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Review of Australia's Autonomous Sanctions Framework
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Submission of the Synod of Victoria and Tasmania, Uniting Church in Australia to the 'Issues Paper. Review of Australia's Autonomous Sanctions Framework'

The Synod of Victoria and Tasmania, Uniting Church in Australia, welcomes the opportunity to provide a submission to the 'Issues Paper. Review of Australia's Autonomous Sanctions Framework'. From its formation, the Uniting Church in Australia committed itself to supporting fundamental human rights in response to the Christian gospel. The concern for promoting and respecting human rights has extended across borders, often in collaboration with local churches in other jurisdictions.

In recent years we have lobbied and campaigned regarding human rights abuses in Myanmar, Vietnam, Cambodia, the Philippines, the People's Republic of China, South Sudan, Sudan, Pakistan, Iran, Indonesia, Ethiopia, Burundi, Thailand, Sudan, Algeria, Israel and Colombia. In the cases of Myanmar, Cambodia, the Philippines and South Sudan, this has involved investigations if some of those connected with human rights abuses or corruption have shifted assets into Australia. The Synod has also submitted to Parliamentary Committees and the Commonwealth Government on having effective anti-money laundering and unexplained wealth laws to deal with funds stolen from foreign governments being shifted in Australia.

1A. How could the Autonomous Sanctions Framework be made more clear and easy to navigate?

The Synod supports the first proposal in the issues paper to simplify the Autonomous Sanctions Framework by establishing a two-tiered legislative structure:

- Moving various provisions currently contained in the Regulations, including the offence provisions, to the Act; and,
- Grouping together all the relevant provisions unique to a particular jurisdiction or thematic sanction into one instrument.

The Synod believes the most significant challenge for the Autonomous Sanctions Framework is making more relevant people and businesses aware that it exists. The experience of the Synod is that people who are more likely to do business with a sanctioned individual or entity, such as real estate professionals, corporate services providers, accountants and companies that deal with high-value goods, would rarely check if the person or business they are dealing with is on the sanctions list.

2A. 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?

The current Autonomous Sanctions Framework has the key failing that too few relevant businesses and individuals would check the sanctions list to ensure they are not about to do business or provide an asset to a person or entity on the DFAT Consolidated List. The example on page 17 of the company providing computer repair services to a designated entity strikes us as wishful thinking. It is improbable that a computer repair service would be checking the DFAT Consolidated List before taking on a client. Thus, the critical reforms needed are measures that will increase the number of professionals and businesses checking the DFAT Consolidated List. There is also the need for measures to make it easier for firms and professionals to determine that an entity they are about to do business with is not a front for a sanctioned individual or entity.

To that end, two measures that should be introduced are:

- The introduction of legislation to provide for a public beneficial ownership register of companies and trusts; and,
- Amendments to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* so that lawyers, accountants, real estate professionals, dealers in high-value assets and corporate service providers (designated non-financial businesses and professions under the Financial Action Task Force Recommendations) are required to undertake due diligence on their transactions to ensure they are not dealing with an entity on the DFAT Consolidated List. They should also be required to report any cases where they suspect the entity is on the DFAT Consolidated List to AUSTRAC.

A beneficial ownership register would need to be backed up by an offence of a person acting as a front person for another and not disclosing it. This would help deter people who knowingly or recklessly act as nominees or front people for entities on the DFAT Consolidated List.

Using a front company seems like an obvious way to circumvent the DFAT Consolidated List for those seeking to transfer assets to Australia or purchase assets in Australia. The World Bank and UN Office on Drugs and Crime (UNODC) have previously conducted research showing how shell companies with concealed ownership are used to facilitate a range of criminal activities. They published a report reviewing some 150 cases of corruption where the money obtained had been laundered. In the majority of cases:[1]

- A corporate vehicle (usually a shell company) was misused to hide the money trail;
- The corporate vehicle in question was a company or corporation;
- The proceeds and instruments of corruption consisted of funds in a bank account; and
- In cases where the ownership information was available, the corporate vehicle in question was established or managed by a professional intermediary to conceal the actual ownership.

