised nature of the notices can act as a deterrent for entities.[24]

4.3 Other regulators such as ASIC, AUSTRAC, the ACCC and APRA have successfully incorporated these enforcement options into their toolkit.[25]

4.4 In addition to broadening the enforcement toolkit, we submit that the reasonable precautions and due diligence defence that is currently available for bodies corporate for criminal breaches of

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20 Ibid, regulation 4A.

21 Act, section 4.

22 Office of Financial Sanctions Implementation HM Treasury, 'UK Financial Sanctions – General guidance for financial sanctions under the Sanctions and Anti-Money Laundering Act 2018', dated August 2022 (accessible at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1100991/General_Guidance_-_UK_Financial_Sanctions__Aug_2022_.pdf), page 15.

23 This approach has been noted by other regulators. For example, see Australian Securities and Investments Commission, 'Self-reporting of contraventions by financial services and credit licensees: Submission by the Australian Securities and Investments Commission', dated May 2017 (accessible at https://treasury.gov.au/sites/default/files/2019-03/ASIC-4.pdf), page 20 paragraph [70].

24 Australian Government, 'ASIC Enforcement Review – Positions Paper 7: Strengthening Penalties for Corporate and Financial Sector Misconduct', dated 2017 (accessible at https://treasury.gov.au/sites/default/files/2019-03/c2017-t232150.pdf), pages 72-73.

25 Between 2012 and 2023, ASIC has issued approximately 220 infringement notices for contraventions of the *National Consumer Credit Protection Act 2009* (**NCCP Act**), the *National Consumer Credit Protection Regulations 2010* and the *Australian Securities and Investments Commission Act 2001* (**ASIC Act**) with penalties ranging from approximately $13,320 to $52,500

sanctions offences[26] be made available for civil breaches. This defence was initially implemented to 'promote a culture of corporate compliance'.[27] Extending this offence to civil breaches may go some way to mitigating any risk of reduced transparency and open dialogue between industry and the regulator arising from the introduction of the civil penalty regime. This would also bring the structure of civil penalties in the Act in line with the AML/CTF legislation which includes a defence for contravention of a civil penalty provision if reasonable precautions and due diligence were undertaken.[28]

4.5 Alternatively, a mental element for the civil sanctions offences could be introduced requiring the person or body corporate to have knowledge, a reasonable cause to suspect, or to be reckless or negligent as to the circumstances that would constitute a breach of the Act (for example, if they were making an asset available to a designated person, they would need to know or have reasonable cause to suspect that person was designated, or be reckless or negligent as to that fact). This option may involve a tiered penalty scheme depending on the seriousness of the person's fault element, with knowledge attracting the highest penalty followed by recklessness and then negligence.[29] However, a mental element should only be introduced if the reasonable precautions and due diligence defence is not extended to civil breaches given both approaches essentially provide the same type of protection to the person.

5 Immunity provision in section 25 of the Act

5.1 Finally, we submit that the immunity provision in section 25 of the Act should be extended to provide protection from civil or criminal liability arising from any act or omission done in compliance with the provisions of the Act. The provision as it is currently drafted is confined only to protection from liability for persons who, in good faith, comply with sections 18, 19, 23 or 24 of the Act (relating to disclosing information, making records or copies of documents or using information or documents for certain purposes described in those clauses).[30]

5.2 This would bring the Act into alignment with the framework existing under the AML/CTF legislation. The immunity provision in the AML/CTF Act grants protection to a person acting in good faith from civil or criminal liability and '*in compliance, or in purported compliance with any other requirement under (i) this Act; or (ii) the regulations; or (iii) the AML/CTF Rules*'.[31] A similar

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per notice. It has also accepted approximately 158 court-enforceable undertakings for contraventions of the *ASIC Act*, *Corporations Act 2001* (**Corporations Act**), *NCCP Act* and *Superannuation Industry (Supervision) Act 1993* (**SIS Act**).

Between 2012 and 2023, the ACCC has issued approximately 271 infringement notices for contraventions of the *Competition and Consumer Act 2010* (**CCA**) and the *Australian Consumer Law* (**ACL**) with penalties ranging from approximately $2040 to $159,840 per notice. It has also accepted approximately 256 court-enforceable undertakings for contraventions of the CCA.

AUSTRAC has issued 6 infringement notices for contraventions of the *Anti-Money Laundering/Counter Terrorism Financing* (**AML/CTF**) legislation since 2013. It has also accepted 7 court-enforceable undertakings for contraventions of AML/CTF legislation since 2009.

APRA has issued 715 infringement notices (for 3 entities) for contraventions of the *Financial Sector (Collection of Data) Act 2001* since 2019. It has also accepted 22 court-enforceable undertakings by individuals and 10 court-enforceable undertakings by entities for contraventions of the *Banking Act 1959*, the *Insurance Act 1973* and the *SIS Act* since 2005.

26 Act, section 16(7).

27 Replacement Explanatory Memorandum dated 3 March 2011, Autonomous Sanctions Bill 2010 (Cth), clause 16.

28 *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AML/CTF Act**), section 236(2).

29 This standard was adopted in the *Crimes Legislation Amendment (Economic Disruption) Act 2021* (Cth) which amended the *Crimes Act 1900* (Cth), *Criminal Code Act 1995* (Cth) and the *Proceeds of Crime Act 2002* (Cth).

30 Act, section 25(1).

31 AML/CTF Act, section 235(1)(e).

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provision could be incorporated into the Act to capture any circumstances where an entity has acted in good faith and in compliance with the Act. This would provide appropriate protection for individuals and entities which may otherwise risk exposure (for example, breaching a contract) as a result of ensuring compliance with the Act.

We would welcome the opportunity to discuss these submissions with the ASO. If there are any questions arising from these submissions, please contact **Kate Jackson-Maynes** at the email address or phone number provided below.

Yours sincerely

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