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Public consultation on Australia’s autonomous sanctions legislation.

The University of Sydney welcomes the opportunity to provide initial comments on the exposure draft of the proposed amendments to the Autonomous Sanctions Regulations 2011.

The University received notification on 26 April 2013 about the opportunity to provide comment on the proposals concerning the additional sanctions relating to Iran. We note, however, that the proposed amending regulations would introduce additional provisions that we believe require further clarification from the Department of Foreign Affairs and Trade (‘DFAT’) so that Australian universities have an opportunity to further consider the consequences of those amendments. Insufficient time has been provided for universities to consult with faculties and departments that may be affected, and it would be regrettable if these changes were to be progressed before such discussions can occur.

The sanctions legislation has considerably impacted the Australian university sector. It has affected the provision of core educational services to students and potential applicants to higher degree by research education. It has also impacted certain research endeavours. The University of Sydney has worked hard to ensure its compliance under the sanctions legislation with DFAT and will continue to do so, but wants to ensure that these latest amendments do not have unintended consequences for the University and the sector more broadly.

The University recently contacted DFAT to obtain further clarity on these points because there has been no detailed explanatory information provided.

For the university sector, the proposed amending regulations have potentially relevant effects that need to be considered, including the following:
the introduction of new ‘export sanctioned goods’ for Iran that will need to be considered by the sector and that may require further authorisations from the Minister;

the creation of a strict liability offence for individuals as described in the proposed amendments to the Autonmous Sanctions Regulations and detailed below; and

the inclusion of new wording to the ‘sanctioned services’ provision at regulation 5(4).

New export sanctioned goods for Iran

The current articulation of controlled ‘export sanctioned goods’ for Iran in the proposed amending regulations is described very broadly (i.e. graphite, raw metals and semi finished metals that are set currently out at: http://www.dfat.gov.au/un/unsc_sanctions/iran-goods.html) and without wording to connect it to Iran’s nuclear and ballistic programs or entities of concern. The University is concerned that the potential breadth of these new restrictions may have unintended consequences, and would like an opportunity to provide DFAT with further comment drawing upon the advice of our academic experts likely to be affected, prior to these goods being specified by the Minister in a separate instrument.

The articulation of another set of ‘export sanctioned goods’ for Iran will again require further detailed assessments to be undertaken of a potentially broad number of university activities and existing research projects. As DFAT is aware, completing these technical assessments is extremely resource intensive (for both the sector and DFAT). The University is still in the process of finalising its permit arrangements with DFAT for the goods that were introduced late last year in oil, natural gas and the petrochemical industry.

DFAT’s website notes that for pre existing legal obligations involving this newly expanded ‘sanctioned service’, persons would only have 30 days from the commencement of the new sanctions to apply to the Minister for authorisation. Mindful of the importance of appropriately complying with sanctions legislation, the sector is likely to require a greater period of time in which to again assess its existing contractual obligations, including, for example, ongoing research projects, some of which DFAT has already spent a significant amount of time and technical resources to either authorise or determine not to pose a concern under the legislation.

Strict liability offence

Relevantly to the higher education sector, regulation 13(1A) has been introduced where “strict liability applies to the circumstance that the ‘sanctioned service’ is not in
accordance with a permit under regulation 18 of the existing Autonomous Sanctions Regulations (e.g. technical advice, assistance or training if it assists with, or is provided in relation to, a particular sanctioned activity as described in the Regulations).

Given the interplay between Part 3 of the Autonomous Sanctions Regulations and section 16 of the Autonomous Sanctions Act, it would appear that this is not a departure from the existing status quo, whereby bodies corporate (universities) are faced with a strict liability offence, but could continue to rely on an absolute defence of being able to prove that they took reasonable precautions and exercised due diligence to avoid contravention of the section. Please advise us if this is not the case.

Individuals, on the other hand, who previously had the benefit of the Commonwealth being held to a high standard of proof to make out a conviction in these stated circumstances, would no longer appear to benefit from that position.

If this interpretation is correct, this would appear to be a departure from DFAT’s original report on ‘Public Consultations on Autonomous Sanctions Regulations’ in respect to the requisite standard of proof for individuals and the justification for that position (see attached to this letter Annexure A an extract from DFAT original report on issues of liability). The outcome of such a departure would be an injustice to the individual as was well articulated in DFAT’s report. It also creates an anomalous position between bodies’ corporate and individual employees. In these circumstances individual employees are unlikely to want to provide or continue to provide their ‘services’ under otherwise authorised Ministerial permits.

It also seems to create a different standard of proof for this type of offence as compared to the Charter of the United Nations Regulations on which DFAT justified its original modelling of the offence provisions.

The University would welcome DFAT’s explanation of the interplay between the new amendments and how they relate to section 16 of the Autonomous Sanctions Act, and the justification for the imposition of a strict liability offence in the context described above.

Amended wording to Regulation 5(4) ‘sanctioned services’

The University would also like clarification from DFAT about the intended practical consequences (if any) of the amendment to regulation 5(4), a regulation that is particularly relevant to sector activities.

In the previous regulation 5(1) the wording was: “for these Regulations, a sanctioned service, for a country mentioned in an item of the table, is the provision to a person of...”,
and the new wording states that: "for these Regulations, a sanctioned service is also, for a country mentioned in an item of the table, the provision to the country, or a person for use in the country, of...".

