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SUBMISSIONS TO THE REVIEW OF AUSTRALIA'S AUTONOMOUS SANCTIONS FRAMEWORK

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This submission is made to the Department of Foreign Affairs and Trade (the '**Department**') with respect to their Review of Australia's Autonomous Sanctions Framework (the '**Review**').

Nyman Gibson Miralis is a leading Australian criminal law firm with specialist expertise in international criminal law and white-collar corporate crime. We have advised and represented multinational corporations and affected individuals on Australia's autonomous sanctions framework, and regularly engage with various Australian authorities and departments in respect of the same.

We are grateful for the opportunity to share our specialist experience with respect to the following Terms of Reference ('**ToR**') drawing on practical insights into Australia's autonomous sanctions framework:

(a) ToR 1: Streamlining the legal framework;

(b) ToR 2: Pre-conditions for applying sanctions measures;

(c) ToR 3: The existing categories of sanctions measures;

(d) ToR 4: Permit powers;

(e) ToR 6: Sanctions enforcement and offences;

(f) ToR 7: Regulatory functions of the ASO;

(g) ToR 8: Review mechanism for designations and declarations; and

(h) ToR 9: Key concepts, terms and definitions.

[redacted]

Yours faithfully,

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INTRODUCTION

1. The following submission is set out to specifically address the first to fourth and sixth to ninth Terms of Reference ('**ToR**') contained in the Review of Australia's Autonomous Sanctions Framework (the '**Review**'), with due regard to the issues identified in the Issues Paper (the '**Issues Paper**') of the Review.

2. All references to defined terms are as defined in the Issues Paper.

ToR 1: STREAMLINING THE LEGAL FRAMEWORK

3. The autonomous sanctions framework comprises the *Autonomous Sanctions Act 2011* (Cth) (the '**Act**'), the *Autonomous Sanctions Regulations 2011* (Cth) (the '**Regulations**'), and 18 individual legislative instruments made in accordance with the Act and Regulations. As noted in the ToR, the "*framework is designed to enable swift implementation of sanctions by Government, with high-level machinery provisions contained in the Act, and specific sanctions measures provided for in the Regulations and other delegated legislation*". We submit that this swiftness is best achieved by way of administrative simplicity and transparency. On the Federal Hansard alone there are approximately 45 subordinate instruments, excluding the Act and Regulations. The location of regime-wide and country-specific provisions is also not discernible between each instrument. The current framework can be assisted by a reformed and organised approach.

4. As a way of improving the accessibility of the legislation and streamlining the current framework, we propose a two-tiered legislative structure comprising:

   a) one consolidated legislative act, consolidating all regime-wide provisions (i.e. those that are thematic or otherwise non-country specific); and

   b) an individual regulatory instrument for each country, containing provisions specific to the relevant country. Any country designation lists or similar instruments could be added as schedules to a country's regulation.

5. By way of example, having regard to Part 2 of the Regulations:

   a) regs 6A to 11 of the Regulations could be included in the legislative act; and

   b) regs 5A to 6 of the Regulations could be included in country-specific regulations.

6. Such a consolidated, two-tiered structure aligns with the objective purpose of the Act as stipulated under section 3(1)(c), which states that an objective of the Act is to "*facilitate the collection, flow and use of information relevant to the administration of autonomous sanctions (whether applied under this Act or another law of the Commonwealth)*".

7. This approach would further increase the ability of individuals, corporations, legal professionals and other entities to identify and use the information relevant to the administration of autonomous sanctions; and ease the burden of doing so.

8. Moreover, a streamlined framework would align with the principle of access to justice and the rule of law, in light of the framework's improved accessibility to all and would ultimately better facilitate compliance.

ToR 2: PRE-CONDITIONS FOR APPLYING SANCTIONS MEASURES; ToR 3: THE EXISTING CATEGORIES OF SANCTIONS MEASURES; AND ToR 9: KEY CONCEPTS, TERMS AND DEFINITIONS

9. The Issues Paper correctly identifies the difficulties in understanding the scope of Targeted Financial Sanctions.[1] We submit the difficulties in understanding the scope are compounded by the insufficient, legislative clarity of the Target Financial Sanctions' key terms: "*indirectly*" and "*dealing*".

