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Ms Lindsay Buckingham
Review of Australia's Autonomous Sanctions Framework
Australian Sanctions Office
Department of Foreign Affairs and Trade
RG Casey Building
John McEwen Crescent
Barton
Australian Capital Territory 0221

By email

Dear Assistant Secretary

Moulis Legal submission
Review of the autonomous sanctions framework

We offer our submission to the review conducted by the Australian Sanctions Office (**ASO**) of Australia's autonomous sanctions framework (**the Review**).

Our submission is directed towards the definitions of *"asset"* and *"controlled asset"* under the *Autonomous Sanctions Act 2011* (**the Act**) and the *Autonomous Sanctions Regulations 2011* (**the Regulations**) respectively, and the need to clarify the extent of those terms to assist Australian businesses to receive payments from foreign entities in a timely and efficient manner. This particularly extends to law firms, and their ability to advise foreign clients, whether designated individuals or not, with respect to their rights and obligations under Australian law.

A Purpose of submission

Our submission is intended to illustrate that the definition of *"controlled asset"* requires clarification to assist lawyers and their respective financial institutions to comply with the Act. In making this submission, we are not acting under the instruction of any client or clients. Our submission is made from the standpoint of legal policy and is intended to assist the Review to consider the practical issues arising from the Act's definition of *"asset"* and its companion term, *"controlled asset"*.

In our experience, our financial services provider has adopted an overly cautious and incorrect approach in its interpretation of what is a *"controlled asset"*. We presume that it is not alone. A reason

for this is likely to be the strict and significant penalties for non-compliance. Another reason could be the potential extraterritorial effect of foreign sanctions laws.

Whatever the case, it has been our repeated experience that lawful payments of legal professional fees have not been forwarded to us by our financial services provider in a timely manner. At the time of writing, some payments are still held up. The direct difficulty appears to be the perceived risk that such payments could be considered an *"asset"* of a designated individual or entity (**designated entity**) under the Act and Regulations and, possibly, that the financial institution controls that assumed asset in the course of remitting it to us or will facilitate us in controlling that assumed asset if it is remitted to us.

This ongoing uncertainty and caution is a drain on administrative resources for our financial services provider and our firm. It impedes the ability of foreign parties, including designated individuals and entities, to obtain advice about their legal position under the sanctions framework and their compliance with same. It is our strong expectation that the problem is not unique to law firms and the services they provide. We assume that the problem is magnified across other individuals and industries that deal with foreign parties, thereby ultimately having a significant effect on cash flow and the wider economy. Uncertainty about the ability to receive payment for any exported goods and services is likely to be suppressing other business activity as well.

This submission explains that these impediments should not exist. We consider what might be causing them and propose solutions for the ASO's consideration.

We refer to our *"financial services provider"* (an Australian bank) throughout this submission simply as representing our own experience and without negativity. We draw attention to its conduct on the assumption that other Australian financial services providers are experiencing similar uncertainties which are affecting them and their customers as well.

B About Moulis Legal

Moulis Legal (**ML**) is an internationally recognised boutique law firm specialising in international trade and commercial law. We have been constantly ranked as an Australian Band 1 International Trade/WTO practice by international ranking agency Chambers & Partners over the past 16 years since our inception.

We are regularly instructed in international trade advisory and litigation work, including World Trade Organisation proceedings, anti-dumping/countervailing, commercial implications of WTO agreements, export controls, trade sanctions, data and privacy, and border formalities. Our clients in these areas include major Australian and international companies, foreign governments, and individuals based overseas.

Relevantly, we have acted for various overseas clients listed as designated entities and their overseas lawyers.

C Uncertainty about meaning of "controlled asset"

Part 3 of the Issues Paper acknowledges that the Act's definition of *"asset"* is fundamental to the scope of targeted financial sanctions. Our submission relates to the use of that term in regulations 14 and 15 of the Regulations. Those regulations prohibit unauthorised handling of assets and controlled assets.

The definition of *"asset"* under section 4 of the Act is a broad one. It is readily accepted that cash is an asset, and that remittance of cash by electronic means does not alter its character as an asset. Under regulation 3 of the Regulations, *"controlled asset"* is defined as *"an asset owned or controlled by a designated person or entity"*.

We take the view that a remittance of a payment by a designated entity for goods sold or services rendered by an Australian party, the receipt and handling of that payment by an intermediary in the form of a financial institution, and its receipt by the party that sold the goods or rendered the services does not at any stage of that remittance contravene regulations 14 or 15. The receipt of the payment by the financial institution its customer is compliant with law and does not attract any reporting or notification requirements under the Act or Regulations on the part of the customer.

We explain as follows:

1 Regulation 14 is contravened by a person if *"the person directly or indirectly makes an asset available to, or for the benefit of, a designated person or entity"* without a permit. Using our case as an example, that does not apply, because a law firm, in receiving payment for an invoice from a designated entity is not making an asset available to the designated entity, or for their benefit. To the contrary, upon remittance of the funds they cease to be available to the designated client, because the designated client has committed them to payment of the invoice. The law firm's terms of engagement may also touch upon this issue, by way of an acknowledgement by the client, if it be needed, that payment of the law firm's invoice is made at the moment of the client's electronic instruction to its bank or financial institution.

