

The Senate

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Legal and Constitutional Affairs  
Legislation Committee

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Anti-Money Laundering and Counter-Terrorism  
Financing Amendment Bill 2017 [Provisions]

October 2017

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# Members of the committee

## Members

Senator the Hon Ian Macdonald (LNP, QLD) (Chair to 12 October 2017)

Senator David Fawcett (LP, SA) (Chair from 12 October 2017)

Senator Louise Pratt (ALP, WA) (Deputy Chair)

Senator Jane Hume (LP, VIC)

Senator Nick McKim (AG, TAS)

Senator Murray Watt (ALP, QLD)

## Substitute members

Senator Barry O'Sullivan (LNP, QLD) to replace Senator Ian Macdonald from 12 October 2017

## Secretariat

Mr Tim Watling, Committee Secretary

Mr Nicholas Craft, A/g Principal Research Officer

Ms Ophelia Tynan, Research Officer

Ms Alexandria Moore, Administrative Officer

Suite S1.61

Telephone: (02) 6277 3560

Parliament House

Fax: (02) 6277 5794

CANBERRA ACT 2600

Email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)



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# **Recommendations**

## **Recommendation 1**

**2.76** The committee recommends that the government consider whether the terms 'article', 'stored value card' and 'in the course of carrying on a business' in the bill and Explanatory Memorandum, could be better defined with a view to addressing the uncertainty expressed by some submitters, and amendments where relevant.

## **Recommendation 2**

**2.83** The committee recommends that the bill be passed.





# Chapter 1

## Introduction

1.1 On 17 August 2017 the Senate referred the provisions of the Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017 (the bill) to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 16 October 2017.<sup>1</sup>

1.2 The Selection of Bills Committee recommended that the bill be referred to the committee, commenting that:

This Bill deals with Australia's efforts to combat money laundering and terrorism financing. Given the importance and complexity of these matters, it would be prudent to have this Bill considered by Committee to:

- ensure proper scrutiny of the measures contained in the Bill;
- engage with stakeholders who will be impacted; and
- hear evidence from agencies working in this area.<sup>2</sup>

### Background and overview of the bill

1.3 On 17 August 2017, the Hon. Michael Keenan MP, Minister for Justice and Minister Assisting the Prime Minister for Counter Terrorism (the Minister) announced a package of measures to amend the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act).<sup>3</sup> The Minister stated that the bill is the first stage of reforms to strengthen the AML/CTF Act and increase the powers of the Australian Transactions and Reporting Analysis Centre (AUSTRAC).<sup>4</sup>

1.4 The reforms were prompted by the recommendations of the *Report on the Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 and Associated Rules and Regulations* (Report on the Statutory Review), which was tabled in the Parliament on 29 April 2016. Conducted by the Attorney-General's Department (AGD), the Report on the Review made 86 recommendations to strengthen, streamline and simplify the Australian anti-money laundering and counter-terrorism financing legislative regime.<sup>5</sup>

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1 *Journals of the Senate*, No. 55, 17 August 2017, pp 1756–7.

2 Selection of Bills Committee, *Report No. 9 of 2017*, 17 August 2017, p. 1 and appendix 1.

3 The Hon Michael Keenan MP, Minister for Justice and Minister Assisting the Prime Minister for Counter Terrorism, 'Crackdown on money laundering and terrorism financing', *Media Release*, 17 August 2017.

4 The Hon Michael Keenan MP, Minister for Justice and Minister Assisting the Prime Minister for Counter Terrorism, 'Crackdown on money laundering and terrorism financing', *Media Release*, 17 August 2017.

5 The Hon Michael Keenan MP, Minister for Justice and Minister Assisting the Prime Minister for Counter-Terrorism, *House of Representatives Proof Hansard*, 17 August 2017, p. 8832.

1.5 This bill, consisting of a schedule containing seven parts, seeks to amend the AML/CTF Act and the *Financial Transaction Reports Act 1988* (FTR Act) to:

- expand the objects of the AML/CTF Act to reflect the domestic objectives of AML/CTF regulation;
- regulate digital currency exchange providers;
- provide regulatory relief to industry with measures such as clarifying due diligence obligations, qualifying certain terms and allowing certain bodies to share information;
- strengthen AUSTRAC's investigation and enforcement powers by expanding the powers of the AUSTRAC CEO;
- give police and customs officers broader powers to search and seize physical currency and bearer negotiable instruments (BNI) and establish civil penalties for failing to comply with questioning and search powers; and
- clarify other regulatory and administrative powers.<sup>6</sup>

### **Conduct of the inquiry**

1.6 Details of this inquiry were advertised on the committee's website, including a call for submissions to be received by 8 September 2017. The committee also wrote directly to some individuals and organisations inviting them to make submissions.

