Australian Government

Department of Foreign Affairs and Trade

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Dr Kathleen Dermody
Committee Secretary
Senate Standing Commitee on Foreign Affairs, Defence and Trade
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Parliament House
CANBERRA ACT 2600

Dear Dr Dermody

Further to the letter of 2 June 2010 from Senator Mark Bishop, Chair of the Legislation Committee, to the Minister for Foreign Affairs and Trade, the Hon. Stephen Smith MP, please find attached the submission of the Department of Foreign Affairs and Trade to the Committee's Inquiry into the *Autonomous Sanctions Bill 2010*.

Yours sincerely

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Submission of the Department of Foreign Affairs and Trade to the Inquiry into the provisions of the Autonomous Sanctions Bill 2010 by the Senate Foreign Affairs, Defence and Trade Committee

Introduction

"Sanctions" are measures not involving the use of armed force applied in response to situations of international concern as a means of both mitigating the adverse consequences of the situation in question and influencing the behaviour of the persons or regime responsible for bringing it about. "Situations of international concern" range from systematic acts of oppression, abuses of human rights and suppression of democratic freedoms by a government against its own people, to internal or international armed conflicts, to the proliferation of weapons of mass destruction.

Sanctions can be imposed by the United Nations Security Council (UNSC) through decisions under Chapter VII of the Charter of the United Nations (relating to threats to, or breaches of, international peace and security), which are legally binding on all UN Member States. Sanctions can also be imposed autonomously by individual states, or groups of like-minded states, as a foreign policy response to situations of international concern. Autonomous sanctions are generally imposed in situations where the UNSC is unable to act (either because the situation concerned falls outside its mandate, or because its members cannot agree on the imposition of sanctions), or to supplement a UNSC sanctions regime with additional measures.

Traditionally, Australian autonomous sanctions have been limited to financial sanctions and travel restrictions targeted against individuals and entities within or supporting a government of concern, as well as restrictions on arms exports and a number of executive measures (suspension of ministerial visits, cultural relations and non-humanitarian development assistance). Successive Australian governments have chosen not to impose trade bans beyond arms, given the limited impact such measures could have in the absence of broader international support, as well as a need to ensure that Australian autonomous sanctions were not targeted at the people of the country concerned, but only its government.

A list of countries subject to Australian autonomous sanctions, as well as the sanctions measures applied in relation to each country, is at **Attachment A.**

In relation to sanctions imposed by the UNSC, the Commonwealth Parliament, through the *Charter of the United Nations Act 1945*, has given the Executive the authority to implement any measure not involving the use of armed force that is the subject of a legally-binding UNSC decision. This allows Australia to give full scope and effect to any legally binding UNSC sanction measure. In contrast, Australia has no legislation specifically intended to implement autonomous sanctions. Instead, existing regulations, intended for other purposes, are used to give effect to autonomous sanctions.

Reliance on existing regulations to implement autonomous sanctions can hinder the Government's ability to meet fully the objectives underlying the imposition of autonomous sanctions. The effectiveness of autonomous sanctions relies in part on the replication of measures amongst countries supporting the measure. Under present arrangements, Australia can approximate but not fully replicate either the financial or trade-related measures imposed

by like-minded states. This means we are unable to match the measures of key like-minded partners when imposing autonomous sanctions in a broader coalition of states.

As autonomous sanctions (either supplementary to, or independent of, UNSC sanctions) are likely to play an increasing part in both national and like-minded responses to situations of international concern, the Government has decided to strengthen Australia's ability to impose stronger autonomous sanctions measures, and to participate fully in coalitions of like-minded states imposing such measures, by enacting dedicated autonomous sanctions legislation.

Autonomous Sanctions Bill 2010

The legislative purpose of the Autonomous Sanctions Bill 2010 is to provide the Government with the means to impose autonomous sanctions in the same way, with the same scope and effect, and subject to the same compliance measures, as UNSC sanctions implemented under Australian law.

Clause 3 of the Bill provides that its main purposes, once enacted, are to provide for autonomous sanctions and their enforcement, and to facilitate the collection, flow and use of information relevant to the administration of autonomous sanctions. This submission outlines the rationale behind each of these purposes.