We look forward to a further opportunity for dialogue to occur with the higher education sector in advance of the commencement of these amendments, and trust that these regulations can be discussed with staff likely to be affected at the forum on 22 May that the University and DFAT are hosting together.

Yours sincerely,

ORIGINAL SIGNED

Pro-Vice-Chancellor (Academic Affairs)

Annexure A
DFAT Report ‘DFAT public consultation on the Autonomous Sanctions Regulations’

Part 3 – Sanctions laws

Recommendation 25: Amend the Act to clarify the interplay between the sanction laws and section 16 of the Act.

Response: Not accepted. The operation of the Act is outside the scope of the present consultation. The Government nevertheless wishes to clarify how the conduct prohibited in Part 3 of the Regulations relates to section 16 of the Act.

The offences for individuals under section 16 of the Act (sub-sections 16 (1) and (2)) do not specify fault elements. As such, the fault elements for paragraphs (a) and (b) of sub-sections 16 (1) and (2) are determined by Division 5.6 of the Criminal Code Act 1995. Consequently, the fault element of paragraph (a) of sub-sections 16 (1) and (2) is “intention”, as it consists only of conduct. The fault element of paragraph (b) of sub-sections 16 (1) and (2) is “recklessness”, as it consists of a circumstance or a result.

An individual must therefore be reckless as to the fact that his or her conduct contravened a “sanction law” to be convicted under sub-section 16 (1) of the Act. In other words, the individual must be aware of the existence of the sanction law in question, and be reckless as to whether his or her conduct contravened that sanction law. To be clear: it is not sufficient for the Commonwealth to prove that an individual engaged in conduct described in the sanction law; the Commonwealth must also prove that the individual knew that that conduct was a “sanction law” and was reckless as to whether his or her conduct contravened that sanction law. It is a very high standard of proof for the Crown to make out in order to secure a conviction.

Similarly, for an individual to be convicted under sub-section 16 (2) of the Act, he or she must be aware, both of the existence of the condition in the authorisation in question and that the authorisation was made under a sanction law, and then be
reckless as to whether his or her conduct contravened that condition.

The Government is therefore not concerned that the breadth of conduct captured by the prohibitions in Part 4 of the proposed Regulations will result in individuals being prosecuted or convicted of conduct in situations where they were not aware a sanction law existed.

The situation is different for bodies corporate. Sub-section 16 (8) provides that the offences for bodies corporate under section 16 (sub-sections 16 (5) and (6)) are of strict liability. As such, there are no fault elements for any of the physical elements of the offences. The rationale for this approach was set out in detail in the revised Explanatory Memorandum to the Autonomous Sanctions Bill:

This clause ensures that the consequences for contravening Australia’s autonomous sanctions are identical to a contravention of Australian laws implementing United Nations Security Council sanctions. As the object and purpose of the Bill is to ensure identical consequences for a contravention of Australian laws implementing both autonomous and UNSC sanctions, the Bill must necessarily replicate the offence provisions of the Charter of the United Nations Act 1945.

The origin of the strict liability offence for bodies corporate in the Charter of the United Nations Act 1945 is Recommendation 2 of 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). Commissioner Cole proposed that there be new strict liability criminal offences with severe penalties - three times the value of the offending transactions, by way of monetary fine for corporations - for acting contrary to Australian law implementing UNSC sanctions to ensure both that the penalties have a sufficient deterrent effect for bodies corporate.
The strict liability offence provisions for bodies corporate are balanced by an absolute defence for bodies corporate that can prove they took reasonable precautions, and exercised due diligence, to avoid contravening the sanction law or authorisation concerned. This in turn is intended to promote a culture of corporate compliance.

The penalties are appropriately severe given the context in which the sanctions laws will operate. The sanctions laws 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.

**Clarification 7:** What defences are available to individuals charged with an offence under section 16 of the Act? Would individual employees of a body corporate acting in the course of their employment be entitled to rely on the defence available to the body corporate in sub-section 16 (7)?

**Response:** As discussed in relation to recommendation 25, the offences for individuals in sub-sections 16 (1) and (2) of the Act are fault-based offences. The Crown must prove first that the individual intended to engage in the conduct alleged. In other words, the act or omission that resulted in a contravention of a sanction law cannot be unintentional. The Crown must then prove that the individual was at least reckless as to the fact that the conduct engaged in contravened a sanction law, or a condition in a permit under a sanction law. In other words, the individual must be aware of the sanction law and reckless as to whether his or her conduct contravened it. There is therefore no need to provide for special defences applicable to individuals charged with these
offences. This is the case irrespective of whether the individual was acting in his or her own capacity or in the capacity of an employee of a body corporate.

The provision of a special defence for bodies corporate (in subsection 16 (7) of the Act) is because the offences for bodies corporate are strict liability offences, meaning bodies corporate are liable also for the unintended consequences of their conduct. The policy of the Act is to ensure bodies corporate that take active measures (due diligence / reasonable precautions) not to contravene sanctions are not liable if circumstances beyond their control result in their conduct contravening a sanction law. There is no advantage to an individual employee of a body corporate using this defence, as that employee, unlike the body corporate, cannot be guilty of unintentional outcomes.