1.7 The committee received twelve submissions, which are listed at appendix 1 of this report and are available in full on the committee's website.<sup>7</sup>

1.8 A public hearing was held on 20 September 2017 at Parliament House in Canberra. A list of witnesses who appears before the committee is listed at appendix 3, and a Hansard transcript of the hearing is also available on the committee's website.

### **Financial implications of the proposed measures**

1.9 The Explanatory Memorandum (EM) includes a financial impact statement stating that the bill will be implemented within existing resources.<sup>8</sup> The EM also notes:

The overall financial impact of the Bill is estimated to be savings to industry each year for the ten years after the measures come into force totalling \$36,086,393.

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6 Explanatory Memorandum, p. 3.

7 Senate Legal and Constitutional Affairs Legislation Committee, *Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017 [Provisions]*, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/MoneyLaundering2017](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/MoneyLaundering2017).

8 Explanatory Memorandum, p. 4.

This financial impact includes average annual regulatory costs of \$662,221 for business and community organisations arising from measures to regulate digital currency exchange providers.<sup>9</sup>

1.10 Additionally, the financial impact to government also includes annual offsets for the ten years after the measures come into force, totalling around \$3.7 million.<sup>10</sup>

1.11 The EM states that these measures will have a positive financial impact by helping to prevent fraud against the Commonwealth and increase recovery efforts:

...from 2012 to 2015 the Australian Institute of Criminology estimated there was over \$1.2 billion in reported fraud, but only \$50 million was recovered during that period. The Bill reduces the complexity of investigating or otherwise controlling fraud against the Commonwealth to help increase recoveries and prevent fraud occurring.<sup>11</sup>

### **Compatibility with human rights**

1.12 The EM states that the bill is compatible with human rights.<sup>12</sup>

1.13 However, the committee is aware that the Parliamentary Joint Committee on Human Rights (PJCHR) expressed concern regarding the civil penalty provisions contained in section 175 of the AML/CTF Act, which would result in:

...an individual potentially being liable for a civil penalty of up to \$4.2 million for a failure to notify the AUSTRAC CEO of a change in circumstances that could materially affect the person's registration; a failure to declare an amount of currency or a bearer negotiable instrument when leaving or entering Australia; or providing a registrable digital currency exchange if not registered.<sup>13</sup>

1.14 The PCJHR noted that civil penalty provisions are treated in accordance with the rules and procedures that apply in relation to civil matters (the burden of proof is on the balance of probabilities).<sup>14</sup> However, it noted that:

...if a civil penalty provision is in substance regarded as 'criminal' for the purposes of international human rights law, it will engage criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR).<sup>15</sup>

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9 Explanatory Memorandum, p. 4.

10 Explanatory Memorandum, p. 4.

11 Explanatory Memorandum, p. 4.

12 Explanatory Memorandum, pp. 8–24.

13 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report*, Report 10 of 2017, 12 September 2017, p. 3.

14 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report*, Report 10 of 2017, 12 September 2017, p. 3.

15 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report*, Report 10 of 2017, 12 September 2017, p. 3.

1.15 After examining the provisions in mind of the PJCHR's *Guidance Note 2* which sets out some of the key human rights compatibility issues regarding civil penalties, the PJCHR found that while the provision was stated in the bill to be a civil penalty, it was in fact likely to be a criminal penalty due to its purpose as a deterrent measure.<sup>16</sup> The PJCHR particularly noted concerns with the severity of the penalty. The PJCHR indicated that the 'very significant' penalties arising from section 175 further indicate that it is a criminal penalty, and subsequently raises the concern that the provisions may be 'criminal' for the purposes of international human rights law. The PJCHR stated:

...the consequence of this would be that the civil penalty provisions in the bill must be shown to be compatible with the criminal process guarantees set out in articles 14 and 15 of the ICCPR. However, in this case the measure does not appear to be consistent with criminal process guarantees. For example, the application of a civil rather than a criminal standard of proof raises concerns in relation to the right to be presumed innocent. The right to be presumed innocent generally requires that the prosecution prove each element of the offence to the criminal standard of proof of beyond reasonable doubt. Accordingly, were the civil penalty provisions to be considered 'criminal' for the purpose of international human rights law, there would be serious questions about whether they are compatible with criminal process rights.<sup>17</sup>

1.16 The PJCHR sought the advice of the Minister as to whether:

- the civil penalty provisions in the bill may be considered to be 'criminal' for the purposes of international human rights law; and
- if they are considered 'criminal', whether the measures could be amended to accord with criminal process rights as per articles 14 and 15 under the ICCPR.<sup>18</sup>

1.17 To date, the PJCHR is yet to confirm whether a response has been received.

1.18 These concerns were shared by other submitters, and will be further examined in Chapter 2 of this report.

### **Structure of this report**

1.19 This report consists of two chapters:

- This chapter provides a brief background and overview of the bill, as well as the administrative details of the inquiry.