Providing for autonomous sanctions

The Minister for Foreign Affairs, in his second reading speech on 26 May 2010, explained that the purpose of the Bill was to strengthen Australia's autonomous sanctions regime by allowing greater flexibility in the range of measures Australia could implement, beyond those achievable under existing instruments, thus ensuring Australia's autonomous sanctions could match the scope and extent of measures implemented by like-minded states. The Bill would also assist the administration of, and compliance with, sanctions measures by removing the distinctions between the scope and extent of autonomous sanctions and Security Council sanction enforcement laws.

By way of illustration, Australia presently implements arms embargoes and targeted financial sanctions both under obligation arising from decisions of the UNSC as well as on an autonomous basis. A UNSC arms embargo typically obliges States to prohibit the following conduct, from its territory or by its nationals anywhere in the world:

- the sale, supply or transfer of arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment and spare parts, to specified persons or countries; and

- the provision, to specified persons or countries, of financing and financial assistance and technical assistance, brokering services and other services related to military activities and to the provision, manufacture, maintenance and use of arms and related materiel of all types.

UNSC targeted financial sanctions typically oblige States to:

- freeze the funds, other financial assets and economic resources which are on their territories that are owned or controlled by persons or entities designated by the UNSC for this purpose (sanctions designated persons or entities); and

- ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any persons or entities within their territories, to or for the benefit of sanctions designated persons or entities.

Australia is able to give full scope and effect to these obligations in regulations made under Part 3 of the *Charter of the United Nations Act 1945*, on which Part 2 of the Bill is closely modelled. In the current absence of the regulation-making authority envisaged in Part 2, however, Australia's autonomous arms embargoes are limited to the exercise of existing defence export control powers in regulation 13E of the *Customs (Prohibited Exports) Regulations 1958*. These powers:

- apply only to tangible goods, and not to intangible goods or to services; and

- apply only to exports from Australia, and not to the conduct of Australian nationals or bodies corporate overseas.

Similarly, Australia's targeted financial sanctions are given effect through the *Banking (Foreign Exchange) Regulations 1959*, which were made to protect the Australian currency and regulate Australia's foreign currency reserves. The sanctions measures are achieved by excluding named individuals and entities from broad exemptions (most recently promulgated in 25 November 2002) to provisions of the regulations relating to dealing in or exporting Australian currency (thus prohibiting a range of Australian currency transactions involving the named individuals and entities). Sanctions are also achieved using broad powers in the regulations relating to foreign exchange transactions, by directions from the Reserve Bank Governor prohibiting any such transactions involving the same named individuals and entities. The measures thus apply only to transactions involving currency, rather than to assets, and do not amount to an asset freeze.

Clause 6, Part 2 and clause 28 of the Bill provide the means for the Government to apply sanctions of the same kind, and to the same scope and effect, as sanctions imposed by the United Nations Security Council and by other countries with which Australia cooperates in the imposition of autonomous sanctions measures. This includes provision for making regulations to apply targeted financial sanctions and restrictions on the trade in specified goods or services with extraterritorial effect (that is, to apply to conduct not only in Australia, but conduct by Australian citizens and bodies corporate overseas – clause 10, 11 and 28).

Part 2 also ensures that the fact that autonomous sanctions measures will be predominantly applied under regulations will not prevent them having effect if pre-existing Commonwealth, State or Territory legislation or legislative instruments, or future Commonwealth laws, would otherwise conflict with those measures (clauses 12 and 13). This in turn ensures "sanctions laws" in the regulations will have legal equivalence to Australia's laws implementing United Nations Security Council sanctions ("UN sanction enforcement laws" as specified under the *Charter of the United Nations Act 1945*).

Providing for sanctions to be applied primarily through regulations will allow the Government the necessary flexibility to apply new, or amend existing, autonomous sanctions measures quickly, in response to international developments, which can change rapidly. Such flexibility and responsiveness would not be possible if the specific measures were to be implemented under the Bill itself.

