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26th February 2023

Dear Sir / Madam

Thank you for the opportunity to provide this submission on the Department of Foreign Affairs and Trade's (the department's) public consultation on the review of Australia's framework for autonomous sanctions ('Consultation Paper') and assist in helping to shape the future of Australia's sanctions' legislative framework.

We look forward to opportunity to discuss our submission further and provide ongoing assistance as appropriate to the department as it continues its review into the autonomous sanction's framework.

Kind regards,

[REDACTED]

Rachel Waldren  
Partner



## Submission: review of the legal framework for autonomous sanctions

February 2023

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## Overview

KordaMentha welcomes the opportunity to provide this submission on the Department of Foreign Affairs and Trade's (the department's) public consultation on the review of Australia's framework for autonomous sanctions ('Consultation Paper') and assist in helping to shape the future of Australia's sanctions' legislative framework.

KordaMentha is an independent and trusted advisory firm providing specialist expertise across financial crime, forensic accounting, restructuring, cybersecurity, performance improvement, and real estate services. Our team of almost 400 specialists extends across Asia-Pacific and has experience ranging from c-suite advisory, finance and real estate to law enforcement.

Since 2002, our experts have been entrusted with some of the region's most complex and sensitive commercial situations. We work together to solve the challenges facing corporations, financiers, lawyers, private investors, and government clients.

Our extensive financial crime advisory team has gained experience understanding the commercial challenges of implementing sanctions obligations from a range of roles in industry, including as Compliance Officers in some of Australia's largest financial institutions, professional advisory firms, both in Australia and internationally and in regulatory roles with the Australian Transaction Reports and Analysis Centre (AUSTRAC). As a result, our team have developed a wide range of insights into the breadth of challenges facing industry.

The views provided in this submission are made on a general basis and limited to the Consultation Paper's terms of reference. As a technological and politically neutral firm, KordaMentha support the development of regulation which offers consistency and alignment with international best practise, clear guidance for business, and effective supervision and enforcement of the regulatory regime.

We welcome continued collaboration with the department as it progresses in the review and development of robust and effective legislative amendment for Australia's autonomous sanctions regime.

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## Issue 1: Streamlining the legal framework (ToR 1, 3, 9) – consideration of the Autonomous Sanctions Framework

### 1 (a) How could the Autonomous Sanctions Framework be made clearer and easier to navigate?

The simplification and streamlining of sanctions measures, criteria, and listings contained across the Act, Regulations, and related instruments would be an essential benefit to this reform. Were regulated entities better able to understand, implement, monitor and assess compliance with a streamlined Autonomous Sanctions Framework, compliance with their obligations may be more easily assured.

### 1 (b) What challenges have you experienced in navigating the Autonomous Sanctions Framework? How could these be addressed?

Currently monitoring changes to Autonomous sanctions measures, criteria, and listings is a complex and time-consuming exercise for regulated entities; increasing the risk associated with breaching legislative obligations. In our experience, the complexities afforded by the current framework are often beyond the capability and / or capacity of smaller entities resulting in sub-optimal compliance. KordaMentha considers there would be a reduction in regulatory burden should the framework be simplified.

KordaMentha supports the model outlined in the Consultation paper that proposes the establishment of a two-tiered, legislative structure which would:

- i. Move various provisions currently contained in the Regulations, including the offence prohibitions, to the Act; and
- ii. Group together all the relevant provisions unique to a particular country or thematic sanction into one instrument (e.g., definitions for sanctions prohibitions and listing criteria).
- iii.

### 1 (c) How would reducing the number of pieces of legislation that apply sanctions measures better assist you? Could this help with managing your administrative burden?

See response above at 1 (b)

## A.1.1 Issue 2: Scope of sanctions measures (ToR 2, 3, 9) – clarification of scope and definitions

### 2 (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?

KordaMentha is of the view that the outcomes of the Consultation process will assist in ensuring the Autonomous Sanctions framework is fit-for-purpose and support Australia's foreign policy objectives.

### 2 (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? For example:

- i. Directly or indirectly
- ii. Assets; and
- iii. Controlled asset.

Clear definitions supported by practical guidance and education for the public and regulated entities would clarify any misunderstanding and provide reasonable assistance in determining the scope of the framework. KordaMentha supports, where possible definitions consistent with international practice to reduce the risk of non-compliance.

### 2 (c) Would having a uniform concept of sanctioned commercial activity assist you in understanding sanctions obligations for this measure? If not, what might?

While a uniform concept of sanctioned commercial activity would benefit the public and regulated entities it is essential that these concepts are aligned to international definitions and practices. Implementation of targeted financial sanctions extraterritorially means that for any uniform concept to be effective, reliance on that concept being used and understood, by foreign counterparts is essential.

## A.1.2 Issue 3: Permit powers (ToR 4, 9)

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

Yes, we are of the view that a standing general permit may be warranted in specific commercial situations.

### 3 (b) Are there other permit-related matters you wish to raise?

In addition to detailing the Minister's general permit granting powers in the Regulations, KordaMentha proposes that for consistency and transparency standing general permits should be available on the Department's website for the public and reporting entities to view.

Furthermore, we support clear guidance being made available to those individual and entities granted permits including their potential limitations. Given the nature of global sanctions regimes, and risk appetite position adopted by Australian financial institutions, in our experience, permits may not be as effective in practice as intended.