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16 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report*, Report 10 of 2017, 12 September 2017, p. 3.

17 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report*, Report 10 of 2017, 12 September 2017, p. 4

18 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report*, Report 10 of 2017, 12 September 2017, p. 4

- Chapter 2 outlines the provisions of the bill in more detail, discusses the concerns raised by submitters, and sets out the committee's view.

**Note on references**

1.20 References to Committee Hansard are to proof transcripts. Page numbers may vary between the proof and official transcripts.

**Acknowledgements**

1.21 The committee thanks all organisations and individuals that made submissions to this inquiry and all witnesses who attended the public hearing.



# Chapter 2

## Key issues

2.1 This chapter outlines the provisions of the bill in more detail, discusses the issues raised by submitters about the proposed amendments and outlines the committee's view.

2.2 Submitters to the inquiry were generally supportive of the bill's measures to implement the reforms arising from the *Report on the Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 and Associated Rules and Regulations* (Report on the Statutory Review).<sup>1</sup>

2.3 However, specific concerns were raised in relation to the following issues:

- the scope of the legislation;
- definitions in the bill;
- search and seizure powers for police and customs officials;
- the conferral of powers to the AUSTRAC Chief Executive Officer (CEO);
- strict liability offences;
- the introduction of a digital currency exchange; and
- the limits of the legislation in tackling international money laundering.

### Scope of the proposed legislation

2.4 In the Explanatory Memorandum (EM), the bill is described as significantly widening the scope of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (the AML/CTF Act).

2.5 The bill would provide the basis for the regulation of certain businesses by the Australian Transaction Reports and Analysis Centre (AUSTRAC), the Australian financial intelligence unit that collects information about the movement of money in the private sector, and money carried by travellers entering or leaving Australia.<sup>2</sup> AUSTRAC also shares financial intelligence with designated agencies (including Commonwealth agencies and international counterparts) 'in order to combat money laundering (ML), terrorism financing (TF) and other serious crime'.<sup>3</sup>

2.6 The Australian Bankers' Association (ABA) noted in its submission that the phrase 'other serious crimes' is used in the bill, but the words 'serious financial crimes' are currently used in the AML/CTF Act.<sup>4</sup> The ABA questioned the use of this phrase, stating that:

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1 Explanatory Memorandum, p. 3.

2 Explanatory Memorandum, p. 5.

3 Explanatory Memorandum, p. 3.

4 Australian Bankers' Association, *Submission 1*, p. 1.

The scope of the Act should be to detect, deter and disrupt money laundering, the financing of terrorism, and other serious financial crimes, but should not be more broadly applied to the deterrence of all 'serious crimes'. The ABA is unclear as to the reasons why the legislation is to be broadened beyond "serious financial crimes", as the regulatory need to justify such a large expansion has not been made. The Bill, as it stands will generate new and substantial regulatory costs for all of AUSTRAC's reporting entities (REs), not just banks, regardless of size.<sup>5</sup>

2.7 The ABA stated that the expanded scope of the phrase 'other serious crimes' would result in every relevant organisation being required to expand their transaction monitoring scenarios to include crimes of a non-financial nature. The ABA argued that this result would necessitate a longer transition period than is currently contained in the bill.<sup>6</sup>

2.8 Given this, the ABA recommended changing all references to 'serious crimes' to 'serious financial crimes'.<sup>7</sup>

## **Definitions**

2.9 Submitters raised a number of issues regarding the bill's proposed amendments to the definitions of terms in the AML/CTF Act, including:

- the definition of 'stored value card' (SVC);<sup>8</sup>
- the definition of 'in the course of carrying on a business';<sup>9</sup>
- the definition of 'signatory';<sup>10</sup> and
- the definition of 'article'.<sup>11</sup>

### ***Definition of 'stored value card'***

2.10 The bill would replace the definition of SVC in the AML/CTF Act. The EM states that this amendment has been made to 'provide industry with greater guidance as to what a SVC can include, while remaining broad, inclusive and sufficiently flexible to cover virtual cards'.<sup>12</sup> The EM expands on the new definition:

This new definition of SVC encompasses all things, whether real or virtual, that store monetary value in a form other than physical currency, or that give access to value stored in a form other than a physical currency. This is substantially similar to paragraph (a) of the previous definition of stored

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5 Australian Bankers' Association, *Submission 1*, p. 1.