The Bill, however, also allows the Government to enlist existing laws and use them to give effect to autonomous sanctions measures, if those laws remain the most appropriate vehicle for the measures contemplated.

Clause 6 establishes the principle that a law is only a "sanction law" (that is, a law that will enliven the measures in the Bill) if it has been specified by the Minister for Foreign Affairs in a legislative instrument. Any law of the Commonwealth (including in relation to particular circumstances) may be so specified for a purpose stated in clause 3. The system of requiring all laws applying autonomous sanctions, whether purpose made in regulations under the Bill or drawn from other Commonwealth laws, to be specified in a single legislative instrument as "sanction laws", ensures maximum transparency. The "sanction law" instrument will act as an index to all laws to which the provisions of the Bill, once enacted, will apply.

Providing for the enforcement of autonomous sanctions

In his second reading speech, the Minister said that there was no sound policy reason to treat breaches of Australian law imposing UNSC sanctions differently to breaches of Australian law imposing Australian autonomous sanctions. Autonomous sanctions, like UNSC sanctions, were designed to prevent the provision of material assistance to regimes engaged in violations of international standards and norms, including human rights abuses, acts of aggression and destabilising actions. The measures themselves—targeted financial sanctions, arms embargoes and restrictions on supply of strategic and dual use goods—were the same as applied by the Security Council.

Consequently, the Bill ensures that the consequences for contravening (clause 16), or for providing false and misleading information in relation to (clauses 15 and 17), sanctions laws specified under the Bill are identical to the consequences for the same conduct in relation to UN sanction enforcement laws specified under the *Charter of the United Nations Act 1945*.

The origin of the relevant measures in the *Charter of the United Nations Act 1945* was the recommendations contained in the report, dated 24 November 2006, of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme conducted by Commissioner the Honourable Terence RH Cole AO RFD QC (the Cole Inquiry).

Recommendation 1 of the Cole Inquiry called for Australian laws implementing UNSC sanctions to make it an offence to knowingly or recklessly provide information that is false or misleading in a material particular in, or omit a material particular from, an application for an authorisation under those laws, with the penalty for doing so being imprisonment for 10 years. This recommendation was the basis for section 28 of the *Charter of the United Nations Act 1945*, on which clause 17 of the Bill is based. Recommendation 1 also called for such laws to render invalid any permission to export granted on the basis of an application that was false or misleading in a material particular or that omitted a material particular. This is the basis for section 13A of the *Charter of the United Nations Act 1945*, the model for clause 15 of the Bill.

Recommendation 2 of the Cole Inquiry called for Australian law to provide for offences of strict liability for acting contrary to UN sanctions with a severe penalty, equivalent to three times the value of the offending transactions, by way of monetary fine for corporations and up to 10 years' imprisonment for individuals. In implementing this recommendation in section 27 of the *Charter of the United Nations Act 1945*, the then Government decided that it was contrary to public policy to make the offence one of strict liability for individuals, but maintained strict liability for bodies corporate and set commensurate penalties. Clause 16 of the Bill is modelled on section 27 of the *Charter of the United Nations Act 1945*.

The Cole Inquiry was concerned with UNSC sanctions but, as the Minister explained in the second reading speech for the Bill, the context of UNSC and autonomous sanctions is largely the same. The sanctions laws under the Bill will restrict the trade in a narrow class of goods and services, such as military and security goods and services to specific regimes and financial transactions involving designated members or supporters of those regimes, that the Australian Government assesses are facilitating the repression of populations or the commission of regionally or internationally destabilising acts (including the acquisition or proliferation of weapons of mass destruction). Contravening such restrictions is thus directly comparable to the contravention of a UN sanction enforcement law under the *Charter of the United Nations Act 1945* and it is therefore appropriate that such conduct be subject to the same consequences.

Clause 14 provides for a superior court, on application by the Attorney-General, to grant an injunction restraining a person from engaging in conduct involving a contravention of the regulations. This replicates the same provision in section 13 of the *Charter of the United Nations Act 1945*, in relation to regulations made under that Act.