In two-thirds of the cases, some form of surrogate, in ownership or management, was used to increase the opacity of the arrangement.[2] In half the cases where a company was used to hide the proceeds of corruption, the company was a shell company.[3] One in seven of the companies misused were operational companies, that is, 'front companies'.[4]

[1] Emile van der Does de Willebois, Emily M Halter, Robert A Harrison, Ji Won Park and J. C. Sharman, 'The Puppet Masters', The World Bank, 2011, 2.
[2] Ibid. 58.
[3] Ibid. 34.
[4] Ibid. 39.

Australia currently lags behind much of the world regarding beneficial ownership disclosure. To increase transparency, ensure appropriate tax compliance, eliminate opportunities for criminal activity, violations of sanctions and money laundering, a public register of beneficial ownership is urgently needed in Australia. Previously Australia has made commitments to beneficial ownership disclosure at the G7, G20 and under the Open Government Plan National Action Plans.[5][6]

In 2018, 34 jurisdictions had laws establishing beneficial ownership registries. That increased to 80 by 2020 and 97 by 2022.[7]

Research by Findley, Nielson and Sharman also found that Australian corporate service providers were near the top of corporate service providers in terms of being willing to set up an untraceable shell company even when there was a significant risk that the company in question would be used for illicit purposes.[8]

A beneficial ownership register is not a panacea but is one necessary component out of several that contribute to the transparency of legal entities. Verified beneficial ownership does not remove the need for verified legal ownership. In our experience, the existing ASIC register contains a significant amount of false information, as the information has not been verified. With the modernising of the business registers project, the regulating authority must have the resources to confirm information about the legal ownership of entities on the business registries to help enforce the Autonomous Sanctions Framework, among other law enforcement objectives.

It is vital to have a central, searchable register of beneficial owners to make the information useable. Regulated entities under the *Anti-Money Laundering/ Counter Financing Terrorism Act 2006* need to be able to search to find what other entities a beneficial owner they are dealing with may hold as part of enhanced due diligence when it is required. Allowing civil society organisations, journalists and researchers to access searchable beneficial ownership registers ensures that authorities and criminals are accountable. It also provides for the following:[9]

- Areas for improvement to be identified;
- Mistakes to be detected;
- Tips to be provided to law enforcement agencies for investigations to be started; and,
- The enforcement of sanctions.

There are 39 jurisdictions that offer public access to beneficial ownership information (irrespective of loopholes in the legal framework, implementation status or access challenges):[10]

- Albania
- Austria
- Belgium
- Bulgaria
- Cyprus
- Czechia
- Germany
- Ghana
- Gibraltar
- Greece
- Croatia
- Hungary
- Indonesia
- Ireland
- Iceland
- Italy

[5] Transparency International, 'Up to the Task? The state of play in countries committed to freezing and seizing Russian dirty money'. 2022.
[6] Prime Minister & Cabinet, 'Australia's First Open Government National Action Plan 2016 – 2018', 2016
[7] Andres Knobel and Florencia Lorenzo, 'Beneficial Ownership Registration around the World', Tax Justice Network, 2022, 8.
[8] Michael Findley, Daniel Nielson and Jason Sharman, 'Global Shell Games: Testing Money Launderers' and Terrorist Financiers' Access to Shell Companies', Centre for Governance and Public Policy, Griffith University, 2012, 21.
[9] Andres Knobel and Florencia Lorenzo, 'Beneficial Ownership Registration around the World', Tax Justice Network, 2022, 15.
[10] Ibid., 16.