6 Australian Bankers' Association, *Submission 1*, p. 2.

7 Australian Bankers' Association, *Submission 1*, p. 2.

8 Schedule 1, Part 6, Item 79.

9 Schedule 1, Part 4, Item 44.

10 Schedule 1, Part 6, Item 78.

11 Schedule 1, Part 5, Item 68.

12 Explanatory Memorandum, p. 44.



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value card, but is technically neutral and includes SVCs that are entirely virtual and do not exist as a physical card. The requirement to prescribe kinds of SVCs in regulations is removed.<sup>13</sup>

2.11 The EM further notes that credit and debit cards are excluded from the definition of the bill, and continue to be regulated by a separate part of the AML/CTF Act. However, it states that certain kinds of SVCs are not captured by the exclusion, such as pre-paid travel cards using credit card networks but not linked to an account provided by a financial institution.<sup>14</sup>

2.12 The Law Council of Australia (Law Council) noted that an 'unhelpful' distinction is drawn in the bill between the existing definition of 'debit cards' and the replacement definition:

[T]he distinction drawn by the existing definition and the replacement definition with 'debit cards' is unhelpful, as both debit cards and the great majority of prepaid cards in the market, have value stored in a ledger managed by the issuer. That is, although value is in all cases 'stored', the only place in practice where that 'storage' can be said to occur is in a ledger managed by the issuer. The sole distinction becomes whether the issuer is a 'financial institution' (in which case the stored value card definition would apparently not apply, given the inclusive definition of 'account'), or is not a 'financial institution' (in which case the product is able to be a 'stored value card').<sup>15</sup>

2.13 The Law Council stated that it did not consider that the policy basis of drawing a distinction based only on the status of the card issuer had been comprehensively explained in the EM or the bill.<sup>16</sup> It argued that, while the EM attempted to make a distinction between SVCs and 'debit cards', they could not be adequately distinguished, particularly in relation to many 'gift cards' and 'travel' cards which had value stored in and debited from an account with the issuer.<sup>17</sup>

2.14 The Law Council recommended that the bill provide greater clarity regarding SVCs issued by financial institutions.<sup>18</sup>

### ***Definition of 'in the course of carrying on a business'***

2.15 The bill would qualify the term 'in the course of carrying on a business' which already exists in the AML/CTF Act. The EM notes that consultation with industry during the review of the Act had revealed 'widespread concern' regarding the breadth

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13 Explanatory Memorandum, p. 44.

14 Explanatory Memorandum, p. 44.

15 Law Council of Australia, *Submission 8*, p. 2.

16 Law Council of Australia, *Submission 8*, p. 2.

17 Law Council of Australia, *Submission 8*, p. 2.

18 Law Council of Australia, *Submission 8*, p. 2.

of the definition that it 'could potentially capture businesses that provided such services incidental to their core function, or on a very occasional basis'.<sup>19</sup>

2.16 However, the Law Council expressed concerns with the new definition, noting that it is inconsistent with the replacement explanatory memorandum of the AML/CTF Act:

We say that the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* should be amended to specifically reflect the original intention that a reference in section 6 to a particular kind of business is intended to limit the broad scope of the defined term 'business' so that it applies only when the specified business is a core function or a substantive part of the operations of the relevant entity.<sup>20</sup>

2.17 The Attorney General's Department (AGD) stated that it was not anticipated that the amendment was likely to affect a significant number of entities, as there was frequently an overlap between entities that provide designated services.<sup>21</sup>

### ***Definition of 'signatory'***

2.18 The bill seeks to amend the definition of 'signatory'. The EM explains that the current definition of 'signatory' is considered too broad in practice, which has given rise to uncertainty. It states that the new definition will provide greater clarity:

The new definition focuses on the account holder and persons who have been authorised by the account holder to manage or exercise effective control over an account. This definition excludes persons who may 'instruct' an account provider where this is incidental to a specific transaction or transactions, in circumstances that fall short of management or control of the account.<sup>22</sup>

2.19 The ABA noted that the proposed definition may cause uncertainty regarding the types of scenarios and parties are intended to be captured. It recommended providing examples of such scenarios and parties to clarify its intended application.<sup>23</sup>

### ***Definition of 'article'***

2.20 Nyman Gibson Miralis expressed concern that the word 'article' used in the proposed section 199(3) is not defined either in the bill or in the AML/CTF Act.

2.21 It stated that the word 'article' could be broadly interpreted to include items such as laptops, smart phones, tablets or smart watches.<sup>24</sup> However, this was unclear in the EM and the bill. Moreover, they noted that the bill did not clarify whether the

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19 Explanatory Memorandum, p. 30.