10. The Targeted Financial Sanctions are specifically codified under regulations 14 and 15 of the Regulations which prohibit dealing with designated persons, entities and controlled assets.[2]

11. The Targeted Financial Sanctions measures are drafted in a broad and abstract manner. The issue of interpretation that ensues is further exacerbated by the lack of extrinsic guiding material to assist individuals and entities understand the measures, the key terms and their practical application and breadth in assessing compliance. The

[1] Department of Foreign Affairs and Trade, *Review of Australia's Autonomous Sanctions* Framework (Issues Paper, 2023) ('Issues Paper'), parass 44-45.
[2] Issues Paper, para. 44.

measures' vagueness and inaccessibility create a regulatory burden as individuals and entities are unable to self-regulate and are instead wholly or excessively reliant on the Australian Sanctions Office ('**ASO**') indicative assessment to identify their compliance with the Regulations.

12. The first key term, "*indirectly*" is found under r.14(1) of the Regulations, which provides that:

> *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 breadth of this term is of concern. The only available guidance to the current scope of what is captured by "*indirectly*" making an asset available is through the academic exercise of statutory interpretation.

14. In our experience, the policy intention for "*indirectly*" to capture the conduct of persons who provide assets to designated persons or entities through the intervening agency of a third-party is not obvious on a plain reading of the Regulations.[3]

15. Due to the ambiguous parameters of the term, individuals and entities are interpreting the term to capture the broad scope of any indirect and unintended results that may arise from their conduct. For example, individuals are seeking advice to confirm the legality of publishing academic research on open-source websites hosted in non-sanctioned States due to potential non-compliance with sanctions law should a person associated with a designated person or entity download the material.

16. This confusion is intensified as individuals and entities are not provided with the appropriate tools and resources to understand the policy's intentions. There is no legislative guidance or regulatory guidance setting defined and clear parameters on the term "*indirectly*" as used in the Regulations.

17. The second key term is "*dealing*", as, for example, found under r.15(1) of the Regulations, which provides that:

[3] Issues Paper, para. 45.

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 undefined breadth of this term is similarly of concern. Though the Targeted Financial Sanctions operation is heavily reliant on the term "*dealing*", the term itself is not defined in the Regulations nor the Act.

19. The only guidance to the current scope of what constitutes "*dealing*" is by the academic exercise of statutory interpretation, namely by interpreting r.14(1)(a) as defining dealing as when a person "…*makes an asset available to, or for the benefit of*". Even then, it is unclear when an asset is made "*available*" to a designated person or entity.

20. The current drafting of the Targeted Financial Sanctions has two significant consequences – firstly, the excessive burden on the individual or entity in determining compliance and secondly, the excessive burden on the regulator due to high volumes of indicative assessments seeking clarifications that the legislation and guiding materials could otherwise provide.

21. We further submit that the ASO would be aided by the publication of public rulings similar to the practice of the Australian Taxation Office that is considered binding advice. The publication of public rulings regarding Targeted Financial Sanctions would assist individuals and entities to understand the nuances of the measures and their key terms and may include further practical examples for illustration. Further, it would assist in clarifying the policy intentions and specific regulatory goals of the Regulations.

22. It is submitted that clear guidance on the breadth of the ambiguous terms would greatly benefit the assessment of compliance for the public.

ToR 4: PERMIT POWERS

23. We submit that the provision of legal services to a designated person or entity and the receipt of funds for such service should have an express legislative carve-out, which distinguishes it from an "*essential service*".

24. The provision of legal services to a designated person or entity including with respect to their right to challenge such designation must be recognised as a guaranteed service on the basis that accessibility of timely legal advice is a cornerstone of any properly functioning democratic society.

25. Alternatively, we submit that the Minister for Foreign Affairs (the '**Minister**') should issue a standing general permit for the provision of legal services and the receipt of funds for those services from designated persons or entities.

26. The timely accessibility of legal advice to a designated person or entity should not be hindered or preconditioned on the obtainment of a permit that can take up to 3 months of consideration by the regulator. The current framework significantly delays a designated person or entity's fundamental common law right to access justice and ability to challenge administrative decisions.

