Australian Government

Department of Foreign Affairs and Trade

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Ms Fiona Bowring-Greer
Committee Secretary
Parliamentary Joint Committee on Law Enforcement
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Ms Bowring-Greer

Further to your letter of 25 October 2012 to Ms Gillian Bird, A/g Secretary of the Department of Foreign Affairs and Trade, please find attached the submission of the Department of Foreign Affairs and Trade to the Committee's Inquiry into the *Regulatory Powers (Standard Provisions) Bill 2012*.

The submission encompasses the views of the Department in relation to legislation implementing United Nations Security Council and Australian autonomous sanctions and legislation implemented by the Australian Safeguards and Non-Proliferation Office.

Part 1 – Sanctions

Introduction

The *Regulatory Powers (Standard Provisions) Bill 2012* (the Bill) represents an opportunity to improve the range of regulatory response options to contraventions of Australian laws implementing United Nations Security Council ('**UNSC**') sanctions and Australian autonomous sanctions.

Controls on trade in goods and services and financial restrictions against persons and entities designated by the UNSC are implemented through regulations made under the *Charter of the United Nations Act 1945* ('**the CotUNA**').

Australian autonomous sanctions applying controls in trade in goods and services, certain investment and commercial activities, access to Australian ports and financial restrictions against persons and entities designated by the Minister for Foreign Affairs are implemented under the *Autonomous Sanctions Act 2011* ('**the ASA**') and the *Autonomous Sanctions Regulations 2011* ('**the ASR**').

Breaches of '**UN sanction enforcement laws**' under Part 4 and Part 5 the CotUNA and '**sanctions laws**' under Part 3 the ASA are serious criminal offences. The consequences for contravening, or for providing false and misleading information in relation to 'UN sanction enforcement laws' and 'sanctions laws' are identical.

Enforcement of UNSC and autonomous sanctions

Responses for dealing with contraventions of UN sanction enforcement laws and sanctions laws are currently limited to two enforcement options. One is an application by the Attorney-General to a superior court for an injunction restraining a person from engaging in the contravening conduct (sections 13 and 26 of the CotUNA and section 14 of the ASA). The other is referral of an alleged contravention to the Australian Federal Police for investigation.

These response options are often disproportionate to the vast majority of contraventions of UN sanction enforcement laws and sanctions laws, are unnecessarily resource intensive, time consuming and lacking in flexibility. Most contraventions of sanctions laws are inadvertent and usually, with the full and willing cooperation of the organisation or individual in question, are capable of being easily remedied.

The availability of a wider range of regulatory options to the CotUNA and the ASA, including the application of civil penalty provisions, infringement notices and enforceable undertakings, would provide for a more flexible and more nuanced approach to the administration and enforcement of UNSC and Australian autonomous sanctions regimes.

Facilitating the collection, flow and use of information

Part 6 of the CotUNA and Part 4 of the ASA already include robust provisions facilitating access to information for purposes associated with the administration and enforcement of UN sanction enforcement laws and sanctions laws.

These measures remove impediments for the sharing of such information within the Commonwealth, and allowing specially designated Commonwealth entities, responsible for the administration and enforcement of UN sanction enforcement laws and 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.

The application of the monitoring powers in Part 2 and the investigation powers in Part 3 of the Bill to the CotUNA and the ASA would provide additional regulatory options to ensure that UN sanction enforcement laws and sanctions laws are being complied with and to investigate whether suspected breaches of these laws have occurred.

Conclusion

Amendments to the CotUNA and the ASA would need to be introduced before the regulatory powers in the Bill could be triggered and applied directly to the regulations under the CotUNA and the ASA. The Department of Foreign Affairs and Trade conducts regular outreach on sanctions and would conduct appropriate public consultation in advance of any such application of the provisions of the Bill to the CotUNA and the ASA.

Part 2 – Australian Safeguards and Non-Proliferation Office

The Australian Safeguards and Non-Proliferation Office (ASNO) is pleased to provide this submission to the Parliamentary Joint Committee on Law Enforcement (PJCLE) for the purposes of its Inquiry into the Regulatory Powers (Standard Provisions) Bill 2012.

This submission focuses on the effect of the Bill to regulatory and enforcement powers as these relate to legislation administered by ASNO.

ASNO implements the *Nuclear Non-Proliferation (Safeguards) Act 1987*, (the Safeguards Act), the *Chemical Weapons (Prohibition) Act 1994* (the CWP Act) and the *Comprehensive Nuclear Test-Ban Treaty Act 1998* (the CTBT Act). With regard to the *South Pacific Nuclear Free Zone Treaty Act 1986* (SPNFZ Act), SPNFZ Act inspectors are persons appointed as an inspector under the Safeguards Act. In broad terms, these acts domestically implement treaty obligations given under the Nuclear Non-Proliferation Treaty and associated Agreements with the International Atomic Energy Agency (IAEA), The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (the Chemical Weapons Convention), the Comprehensive Nuclear-Test-Ban Treaty and the South Pacific Nuclear Free Zone Treaty.