20 Mr Charles Morland Bailes, President-elect, Law Council of Australia, *Committee Hansard*, 20 September 2017, p. 24.

21 Attorney-General's Department, *Submission 7*, p. 12.

22 Explanatory Memorandum, p. 43.

23 Australian Bankers' Association, *Submission 1*, p. 2.

24 Nyman Gibson Miralis, *Submission 2*, p. 6.

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ability to seize items such as laptops or smartphones would also include the power to compel the provision of passwords or passcodes.<sup>25</sup>

2.22 Nyman Gibson Miralis further noted the human rights implications of such a power to potentially compel the disclosure of personal information:

Notwithstanding entrenched human rights principles of a person's right to the presumption of innocence and the right to privacy, it cannot be Parliament's intention that Police can have unchecked and unlimited powers to search, seize, and force disclosure of a suspected person's personal information (such as passwords, or disclosure of pseudonym identities) without a warrant.<sup>26</sup>

2.23 The submission further noted that material obtained in such searches could be susceptible to court actions seeking to declare the searches invalid and unlawful.<sup>27</sup>

2.24 Nyman Gibson Miralis recommended that the term 'articles' be explicitly defined, including the kinds of classes of articles that are intended to be searched.<sup>28</sup>

### **Search and seizure powers**

2.25 The bill would broaden the search and seizure powers available to police and customs officers at Australian borders. The EM states that the bill will:

...give police and customs officers broader powers to search and seize physical currency and bearer negotiable instruments (BNI) and establish civil penalties for failing to comply with questioning and search powers.<sup>29</sup>

2.26 This would enable police and customs officials to demand to know how much money is being brought into or leaving Australia by travellers as well as order that money is produced upon demand. The EM provides a contextual background to the powers and the gaps experienced by law enforcement that the amendment seeks to address:

Police and customs officers do not have general search and seizure powers at the border under the AML/CTF Act. Instead, the search and seizure powers under the AML/CTF Act are linked to breaches of the current reporting requirements for physical currency and BNIs.

This leaves gaps in the ability of police and customs officers to search and seize physical currency and BNIs under the AML/CTF Act (e.g. in circumstances where a person is carrying physical currency under the \$10,000 threshold, or has not been asked to disclose whether they are carrying a BNI).<sup>30</sup>

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25 Nyman Gibson Miralis, *Submission 2*, p. 6.

26 Nyman Gibson Miralis, *Submission 2*, p. 6.

27 Nyman Gibson Miralis, *Submission 2*, p. 6.

28 Nyman Gibson Miralis, *Submission 2*, p. 7.

29 Explanatory Memorandum, p. 6.

30 Explanatory Memorandum, p. 38.

2.27 The Australian Federal Police (AFP) told the committee that search and seizure powers are currently limited to suspecting a breach of the cross-border reporting requirements.<sup>31</sup>

2.28 The Law Council noted their concern regarding the increase in search and seizure powers for police and customs officers:

It ... troubles us that with that goes the substantial increase in search-and-seizure power and the fact that that, as the scrutiny committee referred to, is invested, so far as we can see, in any police member and any member of Customs. Now, that is a significant power to invest in a person of that rank, where it is quite open, for example, with police to invest that power in a commissioned officer to give consent to the search and seizure—I don't think the term 'commissioned officer' was adopted by the committee, but they referred to senior members. So that's a corresponding concern about significant power being invested or devolved without check, necessarily, or balance.<sup>32</sup>

2.29 The Law Council observed that the bill's expansion of powers is granted to officers indiscriminately, and does not take account of experience. It also stated that senior commissioned officers are regularly asked to authorise the use of search and seizure powers at the border, and therefore that the proposed amendments do not provide enough reason to arm all officers with those powers.<sup>33</sup>

2.30 The EM stated that the *Guide to Framing Commonwealth Offences* (the Guide) recommends that seizure powers should generally only be permitted under a warrant, but that the Guide 'contemplates a limited range of situations where it may be appropriate to allow officers the ability to seize pending issue of warrant, such as situations involving conveyances where it may not be possible or practical to obtain a warrant'.<sup>34</sup>

2.31 The EM further states:

The exercise of the new search and seizure powers in the Bill will be time-limited to instances where a person is departing or recently arrived in Australia and can be justified due to the impracticalities of obtaining a warrant in such circumstances.<sup>35</sup>

2.32 The specific terminology of the Guide provides that:

There is a very limited range of circumstances where it may be appropriate to allow officers the ability to seize pending issue of warrant. The Scrutiny

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31 Mrs Elsa Sengstock, Coordinator, Legislation Program, Australian Federal Police, *Committee Hansard*, 20 September 2017, p. 13.

