

Your Ref:

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Sanctions and Transnational Crime Section
Department of Foreign Affairs and Trade
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Dear Section

AUTONOMOUS SANCTIONS REGULATIONS 2011

Thank you for providing the Queensland Law Society (“the Society”) with the opportunity to provide comments on the exposure draft of the *Autonomous Sanctions Regulations 2011* (“the Regulations”).

This response has been compiled with the assistance of our International Law and Relations Committee who have thorough knowledge about the issues affecting this area of law.

At the outset, we reaffirm the Society’s position with respect to the new system of autonomous sanctions introduced by the *Autonomous Sanctions Act 2011* (“the Act”). The Society supports the policy underlying the Act of ending repression of democratic freedoms. We provided submissions in respect of the introduction of the Act by letters dated 1 July 2010 and 5 July 2010 respectively to the Senate Foreign Affairs, Defence and Trade Committee, which raised a number of concerns. We **enclose** both of those submissions for your information.

For convenience, we summarise those concerns as follows:

- The Act is modelled on the *Charter of the United Nations Act 1945* (“the UN Act”), which obliges Australia to implement UN Security Council sanctions. In the Society’s view, it is an inappropriate model for an Act in respect of autonomous sanctions – it gives extensive powers to the Executive, which are not simply by way of implementation of Australia’s international obligations as they are under the UN Act;
- There is an issue of separation of powers: matters as serious as creating offence provisions, in balancing democratic freedoms with individual freedoms, should properly be a matter for the Legislature, rather than the Executive; and

- Australia has already seen, in respect of existing autonomous sanctions, what can be regarded as injustices in their scope, further highlighting the need for such powers to be a matter for the Legislature, rather than the Executive: see [Aye v Minister for Immigration and Citizenship](#).

Turning to the Regulations, the Society provides the following comments for your consideration.

1. Sanctioned supply

The Society is concerned with the breadth of what constitutes a 'sanctioned supply' by clause 4 of the Regulations. It defines a 'sanctioned supply' as being, in effect;

- a supply, sale or transfer of 'arms or related materiel' by a person to another person;
- where, as a 'direct or indirect result' of that supply, sale or transfer, the goods are transferred (potentially for the second time), not only 'to', but also 'for use in' or 'for the benefit of' one of Burma, Fiji, Iran, Syria or Zimbabwe.

Additionally in respect of Iran, it applies to both 'arms and related material' and 'Goods mentioned in the Australia Group Common Control Lists, as existing from time to time'.

It is firstly the concept of 'supply, sale or transfer' which raises concern. It is not limited to direct transactions. It potentially extends to intermediaries who are not parties to a transaction: a person may indirectly 'supply, sell or transfer' goods. It is thus a surprisingly broad concept. As alluded to above, the reference in clause 4(1)(c) to '...the goods are transferred' also raises the possibility of a second transfer as a result (direct or indirect) which will potentially capture the initial 'sale, supply or transfer' as 'sanctioned supply'. It is not clear, however, that its operation is intended to be this broad. Given the issues raised below, the Society's view is that it should not extend this far.

Next it is the concept of 'indirect result' which raises concern. In this case, it is broad in its express terms of 'indirect result'. It potentially means that Person A, in supplying, selling or transferring certain goods to Person B, may unwittingly make a 'sanctioned supply', because Person B transfers those goods to Person C where Person C either:

- (a) uses the goods in (for example) Iran; or
- (b) more extraordinarily, deals with the goods in some other way which is said to be 'for the benefit of' (for example) Iran.

The seriousness of making such a 'sanctioned supply' is then revealed in clause 12. By clause 12(1), a person who makes a 'sanctioned supply' that is not an 'authorised supply' by permit granted under clause 18, contravenes the regulation. The extraordinary breadth of what constitutes a 'sanctioned supply' is then further expanded by subclause (2), which provides for extraterritorial operation of the regulation by operation of section 15.1 of the Criminal Code.

As a result, a person need not make the 'supply, sale or transfer' from or within Australia, but must merely be an Australian citizen or an Australian body corporate in order for it to potentially be a 'sanctioned supply'. As such, an Australian citizen may be engaging in lawful conduct in the jurisdiction in which he is present (outside of Australia), by making a supply, sale or transfer (perhaps not even directly) of 'export sanctioned goods in relation to a country', which, as an indirect result, are transferred to, for use in, or for the benefit of one of the five mentioned countries. In the Society's view, that is an extraordinary result.

The note to clause 12 reveals an apparent intention for that clause to be specified as a 'sanction law' (presumably pursuant to section 6 of the Act), although the relevant legislative instrument has not yet been made. This will bring into the play the operation of section 16 of the Act.