27. The right to judicial review mandates the availability to fair legal representation for the purposes of procedural fairness. Such a right to legal representation is in line with Australia's treaty obligations under Article 14 of the *International Covenant on Civil and Political Rights*. As Lord Hoffman noted in *R v Secretary of State for the Home Department, ex parte Simms* [2002] 2 AC 115 at 131:

> "*... Fundamental rights cannot be overridden by general or ambiguous words ... In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual*."

28. The right to judicially review a designation is a safeguard that ensures a minimum requirement that the Minister act in accordance with the legislation.

ToR 6: SANCTIONS ENFORCEMENT AND OFFENCES

29. The current arsenal of enforcement tools available to the Department of Foreign Affairs and Trade ('the **Department**') is a binary choice between education and prosecution. At this stage, where the Department views that the educational approach is insufficient for its enforcement purposes, its only option is prosecution, which - as acknowledged in the Issues Paper – is "*a lengthy and resource-intensive process*". This extreme measure should not be the Department's only alternative where an educational approach is deemed insufficient for enforcement purposes.

30. Our view is that introducing other enforcement options for the purposes of strengthening the educational/cooperative approach (such as formal private/public warnings and enforceable undertakings) and providing intermediate options prior to prosecution (such as the aforementioned, as well as civil pecuniary penalties) is necessary to ensure the enforcement strategy of the Autonomous Sanctions Framework is not only rigorous but fair.

31. However, we caution against considering only introducing civil pecuniary penalties that may be imposed through a court, as is suggested in the Issues Paper for two main reasons.

32. The first reason is that the enforcement and compliance objectives of the Autonomous Sanctions Framework would be better served with a broader spectrum than limiting it to four (educational approach, injunction, civil pecuniary penalty and prosecution routes). There are additional or alternative enforcement tools, such as public warnings and enforceable undertakings, that can be made available to the ASO that can achieve compliance and enforcement objectives. In our experience, most entities are seeking to comply with (rather than circumvent or breach) the Autonomous Sanctions Framework; however, are having or have had issues navigating the regime. Strengthening the Departments' spectrum of responses to breaches would allow the Department to better respond to the severity of a breach, better deploy their resources, and better pursue an educational/cooperative approach.

33. Second, limiting the availability of civil pecuniary penalties to court proceedings would do little (if anything) to alleviate the time, monetary and resource costs associated with prosecutorial court proceedings. Civil proceedings would still require parties to attend court each time the Department sought this enforcement route – irrespective of the size

of the pecuniary penalty imposed. As such, it may be more practical to provide the Department with powers to issue infringement notices to a certain value, as an alternative to court-based action, in lieu of or in addition to, the civil pecuniary penalty proceedings option. These infringement notices should be appealable to the Court, should the recipient so choose.

34. Any additional powers (enforceable undertakings, infringement notices, civil pecuniary penalties, etc) must be accompanied by proper legislative and policy safeguards, such as proper decision-making processes, maximum penalty values, reviewable decisions, and approval mechanisms.

35. In drafting any legislative instruments and department policies, regard should be had to guidance and lessons learned that can be drawn from other regulatory schemes and their relevant policies, such as the *Australian Securities and Investments Commission Act 2001* (Cth) and *Information Sheet 151*.

36. Providing additional options with the appropriate safeguards would provide a more efficient, fair and robust regulatory regime.

ToR 7: REGULATORY FUNCTIONS OF THE ASO

37. As noted in the Issues Paper, the ASO provides indicative assessments and processes permit application "*to mitigate the risk of the public breaching sanctions law*". In our experience, the reputational, legal and market consequences for individuals and entities who do not correctly navigate this Framework can be significant. As such, the indicative assessments and permit application processes are critical.

38. This foundational dependency on these processes is compounded by the current volume of legislative instruments and lack of sufficient guidance in applying this Framework. Such factors create even further risk of misunderstanding, misapplication and breach.

39. Despite this market need, the ASO Website advises that the process can take up to 3 months and on average six to eight weeks for a decision. These delays are significant, especially when considering that the sanctions are typically impacting either dealing with their own personal/family assets or the operations of ongoing business. These delays can equally result in significant personal and/or commercial consequences.