32 Mr Charles Morland Bailes, President-elect, Law Council of Australia, *Committee Hansard*, 20 September 2017, p. 27.

33 Mr Charles Morland Bailes, President-elect, Law Council of Australia, *Committee Hansard*, 20 September 2017, p. 29.

34 Explanatory Memorandum, p. 39.

35 Explanatory Memorandum, p. 39.

of Bills Committee regards that entry onto premises without consent may be reasonable in situations of emergency, serious danger to public health, or where national security is involved. Seizure in such circumstances would only be appropriate where reasonably necessary to resolve a situation of immediate emergency.<sup>36</sup>

2.33 The Scrutiny of Bills Committee did not agree with the interpretation of the Guide in the EM. The Committee stated:

The explanatory memorandum appears to reinterpret [the Guide] to say that the Guide contemplates there is a limited range of circumstances where it may be appropriate to allow for seizure, such as where it may not be possible or practical to obtain a warrant. The [Scrutiny of Bills Committee] does not consider this is the appropriate test and affirms its scrutiny view that seizure should only take place under a warrant, unless seizure is necessary to resolve a situation of immediate emergency.<sup>37</sup>

2.34 The Scrutiny of Bills Committee observed that it was possible to provide that a police or customs officer may, without a warrant, secure an item pending issue of a warrant authorising seizure, and that this approach had not been taken in the bill. It further noted that provisions in the Act currently give certain powers to police and customs officers to seize such items, albeit in more limited circumstances.<sup>38</sup>

2.35 However, the EM further notes that the Guide suggests that searches without warrants may be permitted in situations where national security is in question. It states that the movement of physical currency and bearer negotiable instruments across national borders is a recognised money-laundering and terrorism-financing risk, which would satisfy the Guide's requirement.<sup>39</sup>

2.36 The EM also stated that the powers were proportionate to the aims of the bill:

The measures are proportionate because they broaden existing powers in order to deter ML and TF, do not constitute a radical departure from current search and seizure powers and assist authorities in ensuring that Australia's AML/CTF framework is robust in the face of the threat of serious crime and terrorism.<sup>40</sup>

### ***Civil penalties for refusing to comply with questioning and search powers***

2.37 The bill would establish a civil penalty for refusing to comply with certain questioning and search powers. It sets out a number of requirements for persons

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36 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 83.

37 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11 of 2017*, 13 September 2017, p. 8.

38 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11 of 2017*, 13 September 2017, p. 8.

39 Explanatory Memorandum, p. 39.

40 Explanatory Memorandum, p. 10.

leaving Australia and persons entering Australia to provide information when it is requested of them by police or customs officers.<sup>41</sup>

2.38 The EM notes that the current provisions contain criminal penalties for offences under sections 199 and 200 of the AML/CTF Act for failing to comply with questioning and search powers in relation to the cross-border declaration regime.<sup>42</sup> It further states that:

The availability of a civil penalty would provide a wider range of options for law enforcement officers to respond to such breaches and assist in ensuring these penalties remain proportionate.<sup>43</sup>

2.39 Nyman Gibson Miralis expressed concern that the application of a civil penalty for refusing to give certain information to police or customs officers may contravene the common law privilege against self-incrimination.<sup>44</sup>

### **Powers conferred on the AUSTRAC CEO**

2.40 The bill would confer a significant number of new powers upon the AUSTRAC CEO. In particular, the bill provides that the delegated legislation in the Anti-Money Laundering and Counter-Terrorism Financing Rules (AML/CTF Rules) may make provision for the suspension and renewal of registrations by the AUSTRAC CEO. Additionally, the bill would enable the AUSTRAC CEO to make rules to expand or narrow the scope of the digital currency definition.

2.41 Some submitters welcomed the use of delegated legislation in 'future-proofing' the AML/CTF Act. Mr Aidan O'Shaughnessy, Acting Executive Director, Industry Policy, Australian Bankers' Association, stated that:

The ABA is supportive of having the further definition within the rules because it will just give AUSTRAC and the Attorney-General flexibility to deal with emerging technologies or changes in environments that emerge over the coming years.<sup>45</sup>

2.42 Mr O'Shaughnessy further observed that the proposed use of the AML/CTF rules would enable AGD to make amendments in a timely manner.<sup>46</sup>

2.43 The Law Council put forth concerns regarding the broad principle of taking a judicial or quasi-judicial function and investing it in the CEO.<sup>47</sup> Mr Charles Morland Bailes, President-Elect, Law Council of Australia, stated:

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41 Explanatory Memorandum, p. 39.

42 Explanatory Memorandum, p. 39.

43 Explanatory Memorandum, p. 39.

44 Nyman Gibson Miralis, *Submission 2*, p. 9.

45 *Committee Hansard*, 20 September 2017, p. 20.