In the case of an individual, section 16(1) of the Act creates an offence. It will apply if the person:

- (a) intentionally engages in conduct (Criminal Code s 5.6(1));
- (b) is reckless as to whether that conduct contravenes a sanction law (Criminal Code s 5.6(2)); and
- (c) which recklessness may be satisfied by proof of the individual's intention, knowledge or recklessness (Criminal Code s 5.4(4)).

The question, then, begins as one of identifying the relevant 'conduct' under section 16(1)(a) of the Act. In doing so, a difficulty is revealed in identifying where the relevant 'intention' must lie. Is it (rhetorically):

- (a) the intentional making of a sanctioned supply (by meaning to make that supply) that is intentionally not an authorised supply (by meaning to make a sanctioned supply that is not an authorised supply);
- (b) the intentional making of a sanctioned supply (by meaning to make that supply) that is (unintentionally) not an authorised supply;
- (c) the (unintentional) making of a sanctioned supply that is intentionally not an authorised supply (by meaning that it not be an authorised supply);
- (d) the intentional supply, sale or transfer of goods to another person that are export sanctioned goods (by meaning to make that supply, sale or transfer) in relation to a country of which the (unintentional) direct or indirect result is that the goods are transferred to, for use in, or for the benefit of that country;
- (e) the intention that the direct or indirect result of that supply, sale or transfer will be that the goods are transferred to, for use in, or for the benefit of that country (by meaning that the sale, supply or transfer will have that direct or indirect result);
- (f) all of the above; or
- (g) a combination of the above?

The next question is that under section 16(1)(b) of the Act: whether the conduct contravenes a sanction law (in this case, clause 12 of the Regulations). A further difficulty is here revealed in identifying where the relevant 'recklessness' must lie. Is it (again rhetorically):

- (a) the recklessness (through intention, knowledge or recklessness) as to whether by making a sanctioned supply that is not an authorised supply (having regard to the intention issues raised above) is a contravention of clause 12 of the Regulations (Criminal Code s 5.4(4));
- (b) the recklessness as to if he or she is:
 - (i) aware of a substantial risk that making a sanctioned supply that is not an authorised supply is a contravention of clause 12 of the Regulations; and
 - (ii) having regard to the circumstances known to him or her, it is unjustifiable to take the risk;

(Criminal Code s 5.4(2))

- (c) the recklessness as to if he or she is:
 - (i) aware of a substantial risk that making a supply, sale or transfer of goods to another person that are export sanctions goods in relation to a country of which the direct or indirect result is that the goods are transferred to, for use in, or for the benefit of that country;
 - (ii) having regard to the circumstances known to him or her, it is unjustifiable to take that risk;
(Criminal Code s 5.4(2))

- (d) the recklessness as to if he or she is:
 - (i) aware of a substantial risk that the direct or indirect result of a supply, sale or transfer to another person of export sanctioned goods in relation to a country will be that the goods are transferred to, for use in, or for the benefit of that country;
 - (ii) having regard to the circumstances known to him or her, it is unjustifiable to take that risk;
(Criminal Code s 5.4(2))

- (e) the recklessness as to intention by:
 - (i) meaning to make a sanctioned supply that is not an authorised supply (having regard to the intention issues raised above) in contravention of clause 12 of the Regulations; or
 - (ii) being aware that in the ordinary course of events, making a sanctioned supply that is not an authorised supply will be in contravention of clause 12 of the Regulations;
(Criminal Code ss 5.2(2) and 5.4(4))

- (f) the recklessness as to intention by:
 - (i) meaning to make a supply, sale or transfer of goods to another person that are export sanctioned goods in relation to a country of which the direct or indirect result is that the goods are transferred to, for use in, or for the benefit of that country;
 - (ii) being aware that in the ordinary course of events, making a supply, sale or transfer of goods to another person that are export sanctioned goods in relation to a country will have the direct or indirect result that the goods are transferred to, for use in or for the benefit of that country;
(Criminal Code ss 5.2(2) and 5.4(4))

- (g) the recklessness as to intention by:
 - (i) meaning that the direct or indirect result of a supply, sale or transfer of export sanctioned goods in relation to a country to another person will be that the goods are transferred to, for use in, or for the benefit of that country; or
 - (ii) being aware that the direct or indirect result of making a supply, sale or transfer of export sanctioned goods in relation to a country to another person will be that the goods are transferred to, for use in, or for the benefit of that country;
(Criminal Code ss 5.2(2) and 5.4(4))

- (h) the recklessness as to knowledge by being aware of one of the matters listed at (e)(ii), (f)(ii) or (g)(ii) above (and in this respect, there does not appear to be a material distinction between “aware that it will occur” (Criminal Code s 5.2(3) as to intention) and “aware that it exists or will exist” (Criminal Code s 5.3 as to knowledge)

- (i) all of the above; or

- (j) a combination of the above?