- Lithuania
- Malta
- Poland
- Sweden
- Demark
- Finland
- Luxembourg
- Nigeria
- Portugal
- Slovenia
- Ecuador
- France
- Latvia
- Netherlands
- Romania
- Slovakia
- Estonia
- UK
- North Macedonia
- Norway
- Serbia
- Ukraine
- Spain

However, we note with concern that following the Court of Justice of the European Union ruling on 22 November 2022, Austria, Belgium, Cyprus, Germany, Ireland, Luxembourg, Malta and the Netherlands have suspended access to their beneficial ownership registers.[11] Nevertheless, the EU Court of Justice has confirmed that the media and civil society organisations related to the fight against money laundering have a legitimate interest in accessing beneficial ownership information. For this reason, some countries that closed their registries, such as Belgium and Luxembourg, are already considering ways to restore access to the media and civil society organisations. Other EU countries, such as Latvia or Estonia, believe that public access to beneficial ownership will be maintained because it serves more purposes beyond curbing money laundering.

Research has shown that professional intermediaries have assisted people in concealing their identities by creating legal structures that hide actual beneficial ownership.[12] Using a professional intermediary to facilitate the concealment of beneficial ownership for criminal purposes offers legitimacy to company formation.[13] *The Age* reported in October 2020 of an Australian lawyer advising clients to use Seychelles' private foundations to conceal companies' actual ownership and activities from law enforcement agencies. He was quoted as suggesting, "In the event of a lawsuit or tax investigation or regulatory inquiry, your client can swear under oath, 'I am not the legal or beneficial owner of this company', which could be the difference between being charged with/ jailed for tax evasion and walking away a free man."[14]

A recent 'mystery shopping' exercise for the Stolen Asset Recovery Initiative of the World Bank and the UN Office on Drugs and Crime found nominee services often explicitly marketed to clients shopping for shell companies as a device to keep the identity of the beneficial owner off the public record. For example, in 14 per cent of active responses to e-mail solicitations asking to set up shell companies, company service providers suggested, unprompted, using a nominee-type arrangement.[15]

Mossack Fonseca allowed for shell companies to be set up with sham directors who signed three initial documents sent to the actual beneficial owners. The first was a waiver declaring they wouldn't pursue claims against the true beneficial owners of their companies. The second was a power of attorney that ensured the sham director handed over control of the company to the beneficial owner. The third was the sham director's termination of employment letter, signed without a date. That way, the beneficial owners could fire their sham directors retroactively at any time. In addition to these three documents, sham

[11] Access Info Europe, 'Missing Data Opens the Door to Corruption', Media Release, 9 December 2022.
[12] Paul Michael Gilmour, 'Lifting the veil on beneficial ownership', *Journal of Money Laundering Control* **23(4)**, (2020), 723.
[13] Ibid., 723.
[14] Nick McKenzie, Charlotte Grieve and Joel Tozer, 'Lawyer who built a booming practise on finding loopholes', *The Age,* 20 October 2020.
[15] Daniel Nielson and Jason Sharman, 'Signatures for Sale. How Nominee Services for Shell Companies Are Abused to Conceal Beneficial Owners', Stolen Asset Recovery Initiative, The World Bank, UN Office on Drugs and Crime, 2022, 2.

directors signed papers such as forms required to open a bank account or the minutes of annual general meetings.[16]

A corporate service provider based in the UK provided a nominee for a UK shell company complete with a pre-signed but undated letter of resignation and a power of attorney agreement. Thus, if necessary, the beneficial owner could fire the nominee retroactively. Each party also agreed to indemnify the other. The beneficial owner committed not to pursue legal action against the nominee for damages caused to the company or its assets. The nominee committed to giving a reciprocal undertaking. Beyond the above arrangements, the nominee had no relationship with the beneficial owner. The UK corporate service provider explained the role of the nominee was only to prevent the beneficial owner from having to reveal their control of the company.[17]

A Canadian nominee sold her services at $100 for each directorship of 200 companies, some of which were involved in criminal activities netting $100 million in proceeds of crime.[18] In court, she stated that she never questioned the legality of documents she signed for the companies she was the nominee director for because they came to her from lawyers.[19]

Geoffrey Taylor, the founder of New Zealand GT Group, a corporate service provider, has stated that he can "act as Director or Shareholder for clients without arousing suspicion that he is a nominee only. In this way, he can act as your front man and attract attention away from you."[20]

5A. Would civil penalties be a suitable enforcement tool in the sanctions context?