2 Regulation 15 is contravened by a person if, relevantly, *"the person holds a controlled asset; and the person uses or deals with the asset, or allows the asset to be used or dealt with, or facilitates the use of the asset or dealing with the asset"* without a permit. Again using our own case as an example, that does not apply because a law firm, in receiving payment from a designated entity, is not at any time holding a controlled asset. The payment for services rendered is not an asset of a designated entity. Rather, it is a cost that the designated entity has expensed by payment. Accordingly, in the situation described, a law firm at no time holds an asset that belongs to the designated entity. Once the funds constituting the payment have been remitted by the designated entity they are at no time thereafter owned or controlled by the designated entity.

For similar reasons, the financial institution's conduct in on-forwarding the payment to its customer, consistent with the terms of the financial service it provides to its customer, is compliant with the Act and the Regulations. Fundamentally, the designated entity loses control of the funds upon remittance. They are not controlled assets in the hands of the financial institution, and the financial institution does not use or deal nor does it allow a use or dealing with them in such circumstances.

We understand that the ASO has provided guidance to the banking sector that incoming transactions are to be treated as no longer under the ownership or control of the remitting entity for the purposes of regulation 15. That should mean that such remittances should be promptly on-forwarded to customers. In our experience that has not been the case. Our financial services provider has, at different times:

(a) recommended that we expressly indicate that we rely on Permit SAN-2022-00079 issued by the Assistant Minister on 7 November 2022 (**the general permit**), and notify the ASO of that reliance, in order to have the funds remitted to us;

(b) requested that we notify the ASO of certain details relating to the remitting party, the circumstances of the legal services provided and the invoice, in order to have the funds remitted to us;

(c) requested that we provide copies to the financial services provider of the notifications that the financial services provider requested us to provide to the ASO, in order to have the funds remitted to us; and

(d) requested that we notify our financial services provider of certain details about the payment, for the financial services provider to consider the matter further, in order to have the funds remitted to us.

Neither a general nor a specific permit, nor some kind of notification, is required. The remittance does not offend against either regulation 14 or regulation 15, and the payment of a legal invoice is not in the nature of a *"dealing"* that requires a permit, not being a *"basic expense dealing"*, or a *"legally required dealing"*, or a *"contractual dealing"*, as defined under regulation 20 of the Regulations.

Of equal concern is the sense on our part that firms such as ours are being requested by their financial services providers, when they ask for copies of notifications to the ASO or of detailed information about the payments to be given to themselves, to divulge confidential attorney-client information when they have no authorisation to do so. Failing compliance, payments are frozen by the financial services providers and not made available to the firms concerned.

It is problematic to expect law firms to divulge confidential attorney-client information to any party, whether the ASO or the firm's financial services provider, merely to extinguish a slight apprehension on the part of the financial services provider that the transaction could be non-compliant or even perceived as such.

Further, a law firm cannot and should not put its client into a position of peril by behaving in a way that implies that its client is in peril when it is not. Having advised a designated entity that its remittance of payment ***would not*** offend Australia's sanctions laws, it would be improper for the law firm to then appear to make a contrary admission, in its own interest, by notifying the ASO or the financial services provider that the firm was relying on the general permit which only applies where remittance of payment ***would*** offend Australia's sanctions laws.

We have explained the Australian legal position to our financial services provider on a number of occasions. It occurs to us, although this has not been expressly indicated by the bank concerned, that its compliance fears are fuelled by the seriousness of offending against the Act and Regulations – something that we take very seriously ourselves – and perhaps also by the extraterritorial effect of the sanctions laws of other jurisdictions.

D Proposed solution

We acknowledge that legal responsibility lies with financial institutions to assess whether they may on-forward remittances they have received from a designated entity for the payment of invoices issued by the customer of the financial institution. Our concern is that, on a proper reading of the Act and the Regulations, the caution that financial institutions are displaying in remitting foreign payments to their customers is not justified. There is no other interpretation available nor any demonstrable ambiguity in the definitions of *"asset"* and *"controlled asset"* under the Act or the Regulations.

The UK introduced a general permit for the provision of legal services to designated entities. Other countries may have done the same thing. In Australia, that is not necessary for payments for legal services, or indeed for payments for the sale of any every-day goods and services, provided that the underlying transactions are not prohibited in some other sense.

We understand that the ASO has already tried to be helpful in explaining the meaning and effect of the relevant Regulations, in a similar way as we have interpreted them in this submission, in a letter to the Australian Banking Association.

May we suggest that the ASO redouble its efforts to resolve the concerns of Australian financial institutions about the remittance of moneys from foreign sources for payment of invoices issued by Australian businesses. The ASO could publish a public explanation and clarification of the *"controlled assets"* sanctions law on its website. Before doing so, relevant inter-departmental consultation should be undertaken, for example with law enforcement agencies, to ensure that there is administrative unanimity and no inconsistency in the treatment of financial institutions that rely on that advice. Given that the controlled assets law does not extend to the kinds of payments to which our submission refers, we do not think that this course of action would meet with any concern or resistance.

Further, we would expect the Australian Government to advocate for Australian entities with foreign subsidiaries, or whose business activities are potentially captured by extraterritorial laws of a foreign jurisdiction, such that those entities are not subject to prosecution in those foreign jurisdictions in relation to their business activities in Australia when those activities are in compliance with Australian laws dealing with the same subject matter.

We look forward to the outcome of the ASO's review and welcome any enquiries regarding our experiences in the area of autonomous sanctions.

Yours sincerely

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Partner Director

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