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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

AUTONOMOUS SANCTIONS BILL 2010

REPLACEMENT EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Foreign Affairs,
the Honourable Kevin Rudd MP)

THIS MEMORANDUM TAKES ACCOUNT OF RECOMMENDATIONS MADE
BY THE SENATE FOREIGN AFFAIRS, DEFENCE AND TRADE LEGISLATION
COMMITTEE REPORT TABLED ON 3 MARCH 2011

AUTONOMOUS SANCTIONS BILL 2010

General Outline

The Autonomous Sanctions Bill (the Bill) provides a framework for the implementation in Australia of autonomous sanctions.

Autonomous sanctions are punitive measures not involving the use of armed force which a government imposes as a matter of foreign policy - as opposed to an international obligation under a United Nations Security Council decision - in situations of international concern. Such situations include the grave repression of the human rights or democratic freedoms of a population by a government, or the proliferation of weapons of mass destruction (WMD) or their means of delivery, or internal or international armed conflict.

Autonomous sanctions measures are intended to achieve three objectives:

- (a) to limit the adverse consequences of the situation of international concern (for example, by denying access to military or paramilitary goods, or to goods, technologies or funding that are enabling the pursuit of programs of proliferation concern);
- (b) to seek to influence those responsible for giving rise to the situation of international concern to modify their behaviour to remove the concern (by motivating them to adopt different policies); and
- (c) to penalise those responsible (for example, by denying access to international travel or to the international financial system).

They are highly targeted measures, applied only to the specific governments, individuals or entities (in the form of targeted financial sanctions and travel bans), or to the specific goods and services (such as military goods or goods with a WMD dual use), that are responsible for, or have a nexus to, the situation of international concern. They are applied so as to minimise, to the extent possible, the impact on the general populations of the affected countries.

Such measures – either supplementary to, or independent of, United Nations Security Council sanctions – are likely to play an increasing part in responses of like-minded countries to situations of international concern.

Australia has actively applied autonomous sanctions as a foreign policy tool for a number of years, relying on existing instruments, intended for other purposes. To achieve more effectively the objectives underlying imposing autonomous sanctions, including the need to participate in concerted international action involving other, like-minded countries, the types of measures Australia would wish to implement are likely to go beyond the scope of these instruments.

The purpose of the Bill is to strengthen Australia's autonomous sanctions regime by allowing greater flexibility in the range of measures Australia can implement, thus ensuring Australia's autonomous sanctions match the scope and extent of measures

implemented by like-minded countries. The Bill will also assist the administration of, and compliance with, sanctions measures by removing distinctions between the scope and extent of autonomous sanctions and UN sanction enforcement laws.

The Bill is modelled on the legislation with which Australia implements United Nations Security Council sanctions, the *Charter of the United Nations Act 1945*. It is intended to be a framework under which regulations are made, with each set of regulations containing the specific measures to be imposed in response to a particular situation of international concern.

By providing for autonomous sanctions measures to be applied by regulation, rather than under the Bill itself, the Bill will allow the necessary flexibility for the Government to respond to international developments in a timely way. It will also enable the Government to harmonise the administration of autonomous sanctions and UN sanction enforcement laws, and simplify compliance arrangements for those entities whose business requires a regular and active engagement with the operation of such laws.

Financial Impact

There is no financial impact.

NOTES ON CLAUSES

Part 1—Preliminary

Clause 1 Short title

This is a formal clause which provides the citation of the Bill.

Clause 2 Commencement

Clause 2 provides that the Bill (once enacted) commences on the day after it receives the Royal Assent.

Clause 3 Purposes of this Act

This clause provides that the main purposes of the Bill (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.

Clause 4 Definitions

This clause defines the following terms as used in the Bill (once enacted): “asset”; “Australia”; “autonomous sanction”; “CEO of a Commonwealth entity”; “Commonwealth entity”; “designated Commonwealth entity”; “foreign government entity”; “officer of a Commonwealth entity”; “public international organisation”; “sanction law”; “State or Territory entity”; “superior court”.

Clause 5 Specifying a Commonwealth entity as a designated Commonwealth entity

This clause provides that the Minister for Foreign Affairs may by legislative instrument specify a Commonwealth entity as a designated Commonwealth entity.

A designated Commonwealth entity is an entity involved in the administration of sanctions laws. Designation of an entity under the Bill (once enacted) confers on the CEO of that entity certain powers provided for in Part 4 of the Bill in relation to obtaining and sharing information for a purposes related to the administration of sanctions laws.