46 Mr Aidan O'Shaughnessy, Acting Executive Director, Industry Policy, Australian Bankers' Association, *Committee Hansard*, 20 September 2017, p. 20.

47 Mr Charles Morland Bailes, President-Elect, Law Council of Australia, *Committee Hansard*, 20 September 2017, p. 27.

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Going to the detail of it: if, for example, you take infringement notices, there is no capacity for internal review of an infringement notice, so a person so served either pays up or attracts potential action, prosecution, initiation of an action in respect of the offence. That is a considerable investment in executive power in the office of the CEO of AUSTRAC that we find unsettling when there is no capacity for external review but also, coming back to the original principle, the substantial devolution of power that might otherwise be held by a tribunal or a court into that office.<sup>48</sup>

2.44 The Scrutiny of Bills Committee raised concerns regarding the bill's use of delegated legislation. It particularly noted that leaving certain issues to be decided by the AUSTRAC CEO may leave a number of important matters to be decided by AML/CTF rules, including the grounds on which suspension decisions are made and whether such decisions should be subject to review.<sup>49</sup>

2.45 The Scrutiny of Bills Committee advised that, as a general principle, significant matters should be included in primary legislation unless there is a sound justification for the use of delegated legislation. In the case of this bill, the Scrutiny committee noted that a number of significant matters were delegated to rules, and that there was no appropriate reason given in the EM. The committee advised that the matters should be provided for in regulations as a minimum, due to a higher level of executive scrutiny being applied to regulations as opposed to rules.<sup>50</sup>

2.46 The Scrutiny of Bills Committee further stated that it has requested more detailed advice from the Minister in relation to a number of matters regarding the renewal and suspension of registrations.<sup>51</sup>

2.47 AGD and AUSTRAC told the committee that, while they were unable to provide details regarding the specific content of the rules, the rules were to be drafted and would be finalised after the bill's passage.<sup>52</sup> AGD also noted that the use of delegated legislation was recommended by the Report on the Statutory Review and is anticipated to be used in further reforms.<sup>53</sup>

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48 *Committee Hansard*, 20 September 2017, p. 27.

49 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11 of 2017*, 13 September 2017, p. 4.

50 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11 of 2017*, 13 September 2017, p. 4.

51 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11 of 2017*, 13 September 2017, p. 5.

52 Mr Bradley Brown, Acting Deputy Chief Executive Officer, International and Policy, Australian Transaction Reports and Analysis Centre, *Committee Hansard*, 20 September 2017, p. 3.

53 Mr Andrew Walter, Acting First Assistant Secretary, Criminal Justice Policy and Programs Division, Attorney-General's Department, *Committee Hansard*, 20 September 2017, p. 3.

2.48 It is also noted that all AML/CTF rules are subject to disallowance, and so will be subject to appropriate Parliamentary scrutiny. The Explanatory Memorandum states:

[AML/CTF Rules] are legislative instruments within the meaning of section 8 of the *Legislative Instruments Act 2003*. Accordingly, AML/CTF Rules must be tabled in Parliament and are subject to disallowance by either House.<sup>54</sup>

### ***Infringement notices***

2.49 The bill would expand the infringement notice provisions of the AML/CTF Act to 'include a wider range of offences established under the AML/CTF Act that are regulatory in nature'.<sup>55</sup> This expansion applies to a number of civil penalty provisions.<sup>56</sup> The bill also contains safeguards to ensure that the AUSTRAC CEO cannot issue an infringement notice for 'trivial matters', with a set of prescribed considerations to be taken into account in each case.<sup>57</sup>

2.50 The purpose of these provisions is to implement changes recommended by the Report on the Statutory Review, which suggested adding eleven minor regulatory offences. This was purported to:

...give the AUSTRAC CEO additional, more expedient and efficient means for promoting and encouraging compliance as an alternative to applying for a civil penalty order through the Federal Court.<sup>58</sup>

2.51 The Uniting Church in Australia (the Uniting Church) supported the proposed increase in powers for the AUSTRAC CEO to provide additional enforcement options to ensure compliance. It cited criminological literature arguing that the perceived certainty of punishment is associated with reduced intended offending.<sup>59</sup>

2.52 However, the Law Council noted that an infringement notice was set as a maximum penalty, which was 'substantial'.<sup>60</sup> It further indicated that an infringement notice was not reviewable or subject to an appeal, and so should be reconsidered.<sup>61</sup>

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54 Explanatory Memorandum, p. 4. See also Mr Bradley Brown, Acting Deputy Chief Executive Officer, International and Policy, Australian Transaction Reports and Analysis Centre, *Committee Hansard*, 20 September 2017, p. 3.