The Synod would support the introduction of civil penalties as part of the regulatory enforcement regime for the Autonomous Sanctions Framework. Allowing a regulator a more comprehensive range of tools to seek compliance results in greater compliance. It will enable the regulator to better tailor their response to maximise the likelihood of future compliance.

It has been argued that the initial deployment of 'softer' forms of social control later legitimises the regulator's use of more punitive sanctions. Such an approach is claimed to have positive compliance effects in that regulation perceived as more procedurally fair tends to strengthen commitments to comply.[21]

Overly severe penalties can risk the offender being alienated from the system and the law enforcement authority, which in turn can have a negative long-term effect on their compliance behaviour.[22] All penalties risk stigmatising those being penalised and pushing them further away from voluntarily complying, particularly if the people involved in being penalised feel they have been treated unfairly.[23] Penalties that are too soft do not work as effective general deterrence.[24]

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[16] Ibid., 8.
[17] Ibid., 8.
[18] Ibid., 8.
[19] Ibid., 9.
[20] Ibid., 9.
[21] Hardy, Tess. (2021). 'Digging into Deterrence: An Examination of Deterrence-Based Theories and Evidence in Employment Standards Enforcement', *Industrial Law Journal*, 139.
[22] Chris Leech, 'Detect and deter or catch and release: Are financial penalties an effective way to penalise deliberate tax evaders?', Tax and Transfer Policy Institute, Australian National University, Working Paper 6/2018, April 2018, 40-41.
[23] Ibid., 43.
[24] Ibid., 41.

Evidence shows that deterrence is more significant when the sanction imposed happens immediately after the detection of the offence. Delayed sanction is far less effective as a deterrent. Where it is impossible to impose a sanction immediately, a penalty regime can increase its deterrent effect by signalling to an offender that their violation has been detected and the sanction might be delayed but will be inevitable.[25] The immediacy of infringement notices has been found to have a more significant deterrent effect than might be expected based on the size of the fine in question.[26]

We believe that the civil penalties should be targeted at the individuals that made the decision to violate the Autonomous Sanctions Framework rather than the legal entity they are employed by or controlling. There is a need to hold the individuals behind illegal activity to account for their decisions and not allow them to hide behind corporate entities. It has been recognised that where a company is fined, rather than the individuals involved, the penalty fails to act as a general deterrent to illegal behaviour. Associate Professor Soltes gave an example: [27]

> *For instance, the day after settling criminal charges with federal prosecutors for helping wealthy individuals evade taxes, executives at Credit Suisse held a conference call to reassure analysts that the criminal conviction would have "no impact on our bank licenses nor any material impact on our operational or business capabilities." And, ironically, fines levied on offending firms are ultimately paid by shareholders rather than by executives or employees who actually engaged in the misconduct. Without the spectre of the full justice system hanging over them, as is the case with individual defendants, labelling firms as criminal often has surprisingly weak, or even misdirected, effects.*

Generally, the more severe the sanction, the less frequently it can be administered. The less frequent application reduces the amount of egregious behaviour targeted by compliance action.[28]