Clause 6 Specifying a provision as a sanction law

This clause provides that the Minister may by legislative instrument specify a provision of a law of the Commonwealth (including in relation to particular circumstances) as a sanction law for a purpose stated in clause 3.

Once a law is specified as a “sanction law”, the provisions of Parts 3 (offences relating to sanctions) and 4 (information relating to sanctions) of the Bill (once enacted) will apply to that law.

Clause 7 Extension to external Territories

This clause provides that the Bill (once enacted) extend to every external Territory.

Clause 8 Act binds the Crown

This clause provides that the Bill (once enacted) binds the Crown in each of its capacities, but does not make the Crown liable to be prosecuted for an offence.

Clause 9 Relationship with other laws

This clause provides that the Bill (once enacted) does not limit the operation of other laws of the Commonwealth so far as they operate to provide for autonomous sanctions or operate in relation to autonomous sanctions.

Part 2—Regulations to provide for sanctions

Division 1—Making and effect of regulations

Clause 10 Regulations may apply sanctions

This clause provides that regulations made under the Bill (once enacted) may make provision relating, amongst other things, to proscription of persons or entities; restriction or prevention of uses of, dealings with, and making available of, assets; as well as restriction or prevention of the supply, sale, transfer or procurement of goods or services. Before the Governor-General makes such regulations, the Minister for Foreign Affairs must be satisfied that the proposed regulations will facilitate the conduct of Australia's relations with other countries or with entities or persons outside Australia or will otherwise deal with matters, things or relationships outside Australia. Despite subsection 14(2) of the *Legislative Instruments Act 2003*, regulations made under the Bill (once enacted) may make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.

The purpose of subclause 10(3) is to enable the regulations to incorporate decisions of public international and national institutions, through publicly available documents, relevant to the administration and enforcement of Australian autonomous sanctions.

Examples of types of 'other writing' that could be incorporated by reference in regulations under subclause 10(3) include documents listing goods of particular sensitivity in the context of the proliferation of weapons of mass destruction, as prepared by international export control regimes in which Australia is an active participant, such as the Nuclear Suppliers Group, the Missile Technology Control Regime, the Australia Group or the Wassenaar Arrangement. The 'reference' would in all cases be to documents publicly and readily available on the Internet.

Clause 10 allows the Government the necessary flexibility to apply new, or amend existing, autonomous sanctions measures 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.

Clause 11 Regulations may have extraterritorial effect

This clause provides that the regulations may have extraterritorial effect.

Clause 12 Effect of regulations on earlier Commonwealth Acts and on State and Territory laws

Clause 12 provides that the regulations have effect despite an Act enacted before the commencement of this clause; or an instrument made under such an Act (including such an instrument made at or after that commencement); or a law of a State or Territory; or an instrument made under such a law.

This clause ensures that the fact that autonomous sanctions measures are applied under regulations (for the reasons set out in relation to clause 10 above) will not prevent them having effect if pre-existing Commonwealth, State or Territory legislation or legislative instruments would otherwise conflict with those measures.

Clause 12 substantially corresponds to section 9 of the *Charter of the United Nations Act 1945*, which was introduced by an amendment to that Act in 1993 and further amended in 2001.

The decision to impose sanctions is properly one for the Executive as a matter of foreign policy, with the Parliament setting the framework and parameters for how such measures will be reflected in Australian law. The measures applied are highly targeted, applied only to specific foreign governments, individuals and entities or to specific goods and services where there is a nexus to situations of international concern.

It is appropriate that measures applied with the intention of limiting the adverse consequences of a situation of international concern should not be prevented from taking effect as intended and should not be affected by pre-existing legislation of legislative instruments of the Commonwealth or a State or Territory.

Clause 13 Later Acts not to be interpreted as overriding this Part or the regulations

This clause provides that an Act enacted at or after the commencement of this clause is not to be interpreted as amending or repealing, or otherwise altering the effect or operation of, a provision of Part 2 of the Bill (once enacted) or of the regulations, or authorising the making of an instrument that does so, unless that Act provides expressly that it, or an instrument made under it, has effect despite the Bill (once enacted), despite the regulations, or despite a specified provision of the Bill (once enacted) or of the regulations.