It is the above demonstration that, in the Society's view, reveals an uncomfortable fit between clause 12 of the Regulations and section 16 of the Act. It is not clear what constitutes conduct for the purposes of section 16(1), or more particularly, the elements of a 'sanctioned supply' for which one must have the relevant intention. Similarly, it is not clear what 'conduct' must be reckless for the purposes of section 16(2).

Additionally, in the event the 'conduct' comprises elements which include a circumstance or a result, it is also not clear to what extent an individual has the benefit of the fault elements in respect of a 'circumstance' or 'result' contained in section 5.2(2) and (3) of the Criminal Code. It appears that, by a general offence provision in the Act requiring 'conduct', with the relevant conduct by which the offence is created bundled up in the Regulations, the result is a subversion of the benefit a person may otherwise obtain by the fault elements required by the Criminal Code through limiting the offence to 'conduct' to the exclusion of 'circumstance' and 'result'. Through being so limited, a person may mean to engage in conduct (Criminal Code s 5.2(1)), but not mean to bring about a result or is not aware that a result will occur in the ordinary course of events.

In the Society's view, this highlights a concern raised at the time of the introduction of the *Autonomous Sanction Bill 2010* ("the Bill"): that the creation of offence provisions should properly be left for the Legislature. The Society submits that the offence provisions create substantial uncertainty, as demonstrated above. The issues surrounding the offence provisions should be clarified and are best clarified by amendment of the Act.

Turning then to clause 12(3): it provides for use of the services of an Australian ship or an Australian aircraft to transport export sanctioned goods. The Society is concerned that the same issues arise in respect of section 16 of the Act as expounded above. An additional issue arises by use of the words "in the course of". The Society's view is that this is too broad a concept that potentially captures innocent use of an Australian ship or aircraft where an indirect result is a further transfer of the goods "for the benefit of" one of the five named countries.

In the Society's view, the words "in the course of" should be removed because the words "for the purpose of" are sufficiently broad.

Additionally, the Society is concerned with the broad definition of a body corporate contained in clause 12(4) of the Regulations. There does not appear to be clarification around what "effective control" means under this legislation. There is a definition of 'control' under section 50AA of the *Corporations Act 2001*, however it cannot be assumed that this will be the definition that bodies corporate should rely on. Furthermore, a body corporate may be liable for the actions of another body corporate or entity that it has "effective control" over if it makes a sanctioned supply that is not authorised. This could have far-reaching and unintended consequences for a body corporate. For example, parent company A may be liable for subsidiary B if it:

- supplies, sells or transfers goods directly or indirectly for use in a sanctioned country; or
- supplies, sells or transfers goods directly or indirectly for the benefit of a sanctioned country.

If subsidiary B makes a supply which does not contravene a sanction law to an unrelated entity, and this unrelated entity acts to make the goods available for the benefit or for use in a sanctioned country, potentially parent company A will be liable.

Of particular importance is that body corporates are strictly liable for offences contravening a sanction law (as per section 16(8) of the Act). This places an extremely extensive burden on bodies corporate to somehow manage actions of any entities that the body corporate deals with. We recommend that the scope of this section be narrowed so that bodies corporate are only liable for sanctioned supplies made as a direct result of a transaction of another body corporate that it has “control” over.

2. Sanctioned service

The Society is similarly concerned with the breadth of what constitutes a ‘sanctioned service’ by clause 5 of the Regulations. It defines a ‘sanctioned service’ as being, in effect:

- provision to a person of:
 - o technical advice, assistance or training;
 - o financial assistance;
 - o a financial service; or
 - o another service;

- if it assists with or is provided in relation to:
 - o a military activity; or
 - o an activity involving the supply, sale, transfer, manufacture, maintenance or use of an export sanctioned good;

- for one of Burma, Fiji, Iran, Syria or Zimbabwe.

It is firstly the concept of ‘another service’ which raises concern. In particular from the Society’s perspective, this potentially extends to legal services provided by lawyers. The issue becomes apparent when coupled with the words “assists with”. A lawyer may ‘assist with’ an activity involving the supply, sale, transfer, manufacture or use of (for example), ‘Goods mentioned in the Australia Group Common Control Lists’ in respect of Iran by providing advice to a client the ‘assists with’ (but is not necessarily ‘provided in relation to’) that sale, transfer, manufacture or use. If that sanctioned supply is not an authorised service or provided in relation to an authorised supply (in accordance with clause 18), a lawyer potentially contravenes clause 13 of the Regulations. Again on the assumption that clause 13 is to be specified as a ‘sanction law’, section 16 of the Act makes such contravention an offence.

