FSC FINANCIAL SERVICES COUNCIL

16 August 2010

Senate Standing Committee on Foreign Affairs, Defence and Trade
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

By email: fadt.sen@aph.gov.au

Dear Sir/Madam

Inquiry into the Autonomous Sanctions Bill 2010

The Financial Services Council[1] is the peak body representing the retail and wholesale funds management, superannuation and life insurance industries. The Financial Services Council has over 135 members who are responsible for investing over $1 trillion on behalf of more than ten million Australians.

We are grateful for the opportunity to make this submission on the Autonomous Sanctions Bill 2010. The Financial Services Council (FSC) supports the proposal to streamline the administration of sanctions by changes to the autonomous sanctions regime.

It is the FSC's view that the proposal will go some way to improve administration of the autonomous financial sanctions regime. The Council also considers the Inquiry to be an opportunity to raise concerns about compliance with the existing *sanctions regime* (autonomous and UN Security Council[2]), which will continue to go unresolved under the proposed new regime.

The FSC's comments are set out below for the Inquiry's consideration. For each concern, a recommendation is provided.

1 Clarification needed - application of the law

The key obligations are to freeze assets and refrain from entering into transactions in respect of individuals, entities, goods, services and countries that are subject to the Australian Autonomous Sanctions.

[1] The Financial Services Council, until recently, was known as the Investment and Financial Services Association (IFSA).
[2] UN Security Council through the *Charter of the United Nations Act 1945* (Cth) (COTUNA)

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Strict compliance with the law would require checking sanctions lists **prior** to establishing a business relationship or screening each and every recipient **before** making a payment in addition to ongoing periodic checking of persons and entities against sanctions lists.

All Australians (individuals and companies) cannot deal with certain persons/entities.

Implicitly in order to comply, there must be some prevention measures to stop inadvertent or otherwise, dealings. The only feasible way is to check targeted financial sanction lists before providing money or making other assets available.

The FSC questions the extent to which the law is meant to apply. For example, does a vendor first check sanction lists before selling a house or a car? Does every company in Australia first check sanction lists before providing assets, including the provision of money?

The *sanctions regime* may satisfy foreign policy needs on paper. However, the lack of application may prevent practical compliance and in turn results in a weak basis for enforcement.

Recommendation 1: That the *sanctions regime* includes a provision on application of the law. At the least, guidance should be provided on the application of the law to clarify who should comply and how.

2 Need for efficiency

If all Australian companies are ensuring that they are not providing assets to proscribed persons/entities, it would require checking account holders as well as transactions before they are executed.

The result is significant duplication of effort, compliance cost and inefficiency. If every Australian company actively complied with the law (in its current state), it would slowdown commerce significantly.

The most common underlying asset is monetary. Financial transactions underscore every single transfer of asset in the economy. A typical transaction involves several companies/individuals in a transfer chain. Such is the nature of our inter-dependent financial service network.

For example, a customer (payer) asks their financial institution to send money to someone else (payee). The financial institution would first check that both the payee and the next financial institution are not on a sanction list. Funds are then sent to the second financial institution, which would check that all the persons/entities in the transaction chain are not on a sanction list. This can happen multiple times before the funds reach the intended recipient (payee). All financial institutions in the transaction chain are involved in making assets available.

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Another set of laws has overcome duplication by targeting the 'gatekeepers'[3] of such transactions, namely the *Financial Transaction Reports Act 1988* (Cth) (FTR Act) and the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (AML/CTF Act). The laws place obligations on certain Australian entities to report all international funds transfers. This was efficiently put into place by acknowledging that instructions to send international funds transfers go between many domestic institutions before the funds are actually sent overseas.

Instead of imposing a reporting obligation on every institution, the FTR Act and the AML/CTF Act impose it on the last sender of funds out of Australia and the first receiver of funds into Australia. They recognise that the only institutions that are able to be in those 'sender' and 'receiver' positions are ADIs[4] or remittance service providers[5]. This is an example of efficient application of the law.

Gatekeepers could also be identified in the trade (import/export) industries, to capture Trade Sanctions compliance. It would be targeted at those who directly finance the import/export of goods and services.

Recommendation 2: Propose the obligations sit with 'gatekeepers' of sanction risks. Alternatively, there should be a provision in the sanctions regime to allow for reliance on gatekeepers.

3 Need to set the scope of sanction risk (domestic v international)

The key obligation does not address the scope of the sanction risk. Is it implied that Australian companies need to check domestic exposures (persons/entities/transactions) against sanction lists, or only international exposures?

We assume that there are no Australian persons/entities on the UN or Australian autonomous sanction lists[6]. The basis is that if there were, the Australian Government would not allow them into Australia. We rely on the controls of the Department of Immigration and Citizenship[7] and ASIC[8] to ensure that there are no persons in Australia (either domiciled or visiting) on these sanction lists.

Points 1 to 3 also apply to trade sanctions. Again, it would need to be defined and gatekeepers identified and consulted to define the scope.

Recommendation 3a: That the abovementioned controls are validated and reflected in revised legislation. The combination of measures would allow the Australian *sanction regime* to scope the obligation to international exposures only.

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[3] This is an FSC term, not a term used in the legislation.
[4] Authorised Deposit Taking Institutions, licensed by APRA.
[5] These are defined and registered under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth).
[6] There is nothing on the *sanctions regime* lists to indicate persons/entities are Australian.
[7] We assume that customs checks against sanction lists when persons enter the country and as part of the processing of visa applications, passport issuing.
[8] We believe it is reasonable to rely on ASIC to ensure that sanctioned entities/persons are not registered.

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We are aware that USA sanctions actively seek enforcement for breaches of their extra-territorial sanctions regime, including Australian companies in their scope. A strong sanctions framework in Australia is required to provide protection for Australian companies from inadvertent breaches of foreign sanction law and protect Australia's standing in respect of its fellow UN members.

Recommendation 3b: To strengthen the regime, a government agency would also check whether there are persons/entities in Australia who also appear on the autonomous sanction lists of other countries and publish the information on an Australian government website. This would support those Australian companies that must comply with foreign autonomous sanction regimes.

The FSC submits that the Autonomous Sanctions Bill would reduce the burden of sanctions administration, which will assist both enforcement and those attempting to comply. However, further steps need to be taken to address how these laws can be applied practically, and effectively enforced.

Please contact me on (02) 8235 2531 if you wish to discuss these matters further.

Yours sincerely

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