Clause 13 substantially corresponds to section 10 of the *Charter of the United Nations Act 1945*, introduced by amendment in 1993. Sub-clause 13(2) preserves Parliament's authority to enact legislation which either directly amends, repeals, or otherwise alters the effect or operation of, a provision of Part 2 of the Bill or of regulations made

under clause 10, or which authorises the making of an instrument that does so. Therefore, the provision does not derogate from any power of the Parliament. The only limitation is that such legislation should expressly provide that that is its purpose.

Given the significance of the Bill and the regulations in the context of seeking to deal with situations of international concern, including prevention of nuclear proliferation, it is appropriate that substantive changes to the Bill (once enacted) or regulations made under it be done deliberately and expressly, rather than through inadvertent or implied inconsistencies in future legislation or regulations.

Division 2—Enforcing the regulations

Division 2 of Part 2 provides for measures relating to the enforcement of regulations made under clause 10. The measures in Division 2 of Part 2 are to be distinguished from measures in the Bill providing for the enforcement of autonomous sanctions, as referred to in paragraph 3(b) of the Bill. The measures to which paragraph 3(b) apply, relate to all laws specified by the Minister as ‘sanction laws’ under clause 6, and not merely those found in regulations made under clause 10. Enforcement of ‘sanctions laws’, within the meaning of paragraph 3(b), is governed by Parts 3 and 4 of the Bill.

Clause 14 Injunctions

This clause 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.

Subclause 14(5) provides that a court is not to require the Attorney-General or anyone else to give an undertaking as to damages, as a condition of granting an interim injunction.

The purpose for which the Attorney-General might seek an injunction under the Bill is to seek to prevent the contravention of a sanctions law, which would be a criminal offence. It is not appropriate, as a matter of policy, to require an undertaking as to damages in an injunction which seeks to prevent the commission of a criminal offence.

It is an established principle of law that liability shall not accrue with respect to a lawfully made decision of a Minister. Subclause 14(5) is consistent with this principle.

Clause 15 Invalidation of authorisations

This clause provides that an authorisation (however described) granted under the regulations is taken never to have been granted if information contained in, or information or a document accompanying, the application for the authorisation is false or misleading in a material particular; or omits any matter or thing without which the information or document is misleading in a material particular.

Part 3—Offences relating to sanctions

Clause 16 Offence—contravening a sanction law

Clause 16 provides that it is an offence to contravene a sanction law, or an authorisation (however described) under a sanction law. When committed by an individual, the offence is punishable on conviction by a maximum 10 years' imprisonment, and / or a maximum fine the greater of 3 times the value of the relevant transaction or transactions (if this can be calculated) or 2,500 penalty units. When committed by a body corporate, it is an offence of strict liability. The offence does not, however, apply to a body corporate if it proves that it took reasonable precautions, and exercised due diligence, to avoid contravening the sanction law or authorisation concerned. The offence for a body corporate is punishable on conviction by a maximum fine the greater of 3 times the value of the relevant transaction or transactions (if this can be calculated) or 10,000 penalty units.

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.

Clause 17 Offence—false or misleading information given in connection with a sanction law

This clause provides that it is an offence to give information or a document which is false or misleading in a material particular to a Commonwealth entity in connection with the administration of a sanction law, or to another person reckless as to whether that information or document will be given to a Commonwealth entity in connection with the administration of a sanction law. The penalty upon conviction is imprisonment for 10 years, 2,500 penalty units or both. Section 15.1 of the *Criminal Code* (extended geographical jurisdiction—category A) applies to such offences. This clause ensures, for the same reasons set out in relation to clause 16, that the consequences for providing false and misleading information in relation to the administration of sanctions laws are identical to providing false or misleading information in relation to the administration of UN sanction enforcement laws under the *Charter of the United Nations Act 1945*.

Part 4—Information relating to sanctions

Clause 18 CEO of Commonwealth entity may give information or document on request by CEO of designated Commonwealth entity

Clause 18 provides that the CEO of a Commonwealth entity may, at the request of a CEO of a designated Commonwealth entity, give that CEO specified information or documents for a purpose directly related to the administration of a sanction law, despite any other law of the Commonwealth, a State or a Territory.

Clause 19 Power to require information or documents to be given

This clause provides that the CEO of a designated Commonwealth entity may, for the purpose of determining whether a sanction law has been or is being complied with, give a person a written notice requiring the person to give the CEO information or documents of the kind, by the time and in any manner or form, specified in the notice. The person must comply with the notice despite any other law of the Commonwealth, a State or a Territory. This clause does not apply to obtaining information or documents from the Commonwealth or a Commonwealth entity.