Facilitating the collection, flow and use of information

Part 4 (and clause 5) of the Bill provides for measures to facilitate access to information for purposes associated with the administration of sanction laws by removing impediments for the sharing of such information within the Commonwealth, and allowing specially designated Commonwealth entities, responsible for the administration and enforcement of sanction laws, to require, by written notice, the production of documents and written information—including under oath—from persons outside of government in order to determine whether a sanction law is being complied with.

These measures are based on Part 5 (and section 2A) of the *Charter of the United Nations Act 1945*, which implemented Recommendation 3 of the Cole Inquiry. Recommendation 3 called for an appropriate body to be given a power to obtain evidence and information of any suspected breaches or evasion of sanctions that might constitute the commission of an offence against a law of the Commonwealth.

During the second reading debate on the Bill in the House of Representatives on 24 June 2010, the Member for Curtin and Shadow Minister for Foreign Affairs, Ms Julie Bishop MP, asked for elaboration on this aspect of the Bill in relation to its domestic privacy implications.

The measures included in Part 4 of the Bill are in accordance with section 14 of the *Privacy Act 1988*, which sets out the Information Privacy Principles. They do not allow a record-keeper who has possession or control of a record that contains personal information to

disclose the information to a person, body or agency (other than the individual concerned) other than as authorised under the measures in Part 4 (this is in accordance with subparagraph 1(d) of Information Privacy Principle 11). They also do not allow a person, body or agency to whom personal information is disclosed pursuant to Part 4 to use or disclose the information for a purpose other than the purpose for which the information was given (in accordance with paragraph 3 of Information Privacy Principle 11).

Clause 18 would only allow a designated Commonwealth entity access to information held by other Commonwealth agencies for a purpose directly related to the administration of a sanction law. Clause 24 then limits the authority of the designated Commonwealth entity to share that information within the entity or with specified external entities to purposes connected with the administration of a sanction law; that is, the purpose for which the information was given. Clause 24 further limits the authority of the designated Commonwealth entity to share such information with external entities to cases where the CEO of the designated Commonwealth entity is satisfied that the recipient of the information will not disclose the information to anyone else without the CEO's consent.

Similarly, clause 19 would only allow a designated Commonwealth entity to require the production of information or documents from a non-Government person or entity for the purpose of determining whether a sanction law has been or is being complied with. Although an individual is not excused from giving information or a document under clause 19 on the ground of self-incrimination, the information is not admissible in evidence against the individual in any criminal proceedings, or in any proceedings that would expose the individual to a penalty, other than proceedings for an offence against clause 17 (false or misleading information given in connection with a sanction law) or clause 21 (failure to comply with requirement to give information or document). This reflects the provisions of section 33 of the *Charter of the United Nations Act 1945*.

Attachment A

List of countries subject to Australian autonomous sanctions, with sanctions measures applied in relation to each country

Burma

From 24 October 2007, Australia has implemented targeted autonomous sanctions against members of the Burmese regime and their associates and supporters. Sanctions currently cover:

1. **Targeted financial sanctions**
   - Restrictions on certain financial transactions involving members of the Burmese regime and their associates and supporters.

2. **Travel restrictions (preceded the imposition of the autonomous sanctions)**
   - Restrictions on visas to travel to Australia by members of the Burmese regime and their associates and supporters.

3. **Arms embargo (in place since 1991)**

Democratic People's Republic of Korea

Following North Korea's missile and nuclear tests in 2006, Australia has had autonomous sanctions in place against North Korea. These measures are in addition to Australia's implementation of United Nations Security Council sanctions against North Korea. Sanctions currently cover:

1. **Targeted financial sanctions**
   - Restrictions on certain financial transactions involving named entities and/or individual(s) associated with North Korea's WMD and missile programs, in place since 19 September 2006.

2. **Travel restrictions**
   - General ban on visas to travel to Australia by North Korean nationals, in place since 10 October 2006.

3. **Ban on port access for North Korea flagged vessels**
   - In place since 16 October 2006.