ASNO perceived benefits

ASNO notes the Bill's enforcement provisions through use of civil penalty, infringement notices, enforceable undertakings and injunctions. These provisions could allow greater flexibility in the legislation that ASNO administers, potentially allowing ASNO to effect civil law proceedings in some circumstances.

ASNO notes the Bill's sections relating to identity cards, noting that this will serve to standardize the form of the identity card across Commonwealth regulatory agencies, including for ASNO.

ASNO notes acknowledgment in the Bill's Explanatory Memorandum (EM) and the second reading speech that some regulatory agencies may have specific requirements that are not met in this Bill and may choose not to trigger the Bill or choose to trigger certain parts, when enacted. National security was cited as an example where some agencies would continue to require specialised powers that exceeded those powers given under the Bill.

ASNO perceived concerns

In the case for ASNO, for example, emergency search and seizure powers are given under the Safeguards Act, the CWP Act and the SPNFZ Act and are exercised in circumstances of such seriousness and urgency as to require and justify the immediate exercise of those powers without the need for a warrant. The Bill has no provision for the exercise of such powers.

Furthermore, the broad powers already given under the Safeguards Act, the CWP Act and the SPNFZ Act, including warrants, allow for the exercise of powers of

authorised persons, are proposed to be segregated into Monitoring and Investigation powers and Monitoring and Investigation warrants. ASNO considers that the broad powers under current legislation are required in order to address national security considerations as well as Australia's treaty obligations, which each of the four pieces of legislation domestically implement.

ASNO also has concerns regarding the Bill's proposal for an occupier of premises to withdraw consent, already given, or limit consent to a particular period. ASNO considers that this could constrain inspections to the extent that some treaty obligations could not be met.

Specifically in relation to the Safeguards Act, the Bill would remove a power given under the Act which stipulates consent to be given by a permit holder, as a condition of permit.

Nuclear Non-Proliferation (Safeguards) Act 1987

The *Nuclear Non-Proliferation (Safeguards) Act 1987* (Safeguards Act), forms the legislative basis for ASNO's nuclear safeguards activities. The Safeguards Act gives effect to Australia's obligations under: the Nuclear Non-Proliferation Treaty, Australia's safeguards agreement and Additional Protocol with the IAEA, agreements between Australia and various countries (and Euratom) concerning transfers of nuclear items and cooperation in peaceful uses of nuclear energy, the Convention on the Physical Protection of Nuclear Material (CPPNM) and the International Convention for the Suppression of Acts of Nuclear Terrorism (ICSANT).

The Safeguards Act also establishes a system for control over nuclear material and associated items in Australia through requirements for permits for their possession and transport, which may include provisions in relation to inspections to be permitted. Communication of information contained in sensitive nuclear technology is also controlled through the grant of authorities.

In particular, Safeguards Act functions include:

- ensuring the effective operation of the Australian safeguards system
- ensuring the physical protection and security of nuclear material and items in Australia
- carrying out Australia's obligations under Australia's safeguards agreement and Additional Protocol with the IAEA
- carrying out Australia's obligations under Australia's nuclear cooperation agreements with other countries and Euratom
- operating Australia's bilateral nuclear cooperation agreements and monitoring compliance with the provisions of these agreements

The Safeguards Act allows for national and International Atomic Energy Agency inspectors and provides comprehensive powers for inspection arrangements, including the right for inspectors to gather information, to collect and remove samples, and to apply and operate containment and surveillance (which includes electronic equipment) at declared nuclear facilities in Australia. IAEA inspectors, in the

presence of national inspectors are also given the authority to visit any facility, declared or not, to investigate questions about, or inconsistencies in, Australia's nuclear declarations. Access to locations by inspectors is by consent of the occupier of any premises, in accordance with an agreement, either oral or written, between Director General ASNO and the occupier of any land or premises or by warrant issued by a magistrate.

Under the Safeguards Act, a permit condition with respect to doing an act or thing may be imposed by reference to the approval or consent being obtained before the act or thing may be done, which includes activities such as inspections or examination of records. ASNO would not wish to relinquish these powers, as these relate to permit holders under the Safeguards Act in order to ensure that Australia's obligations can be met.

Chemical Weapons (Prohibition) Act 1994

The *Chemical Weapons (Prohibition) Act 1994* (the CWP Act) gives effect to Australia's obligations, responsibilities and rights as a State Party to the Chemical Weapons Convention (CWC). The Organisation for the Prohibition of Chemical Weapons (OPCW) is the body responsible for ensuring the implementation of the CWC globally and for verifying the destruction of existing chemical weapons stockpiles and State Party declarations of chemical activities.