It is then, again, that the issues raised above in respect of the fault elements of an offence become relevant. Where must the relevant intention lie? The answer is not clear.

Similarly, by reference to ‘technical advice, assistance or training’, if it assists with an activity involving the (for example) manufacture, maintenance or use of ‘Goods mentioned in the Australia Group Common Control Lists’, that is for use in or for the benefit of Iran, university training in relevant technical fields is potentially captured. The implications for the university sector in this respect are thus far reaching. It also potentially captures not only the relevant university, but the academics teaching such courses. Again, the issues raised above in respect of the fault elements of an offence become relevant; and again where the relevant intention must lie is not clear.

In the Society's view, the words "assists with" should be removed from clause 5 of the Regulations.

3. Designated person or entity

The Society has a number of minor concerns with clause 6 of the Regulations, in particular some of the wording contained in the table. They are:

- item 1(b) (Burma) – the term 'business associate' is not defined. It is a broad concept, and in the Society's view, unnecessarily broad;
- item 1(h) (Burma) – the definition of 'immediate family member' in clause 3 includes 'a brother, sister, step-brother or step-sister of the person'. In the Society's view, these should be limited to an 'adult' in the same way that it is limited to 'an adult child'. Additionally, given the uncertainty surrounding the term 'business associate', in the Society's view, item (b) should be excluded from item (h). Additionally, the Society is concerned that by inclusion of immediate family members more generally, it will include persons who do not share the primary person's views and are not associated in any way, other than by family relation, with that person (see for example *Aye v Minister for Immigration and Citizenship*);
- Item 4(b) and (e) – in the Society's view, immediate family members of 'a supporter of the coup' should be excluded. Additionally, the Society is concerned that by inclusion of immediate family members more generally, it will include persons who do not share the primary's person's views (see concern raised above).

A further concern then arises in respect of clause 14. It has the effect that a person who indirectly makes an asset available to, or for the benefit of, a designated person or entity that is not authorised by permit (clause 18) will contravene the regulation. On the assumption that clause 14 is to be specified as a 'sanction law', section 16 of the Act makes such a contravention an offence. It is again the term 'indirectly' which raises concern, particular when coupled with the issues raised above in respect of the fault elements of an offence.

4. Authorisations

The Society is concerned with the interaction of clauses 18(3)(a) and 19. It appears to require that an application for a permit in respect for a basic expense dealing, legally required dealing, or a contractual dealing, must satisfy the test in clause 18(3)(a): that "it would be in the national interest to grant the permit".

It appears to be an unreasonably high test to apply for what is essentially a carve-out provision for basic expenses (including foodstuffs and medicines) that can never be satisfied. In the Society's view, the provision should be amended in respect of clause 19 to provide for the Minister to be satisfied 'that it would not be against the national interest to grant the permit'.

As to clause 19(4)(b), it appears there is a misspelling of the word 'judgment'.

5. Comments generally

In addition to the issues raised above, the Society has concerns with procedural rights to be afforded to persons affected by the Act and the Regulations. In particular, the recent decision of the General Court of the European Union in *Kadi v European Commission* is relevant.

Mr Kadi was the subject of UN Security Council sanctions. He was an alleged supporter of Osama bin Laden. The Council of the European Union froze his assets in accordance with a UN Security Council resolution. Mr Kadi challenged that measure. Ultimately, in 2008, the European Court of Justice found in favour of Mr Kadi, ruling that even measures giving effect to UN Security Council resolutions must be subject to judicial review for compliance with fundamental procedural rights.

The European Commission then immediately passed a regulation again freezing Mr Kadi's assets. The recent September 2010 decision of the General Court was in respect of that regulation. The Court annulled the regulation. In doing so, it observed that the procedure adopted by the Commission did not grant Mr Kadi even the most minimal access to the evidence against him; Mr Kadi had been unable to defend his rights; and that his right to effective judicial review had been infringed.

The Kadi decisions demonstrate the caution which must be shown in balancing the underlying policy objectives of ending repression of democratic freedoms with the exercise of individual freedoms. In the Society's view, that is best achieved by ensuring that matters as serious as autonomous sanctions, which have implications for individuals and entities both domestically and internationally, including the creation of criminal offences, are properly the subject of parliamentary scrutiny. That is to say, the creation of "sanction laws" should be properly the function of the Legislature.

If you have any questions regarding the contents of this letter, please do not hesitate to contact Mr Matt Dunn on (07) 3842 5889 or m.dunn@qls.com.au; or Ms Raylene D'Cruz on (07) 3842 5884 or r.dacruz@qls.com.au.

Yours faithfully

Bruce Doyle
President

enc. Submissions to Senate Foreign Affairs, Defence and Trade Committee dated 1 July 2010 and 5 July 2010