Fiji

From 6 December 2006, Australia has implemented targeted autonomous sanctions against those responsible for the December 2006 Fiji military coup and senior appointees of Fiji's Interim Government. Sanctions currently cover:

1. **Travel restrictions**
   - Restrictions on visas to travel to Australia by:
     - coup-leader Commodore Bainimarama;
     - high profile coup supporters; ranking Republic of Fiji Military Forces (RFMF) officers (warrant officer rank and above), and their families
     - other RFMF members, but not their families;
     - Interim Government Ministers, and their families;
     - Interim Government-appointed senior public servants; and
     - Interim Government appointees to government or quasi-government boards.

2. **Arms embargo and suspension of defence cooperation**

3. **Suspension of Ministerial level contact with the Interim Government**

Former Federal Republic of Yugoslavia

From 4 June 1992 (following the termination of UN sanctions in relation to the former Federal Republic of Yugoslavia (FRY) in resolution 1367 (2001)), Australia has implemented targeted autonomous sanctions against individuals associated with the former Milosevic regime in the former Federal Republic of Yugoslavia. These sanctions target individuals indicted or suspected of war crimes during the Balkan wars in the 1990s. Sanctions currently cover:

1. **Targeted financial sanctions**
   - Restrictions on financial transactions involving individuals known to be :
     - indicted or convicted by the International Criminal Tribunal for the Former Yugoslavia (ICTY), and by domestic courts in Bosnia-Herzegovina, Croatia and Serbia;
     - subject to Interpol arrest warrants for war crimes have also been included;
     - supporters of the former Milosevic regime; and
     - individuals suspected of assisting ICTY indictees at large.

2. **Travel restrictions**
   - Restrictions on visas to travel to Australia by individuals known to be :
     - indicted or convicted by the International Criminal Tribunal for the Former Yugoslavia (ICTY), and by domestic courts in Bosnia-Herzegovina, Croatia and Serbia;
     - subject to Interpol arrest warrants for war crimes have also been included;
     - supporters of the former Milosevic regime; and
     - individuals suspected of assisting ICTY indictees at large.

Iran

On 15 October 2008, in response to Iran's failure to comply with its international obligations, the Minister for Foreign Affairs announced Australian sanctions in relation to Iran. These autonomous sanctions supplement United Nations Security Council sanctions against Iran. Sanctions currently cover:

1. **Targeted financial sanctions**
   - Restrictions on financial transactions involving designated individuals and entities which:
     - contribute to Iran's nuclear and missile programs; or
     - assist Iran to violate its sanctions obligations.
   - **Cessation of public provided financial support** for trade with Iran in response to the UNSC's call upon all States to exercise vigilance in entering into new commitments of such assistance to avoid such support contributing to Iran's proliferation activities.

2. **Travel restrictions**
   - Restrictions on visas to travel to Australia by individuals who:
     - contribute to Iran's nuclear and missile programs; or
     - assist Iran to violate its sanctions obligations.

Zimbabwe

From September 2002, Australia has implemented targeted autonomous sanctions against the Mugabe regime in Zimbabwe and its close supporters. Sanctions currently cover:

1. **Targeted financial sanctions**
   - Restrictions on financial transactions involving members or supporters of the Mugabe regime, including senior management officials of state owned companies (parastatals).
   - the Trade Minister has directed the Export Finance Investment Corporation to consult DFAT on Zimbabwe-related applications for assistance, to ensure the Australian Government does not inadvertently underwrite undesirable investment in Zimbabwe.

2. **Travel restrictions**
   - Restrictions on visas to travel to Australia by members or supporters of the former Mugabe regime, including senior management officials of state-owned companies (parastatals); and
   - Screening of all student visa applications from Zimbabwe to identify whether any applicants were adult children of Zimbabwean individuals subject to Australian travel and financial sanctions. Applications so identified are referred to the Minister for Foreign Affairs for consideration as to whether their presence in Australia would be in Australia's foreign policy interests.

3. **Arms embargo and prohibition of defence links;**

4. **Downgrading of government-to-government contacts at multilateral forums**

5. **Downgrading of cultural links**