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Submission: DFAT Review of Australia's Autonomous Sanctions Framework

Dear Australian Sanctions Office

Thank you for the opportunity to make a late submission, on select issues, to this review.

Issue 2: Scope of Sanctions Measures

In principle I support efforts to provide clearer definition (legislative or policy) of operative terms (such as 'assets' and 'indirectly') in sanctions law, including non-exhaustive guidance where necessary to ensure that key terms are not defined under-inclusively. International and comparative legal sources can shed some light on the meaning of these terms (e.g., under the Terrorist Financing Convention, Security Council resolutions, and FATF Recommendations); for example, 'indirectly' is understood as a reference to intermediaries or middle-persons.

Issue 4: Humanitarian Exemption

I strongly support legislating a humanitarian exemption to autonomous sanctions. The direct and indirect adverse effects of sanctions regimes (multilateral or unilateral) on humanitarian action globally, including in areas under the control of de facto state authorities, are now well known, culminating in the Security Council adopting a humanitarian exemption to UN sanctions in resolution 2664 (2022). The same logic and necessity for an exemption applies to Australia's autonomous sanctions. Resolution 2664 may serve as a useful guide to the scope of an Australian exemption, as regards both the activities exempted – 'humanitarian assistance' and 'other activities that support basic human needs', and the actors exempted.[1]

The meaning of the activities exempted should be understood in light of good policy and practice in the international humanitarian sector, to include not only assets meeting survival or subsistence needs, but also related legal protection, advocacy and human rights activities.

[1] UNSC res 2664 (2022) para 1 ('the United Nations, including its Programmes, Funds and Other Entities and Bodies, as well as its Specialized Agencies and Related Organizations, international organizations, humanitarian organizations having observer status with the United Nations General Assembly and members of those humanitarian organizations, or bilaterally or multilaterally funded non-governmental organizations participating in the United Nations Humanitarian Response Plans, Refugee Response Plans, other United Nations appeals, or OCHA-coordinated humanitarian "clusters," or their employees, grantees, subsidiaries, or implementing partners while and to the extent that they are acting in those capacities, or by appropriate others as added by any individual Committees established by this Council within and with respect to their respective mandates').

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While resolution 2664 is focused on the exemption of UN or UN-linked actors, and international organisations (such as the ICRC), an Australian exemption should expressly extend to the further actors identified on page 22 of the Issues Paper (accredited NGOs). It is unclear what is meant there by the further category of a 'defined "humanitarian actor"'. I would not support limiting an exemption to a 'closed' list of specified/named actors. A general definition of 'humanitarian actor' may be acceptable if it is sufficiently broad to capture the variety of actors engaged in this area. Various actors engaged in humanitarian work are not exclusively humanitarian actors, but perform multiple roles.[2]

I note that under international humanitarian law, loose associations of individuals, or private persons, do not qualify as 'humanitarian organisations', since they are unlikely to comply with professional humanitarian standards, and there may be questions about their humanitarian purposes and impartiality. Defining 'humanitarian actor' may thus be one means of limiting the risk of abuse of a humanitarian exemption if otherwise extended to any person or entity. A countervailing consideration is that any individual arguably should enjoy the freedom to provide assets for humanitarian causes they care deeply about, including diaspora communities and charitable and religious groups; freedom of association under human rights law may be particularly relevant. In my view, ultimately more important than a definition of the actor is a focus on the nature of their activities, i.e., whether they are engaged in 'humanitarian assistance' or 'activities that support basic human needs' (both with further legal definition as necessary).

I note that in armed conflict settings, a failure to exempt humanitarian activities in some circumstances could be inconsistent with Australia's obligations under international humanitarian law[3] and international human rights law.

I draw attention to this useful guidance on the scope of humanitarian exemptions: Harvard Program on International Law and Armed Conflict, *An Interpretive Note for UN Member States on Security Council Resolution 2664* (March 2023), https://pilac.law.harvard.edu.

Issue 5: Sanctions Offences and Enforcement

Given the high thresholds for a successful criminal prosecution, and in light of the weighty purposes of sanctions, I support introducing not only civil penalties but also administrative penalties for sanctions breaches. The choice of criminal/civil/administrative penalties should be proportionate to the seriousness of the alleged breach, although other considerations, including the strength of the evidence and standards of proof, may be relevant.

I draw your attention to the Australian Law Reform Commission's report, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC Report 95) (2003), which considers the circumstances in which use of civil and administrative penalties may be appropriate, as well as the necessary procedural fairness and other safeguards that should apply.

[2] See e.g. ICRC, Commentary of 2020 to GCIII art 9 (Activities of the ICRC and Other Impartial Humanitarian Organisations) para 1340 ('to qualify as a "humanitarian organization", there is no requirement that the scope of its activities be limited to humanitarian activities').
[3] See e.g. ICRC Customary IHL, Rule 55 (access for humanitarian relief to civilians in need).

Issue 6: Review Mechanism

I oppose the proposal to eliminate time-limited listings and replace them with indefinite listings (subject to a Ministerial invitation to contest the listing every five years). Sanctions are designed not to punish but to change behaviour and induce compliance, and as such they must be designed as temporary tools. There is a real risk that, for example, a scheme for temporary asset freezing will be converted into a de facto permanent seizure/confiscation regime. This in turn could violate the right to property under international human rights law,[4] in the absence of the necessary due process, standard of proof, judicial protection, and guarantees for the lawful taking of property. There should not be an assumption – without any reasoned re-consideration by the Minister – that the original grounds for sanctioning continue to be met in perpetuity; and a five yearly invitation from the Minister to contest the continuation is manifestly insufficient.

The onus should remain on the Minister to periodically demonstrate the continuing necessity of the interference in rights. While the current approach may be administratively burdensome, the weighty human rights interests (such as property and movement) should not be too readily displaced for reasons of administrative convenience. In my view the current three year expiry period strikes an appropriate balance (if anything, it is too long), and should not be either lengthened or abolished as proposed.

While listings are indeed subject to judicial review, they are not subject to any form of independent merits review. The Minister as original decision-maker is the only authority competent to revoke a listing or consider a petition from an affected person or entity for revocation. Far from winding back the existing listing protections, Australia should make available independent merits review, affording a sufficient minimum level of procedural fairness, such as through an appropriate administrative tribunal.

Other Issues

I note the limited scope of the Review in addressing efficiency and effectiveness. I would encourage the Government to review in future other important issues, including:

- Providing for regular and structured civil society consultation into listing decisions, particularly in relation to the use of Magnitsky sanctions;
- Increasing transparency of decision-making, and factors considered in listing decisions;
- Widening the narrow definition of 'serious human rights violations' in Regulation 6A (limited to killings, torture or slavery) to include the full spectrum of serious human rights violations under international law (e.g., mass arbitrary arrests, systematic gender or racial or religious persecution, mass unfair trials, denial of education etc);
- Aligning the regulations with the scope of the Act, to adopt regulations addressing violations of international humanitarian law and threats to peace and security;
- Amending the Act to include 'international crimes' as a basis for sanctions regulations;
- Improving consistency (and hence legitimacy) in the use of Magnitsky sanctions against all countries where comparably serious human rights violations are occurring;
- Improving coordination on listings with other countries using Magnitsky sanctions.

Yours sincerely
[Ben Saul]

[4] See e.g., Case T-85/09 *Yassin Abdullah Kadi v European Commission* [2010] ECR II-5177 para 150.