### A.1.3 Issue 4: Humanitarian exemption (ToR 2, 4, 5, 9, 10)

#### 4 (a) In what circumstance would you support the introduction of a humanitarian exemption for a set group humanitarian actors?

KordaMentha supports the introduction of a humanitarian exemption where those actors are appropriately registered and regulated. For example, the Australian Charities and Not-for-profits Commission (ACNC) is the national regulator of charities and not-for-profit organisations. All recipients of humanitarian exemption should be registered with the ACNC and therefore subject to appropriate oversight and supervision (including anti-money laundering and counter terrorism financing).

#### 4 (b) What safeguards would be necessary to ensure such an exemption is not misused, for example to facilitate proliferation financing or sanctions evasion?

See 4a above.

#### 4 (c) If an exemption for 'humanitarian assistance' were to be included in the legislation, what types of activities would it be important to capture?

Activities providing essential services/ aid including food, medicine, shelter, and all requirements for first responders in the case of international disasters should meet this definition.

### A.1.4 Issue 5: Sanctions offences and enforcement (ToR 6)

#### 5 (a) Would civil penalties be a suitable enforcement tool in the sanctions context?

Yes, we strongly support the introduction of a civil penalty regime as it would provide a more responsive enforcement framework. However, it is KordaMentha's view that a full suite of regulatory and enforcement tools and powers should also be considered to allow for both general and specific deterrence and ensure greater compliance. Given the size and diversity of the regulated sector, these may include:

- i. issuing infringement notices
- ii. issuing remedial directions (for regulated entities to take specified action to ensure compliance)
- iii. accepting enforceable undertakings detailing the specific actions a regulated entity will commence or cease in order to comply with the relevant legislation; and
- iv. seeking injunctions and/or civil penalty orders in the Federal Court.

Furthermore, an effective enforcement regime is only possible where regulated entities are subject to appropriate supervision and oversight. Australia was criticised in its 2015 Financial Action Taskforce (FATF) Mutual Evaluation, regarding its sanctions supervision regime. Specifically we note the comments made below:

*'However, DFAT does not monitor or supervise the financial sector for compliance with the requirements of the FATF Recommendations (which would be difficult given that DFAT is not a supervisory entity) and as expected of a supervisory authority. In addition, no financial institutions are supervised or monitored for compliance with the TFS requirements (as in financial supervision) by any other competent supervisory authority. This is a major shortcoming in the supervisory regime, as reflected under IO.3, but is relevant for IO.10 to measure effective implementation'<sup>1</sup> [pg 75]*

The introduction of a broader enforcement regime, including but limited to civil penalties together with the appointment of a suitable supervisory authority in the revised framework would, in our view go a considerable way in addressing such gaps (see further detail at Issue 7 below).

<sup>1</sup> <https://www.fatf-gafi.org/en/publications/Mutualevaluations/Mer-australia-2015.html>

## Issue 6: Review mechanism for designations and declarations (ToR 4, 8)

**6 (a) What risks or benefits do you see in replacing 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?**

In keeping with Australia's foreign policy objectives, KordaMentha supports initiatives to reduce the administrative and legislative burden of relisting. We would therefore support the proposal as outlined in the consultation paper that

- i. the Minister, by legislative instrument, designates a person or entity for Targeted Financial Sanctions or declares a person for a travel ban if satisfied they meet the relevant criteria —no expiry date would apply to the listing.

However, it is unclear how any invitation to sanctioned persons and entities to make submissions regarding their listings would achieve a reduction in burden. A post implementation review of the UK's legislative amendment in this regard may provide insights for Australia.

## Issue 7: Regulatory functions of the ASO (ToR 7)

The Consultation Paper sets out the department's role as Australia's Sanctions regulator but does not outline the role of supervisor. For a regulatory regime to be effectively measured and enforced, regulatory supervision of the regulated sector is required. As detailed at 5 (a) above, Australia was rated moderately effective in its FATF Mutual Evaluation, for Immediate Outcome 10 (TF Preventative Measures and Financial Sanctions), and a key finding as noted (regarding Australia's targeted financial sanctions legislative framework stated the following statement:

*'However, effective implementation of the legal framework is difficult to confirm in the absence of freezing statistics, financial supervision, or supervisory experience and feedback on practical implementation by the private sector'<sup>2</sup> [pg 6]*

We are of the view that is a significant capability gap in the current Autonomous sanctions' regime which should be addressed ahead of Australia's next Mutual Evaluation by the FATF (expected in 2025). We would encourage the inclusion of the appropriate supervisory authority to be considered as part of the departments review of the framework.

**7 (a) Do you support aligning the existing injunction power with those set out in Part 7 of the *Regulatory Powers (Standard Provisions) Act 2014*?**

KordaMentha supports the alignment of the existing injunctive powers to Part 7 of the *Regulatory Powers (Standard Provisions) Act 2014* in conjunction with our submissions set out in Issues 5(a) and 7.

KordaMentha makes these submissions in its capacity as a professional advisory firm, and not on behalf of any client or class of clients. As such it is not appropriate to make submissions in relation to the remaining issues raised as part of ToR 7.

We would welcome any opportunity to discuss our submission further and provide ongoing assistance as appropriate to the department as it continues its review into the Autonomous Sanctions framework.

<sup>2</sup> Executive summary <https://www.fatf-gafi.org/en/publications/Mutualevaluations/Mer-australia-2015.html>