In particular, the CWP Act:

- prohibits activities connected to the development, production or use of chemical weapons, including assisting anyone engaged in these activities, whether intentionally or recklessly – such offences are punishable by life imprisonment
- establishes permit and notification systems to provide a legal framework for the mandatory provision of data to ASNO by facilities which produce or use chemicals as specified by the CWC, so that ASNO can lodge declarations with the OPCW
- provides for routine inspections of declared facilities and challenge inspections of any facility or other place in Australia by OPCW inspectors to verify compliance with the CWC, and for inspections by ASNO to verify compliance with the CWP Act
- provides for procedures should another State Party seek clarification concerning compliance with the CWC at any facility or other place or by any person in Australia.

Regulations under the CWP Act prescribe procedures and details of other arrangements provided for in the CWP Act. In particular the Regulations grant privileges and immunities to OPCW inspectors and for a foreign Observer (subject to consent by the facility in event of a challenge inspection) when in Australia to carry out inspections.

The CWP Act allows national and OPCW inspectors comprehensive powers for routine inspection arrangements at declared facilities in Australia, subject to any facility arrangement in place, including: the right for inspectors to search a facility,

gather information, take and remove samples, measure a matter or thing, operate any equipment (which includes electronic equipment) and take onto a facility any equipment or material that is approved by the OPCW.

OPCW inspectors, in the presence of national inspectors are also given the authority to inspect any facility, declared or not, to investigate and resolve any questions concerning Australia's possible non-compliance with the provisions of the CWC. The CWP Act allows National and OPCW inspectors powers in addition to those for a routine inspection, including: the right to take photographs, monitor the exit of all vessels, aircraft or vehicles (other than personnel or personal vehicles) leaving the site, verify the proper functioning or calibration of any equipment, install and operate on-site monitoring equipment and to do any other act or thing necessary or convenient to be done in order to carry out a challenge inspection.

Access to locations or declared facilities by inspectors is by consent of the occupier of any premises, or by warrant issued by a magistrate.

Comprehensive Nuclear Test-Ban Treaty Act 1998

The *Comprehensive Nuclear Test-Ban Treaty Act 1998* (the CTBT Act) gives effect to Australia's obligations as a Party to the CTBT. It prohibits the causing of any nuclear explosion at any place within Australian jurisdiction or control and establishes a penalty of life imprisonment for an offence against this prohibition. The CTBT Act also prohibits Australian nationals from causing a nuclear explosion in any other place.

Article IV of the Treaty obliges States Parties to allow CTBT inspectors to inspect any place within their jurisdiction or control in an on-site inspection. The CTBT Act provides comprehensive powers for inspection arrangements, including the right for inspectors to gather information, to collect and remove samples, and to apply a range of monitoring and sensing techniques over a designated area. Access to locations by inspectors is by consent of the occupier of any premises, or by warrant issued by a magistrate.

Those sections of the CTBT Act related to the conduct of on-site inspections will come into effect following entry into force of the CTBT. Other sections of the CTBT Act relate to the offence of causing a nuclear weapons test explosion, or any other nuclear explosion, provision of a framework for the establishment and operation of International Monitoring System facilities in Australia, and a legal basis for the functioning of Australia's CTBT National Authority came into effect following proclamation by the Governor-General.

The CTBT Act allows for the Minister for Foreign Affairs to authorise a person to gain access to, or to do anything on, in or in relation to a Treaty monitoring facility; on such conditions as the Minister determines, if the Minister considers the authorisation necessary or desirable in order to give effect to Australia's obligations under the Treaty.

South Pacific Nuclear Free Zone Treaty Act 1986

The *South Pacific Nuclear Free Zone Treaty Act 1986* (SPNFZ Act), gives effect to Australia's obligations, responsibilities and rights under the South Pacific Nuclear Free Zone Treaty (SPNFZ Treaty). The SPNFZ Act also establishes the framework for SPNFZ Treaty inspections. Safeguards inspectors appointed under the Safeguards Act are also inspectors for the purposes of the SPNFZ Act. These inspectors are to assist SPNFZ Treaty inspectors and authorised officers in carrying out SPNFZ Treaty inspections and to investigate possible breaches of the SPNFZ Act.

The SPNFZ Act provides comprehensive powers for inspection arrangements, including the right for inspectors and Treaty inspectors to inspect or examine a matter or thing, to collect and remove samples, examine, take extracts from or make copies of a document or to do any other act or thing necessary to be done in order to carry out a Treaty inspection. Access to locations by inspectors is by consent of the occupier of any premises, or by warrant issued by a magistrate.

Conclusion

Careful consideration will be required when the time comes to decide how ASNO will work to ensure that its legislation is compatible with the Bill. Several approaches are envisaged in the EM including that ASNO maintain its own specialised powers, and to choose to only trigger certain provisions in the Bill that are relevant to carrying out ASNO's regulatory functions.