40. Streamlining current legislation and creating further guidance would not only assist legal professionals and market players in better understanding the application of the

Autonomous Sanctions Regime; but also better position the ASO to more efficiently respond to indicative sanctions assessments and permit requests.

41. Further consideration should also be given to an online public register/database, in lieu of the excel Consolidated List, with search engine capabilities to allow for sanctioned persons to be easily searched, akin to the Consolidated Canadian Autonomous Sanctions List maintained by the Government of Canada).[4] Such a register would increase accessibility and should reduce maintenance costs on the part of the Department.

ToR 8: REVIEW MECHANISM FOR DESIGNATIONS AND DECLARATIONS

42. We disagree with the proposal of replacing the existing relisting mechanism with an indefinite listing and travel ban or with a five-year invitation to make submissions for removing the listing (as set out in paragraph 70 of the Issues Paper). This proposal places an undue burden on designated individuals and entities.

Indefinite listing/travel ban

43. The Autonomous Sanctions Framework and its structure were intended to "*allow the necessary flexibility for the Government to respond to international developments in a timely way*".[5] That is to say, the Framework was intended to grant the Government a scheme that permitted "*flexibility and responsiveness*" to international situations.[6] The Framework was not intended to allow for one-stop decision-making on the part of the Australian Government.

44. A foundational premise of the Autonomous Sanctions Framework is that it is targeted. According to the Replacement Explanatory Memorandum for the Act, autonomous sanctions are "*punitive measures*" and importantly described as "*highly targeted measures applied only to the specific governments, individuals or entities...or to the specific goods and services, that are responsible for, or have a nexus to, the situation of international concern*".[7] The targeted nature of the sanctions is emphasised throughout material discussing the Autonomous Sanctions Framework. In the Second

[4] Government of Canada, 'Consolidated Canadian Autonomous Sanctions List', 15 February 2023 (accessed 23 February 2023) <https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/consolidated-consolide.aspx?lang=eng>
[5] Replacement Explanatory Memorandum, Autonomous Sanctions Bill 2010, page 3.
[6] Replacement Explanatory Memorandum, Autonomous Sanctions Bill 2010, page 5.
[7] Replacement Explanatory Memorandum, Autonomous Sanctions Bill 2010, page 2.

Reading Speech, then-Minister Kevin Rudd stated "*[t]hese are specifically targeted measures that are intended to apply pressure on regimes engaging in behaviour of serious international concern.*" In the very introduction of the Issues Paper, sanctions are described as "*restrictive measures...that are imposed in response to situations of international concern*" and intended to influence those responsible for the situations, signal Australia's objection and "*target specific...entities to limit the adverse consequences of the situation*".[8] The Government should therefore ensure that any measures imposed remain "*targeted*" by way of the Minister's own assessment of designations for renewal purposes.

45. A failure to ensure considered action and prevent any dilution of the targeted nature of such sanctions could reduce the perceived seriousness of Australia taking such action and negatively impact Australia's international relations as unchecked sanctions continue to be imposed despite the inevitable changes.

46. The justification for this legislative replacement, that being that the current process is "*resource intensive*", is insufficient for this drastic shift. There are a variety of other administrative options that should be considered and resolved internally prior to placing an indefinite burden on the person or entity subject to designation or the travel ban.

Five-yearly invitation

47. We further disagree with the proposition that the Minister would invite submissions every five years from sanctioned persons regarding their listing. The environment as to sanctions and situations that they are addressing are continuously changing. Therefore, crystalising a response to such a situation for three years, let alone five, is at odds with the practicalities of this area of international relations.

48. Further, the Minister is currently in the best position to determine when the international circumstances have changed to justify the lifting of a sanction. The Department has undertaken in-depth research to identify a situation of concern. The Minister makes critical decisions under the Framework. Attempts to delegate the responsibility of review to the subject is a gross reversal of responsibility that should properly sit with the Minister.

[8] Issues Paper, para. 1.

CONCLUDING REMARKS

49. We thank the Department for the opportunity to make submissions on the Review of Autonomous Sanctions Framework in Australia.

Yours faithfully,

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