Clause 20 Information may be required to be given on oath

This clause provides that the notice referred to in clause 19 may require the information to be verified by, or given on, oath or affirmation.

Clause 21 Offence for failure to comply with requirement

Clause 21 provides that it is an offence not to comply with a notice given under clause 19, punishable upon conviction by imprisonment for 12 months. Section 15.1 of the *Criminal Code* (extended geographical jurisdiction—category A) applies to this offence.

Clause 22 Self-incrimination not an excuse

This clause provides that an individual is not excused from giving information or a document under clause 19 on the ground that the information, or the giving of the document, might tend to incriminate the individual or otherwise expose the individual to a penalty or other liability. However, because of this, neither the information given nor the giving of the document is 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).

Clause 22 of the Bill corresponds to section 33 the *Charter of the United Nations Act 1945*, introduced by amendment in 2007. Section 33 is one of a number of measures which implemented Recommendation 3 of the Cole Inquiry. Given the correspondence between autonomous and UNSC sanctions, it is appropriate that the same authority exists to enable sanctions enforcement agencies to monitor compliance with both UNSC and autonomous sanctions.

Clause 23 CEO may copy documents

This clause provides that the CEO of a designated Commonwealth entity may take and keep a copy of a document given by a person under clause 19, but must return the document to the person within a reasonable time.

Clause 24 Further disclosure and use of information and documents

This clause provides that an officer of a designated Commonwealth entity may, for a purpose connected with the administration of a sanction law, copy, make a record of or use any information or document and disclose any information, or give any document, to another officer of that entity.

A CEO of a designated Commonwealth entity may, for a purpose connected with the administration of a sanction law, disclose any information or give any document to a Minister of the Commonwealth, a State or a Territory, or the CEO of another Commonwealth entity, or a State or Territory entity, or a foreign government entity, or a public international organisation, or a person or entity specified by the Minister for Foreign Affairs in an instrument under this clause. The CEO may only do so if he or she is satisfied that the recipient of the disclosure will not disclose the information to anyone else without the CEO's consent.

This clause applies despite a law of the Commonwealth (other than this clause) and a law of a State or a Territory.

Clause 24 correspond to paragraph 35(2)(f) and subsection 35(3) of the *Charter of the United Nations Act 1945*, introduced by amendment in 2007.

The inclusion of the category of a person or entity specified by the Minister provides a limited degree of additional flexibility in the categories of persons or entities with whom information or documents can be shared. This helps to ensure that enforcement of sanction laws is not stymied through the incapacity to exchange information with relevant persons or entities.

Specification by legislative instrument, a disallowable instrument, subjects the specification to Parliamentary scrutiny.

Clause 25 Protection from liability

Clause 25 provides that a person who, in good faith, gives, discloses, copies, makes a record of or uses information or a document under clauses 18, 19, 23 or 24 is not liable to any proceedings for contravening any other law because of that conduct or to civil proceedings for loss, damage or injury of any kind suffered by another person or entity because of that conduct. This does not prevent the person from being liable to a proceeding for conduct of the person that is revealed by the information or document.

Clause 25 corresponds to section 36 of the *Charter of the United Nations Act 1945*, introduced by amendment in 2007. The purpose of the immunity in clause 25 is to protect individuals who act in accordance with the provisions in clauses 18, 19, 23 and 24.

Clause 26 Retention of records and documents

This clause provides that a person who applies for an authorisation under a sanction law must retain any records or documents relating to that application for a period of 5 years from the day on which the application was made (if the authorisation was not granted) or the last day on which an action to which the authorisation relates was done (if the authorisation was granted). Similarly, a person who is granted an authorisation under a sanction law must retain any records or documents relating to the person's compliance with any conditions to which the authorisation is subject for the period of 5 years beginning on the last day on which an action to which the authorisation relates was done.

Clause 27 Delegation

This clause provides that the CEO of a Commonwealth entity may by written instrument delegate all or any of his or her powers or functions under Part 4 of the Bill (once enacted) to an employee at the SES or equivalent level. In exercising powers or performing functions delegated under this clause, the delegate must comply with any directions of the CEO.

“SES employee” is defined for the purpose of Commonwealth law in section 17AA of the *Acts Interpretation Act 1901*.

Part 5—Miscellaneous

Clause 28 Regulations

This clause provides that the Governor-General may make regulations prescribing matters required or permitted by the Bill (once enacted) to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Bill (once enacted).