Civil penalties appear to have many advantages over other types of penalties (such as criminal ones) because they are quick, easy to administer and can be scaled proportionately to the level of culpability. However, research has shown that a critical problem with financial penalties is a gap between those issued and those paid.[29] A review by the Australian Law Reform Commission in 2002 found that payment of financial penalties to some regulators at the state level was as low as 30%.[30] The Victorian Sentencing Advisory Council found that in 2014 payment of infringement notices was at 66%, and only slightly more than 50% of fines levied by a magistrate were paid.[31] The Council observed that the reason for non-payment of fines ranged from "the most compelling of mitigating circumstances to wilful disregard of the law."[32] In 2017, the director of South Australia's Fines Enforcement Recovery Unit gave evidence to a parliamentary committee that up to 40% of fines will never be recovered in some states, while in South Australia, it was 20 to 25%.[33] The US customs authority only collected 31% of outstanding financial penalties from 1997 to 2000.[34]

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[25] Hardy, Tess. (2021). 'Digging into Deterrence: An Examination of Deterrence-Based Theories and Evidence in Employment Standards Enforcement', *Industrial Law Journal*, 145.
[26] Ibid., 146.
[27] Soltes, Eugene. (2016). 'Why they do it', Public Affairs, USA, 325.
[28] Chris Leech, 'Detect and deter or catch and release: Are financial penalties an effective way to penalise deliberate tax evaders?', Tax and Transfer Policy Institute, Australian National University, Working Paper 6/2018, April 2018, 42.
[29] Ibid., 6-7.
[30] Ibid., 24.
[31] Ibid., 24.
[32] Ibid., 25.
[33] Ibid., 25.
[34] Ibid., 26.

The Inspector General of Taxation reported that the ATO has found that the probability of recovering debts, both unpaid taxes and fines, is approximately 2% after they have aged more than a year.[35]

6A. What risks or benefits do you see in replacing the current 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 a submission that the Minister would be required to consider?

The Synod supports replacing the current relisting mechanism with the process suggested in the Issues Paper. The current approach seems to waste time for Department staff to relist a person or entity. The benefit of the proposed new process would be that it would address the waste of time.

A risk with the new proposed process would be that it might attract submissions that could also tie up time. However, we hope that meritless claims for removal from the DFAT Consolidated List will be dismissed with little use of administrative resources.

The other risk with the proposed new process would be that people and entities would remain on the DFAT Consolidated List longer than needed. However, the existing safeguards under the Autonomous Sanctions Framework would appear to address that problem.

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

The Synod supports aligning the existing injunction power with those set out in Part 7 of the *Regulatory Powers (Standard Provisions) Act 2014*. Such a change would improve the efficiency in using the injunction power and avoid the need for the time of the Attorney-General to be used on straightforward decisions.

Term of Reference 7 – the appropriateness of existing regulatory powers – to examine if additional compliance tools are required and Term of Reference 10 – any other matters that are relevant to the efficiency and effectiveness of the Autonomous Sanctions Framework

In addition to the measures considered by the questions in the Issues Paper, there is a need for adequate law enforcement resources to be provided to investigate breaches of the Autonomous Sanctions Framework. There is also a need to have law enforcement resources available to take the necessary action when a breach is detected.

Currently, the federal Criminal Assets Confiscation Taskforce (CACT) locates concealed criminal wealth using conviction or civil means to confiscate proceeds of crime. As their multi-disciplinary teams specialise in finding hidden criminal wealth, they appear best placed to deal with finding assets associated with breaches of the Autonomous Sanctions Framework. Examples of assets restrained by CACT include:

- Cash;
- Bank balances;
- Real property;
- Shares and derivatives;
- Motor vehicles and vessels; and
- Bullion and precious stones.

[35] Ibid., 27.

If Australia becomes more active in trying to stop breaches of the Autonomous Sanctions List, those on the DFAT Consolidated List will likely increase their use of associates to shift the assets into Australia. Thus, the measures implemented will be more effective if the Australian Government assists in the development of up-to-date lists of the associates of those on the DFAT Consolidated List so that Australian businesses can alert the Australian Sanctions Office of any transactions involving such associates that may need further investigation. That assumes the Australian company has a requirement to report such suspicious transactions.

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