55 Attorney-General's Department, *Submission 7*, p. 7.

56 See: subsections 32(1), 41(2), 43(2), 45(2), 47(2), 49(2) and 116(2), (3) or (4).

57 Attorney-General's Department, *Submission 7*, p. 8.

58 The Hon. Michael Keenan MP, Minister for Justice and Minister Assisting the Prime Minister for Counter-Terrorism, *House of Representatives Proof Hansard*, 17 August 2017, p. 8837.

59 Uniting Church of Australia, *Submission 3*, p. 4.

60 Mr Charles Morland Bailes, President-Elect, Law Council of Australia, *Committee Hansard*, 20 September 2017, p. 27.

61 Mr Charles Morland Bailes, President-Elect, Law Council of Australia, *Committee Hansard*, 20 September 2017, p. 27.



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### ***Sharing of information with agencies***

2.53 The bill would provide that the AUSTRAC CEO's functions extend to providing access to, and the sharing of, AUSTRAC information to support domestic and international efforts to combat money laundering, terrorism financing and other serious crime.<sup>62</sup> The Minister stated in the second reading speech that the bill would:

[provide] access to, and the sharing of, AUSTRAC information to support domestic and international efforts to combat and disrupt money laundering, terrorism financing and other serious crimes...<sup>63</sup>

2.54 The Uniting Church expressed support for the proposed increase in information-sharing between agencies, stating that:

It is our view that the anti-money laundering and counter-terrorism financing system would be more robust if the ability of those attempting to launder money or finance terrorism had less chances to try multiple entry points to get the money into the system because there was better sharing of information between reporting entities.<sup>64</sup>

2.55 King & Wood Mallesons (KWM) were similarly supportive of proposed information-sharing provisions, informing the committee that reporting entities that are part of multinational corporate groups are currently unable to escalate potential money laundering or terrorism financing issues to senior management and specialised personnel due to the prohibition in the AML/CTF Act on disclosure of their suspicions to anyone other than AUSTRAC.<sup>65</sup> However, KWM noted that the bill as drafted does not allow disclosure within a multinational corporate group as the definition of a 'reporting entity' does not extend to an offshore head office or company.<sup>66</sup>

2.56 KWM recommends a range of amendments to the bill to address this issue, including:

- inserting 'or a corporate group' after 'designated business group' in paragraph 123(7)(a);
- inserting 'or to a body corporate that belongs to the corporate group (as the case may be)' after 'designated business group' in paragraph 123(7)(d); and
- adding a definition of a 'corporate group' at the end of section 123.<sup>67</sup>

2.57 Nyman Gibson Miralis raised concerns regarding the proposed increase of AUSTRAC's functions to share information with overseas agencies:

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62 Explanatory Memorandum, p. 46.

63 The Hon. Michael Keenan MP, Minister for Justice and Minister Assisting the Prime Minister for Counter-Terrorism, *House of Representatives Proof Hansard*, 17 August 2017, p. 8836.

64 Uniting Church in Australia, *Submission 3*, p. 4.

65 King & Wood Mallesons, *Submission 6*, p. 1.

66 King & Wood Mallesons, *Submission 6*, p. 2.

67 King & Wood Mallesons, *Submission 6*, p. 3.

The Bill is silent on how the sharing of Australian citizens' information will reconcile with the statutory protections in the *Privacy Act 1988* (Cth). There is also a lack of oversight from any organisation (nationally or internationally) that controls what information can lawfully be shared. This oversight is amplified considering an accused person has an entrenched human right to privacy.<sup>68</sup>

2.58 Nyman Gibson Miralis noted that the provision of information to overseas jurisdictions may have consequences on individuals that 'would not be tolerated in Australian society'.<sup>69</sup> It recommends a uniform approach to the dissemination of intelligence to foreign law enforcement, including the application of express limits on the use of information and protection from misuse.<sup>70</sup>

### **Strict liability offences**

2.59 The bill amends the AML/CTF Act to establish a number of civil penalties in relation to an unregistered person providing digital currency exchange services, which are all subject to strict liability.

2.60 This means that the offences are subject to penalty regardless of intention. The EM states that the application of strict liability means:

...it is not necessary for the prosecution to prove an associated fault element—such as intention, knowledge, recklessness or negligence—for these physical elements.<sup>71</sup>

2.61 A number of concerns were raised by submitters. When questioned about the explanation supporting the strict liability offences provided by the EM, the Law Council submitted that:

...as a matter of principle, the Law Council does not welcome the notion of strict liability offences, more particularly, when it involves the potential for long periods of imprisonment. With an aggravated offence, the maximum penalty goes from two years to four years, and I think that, if the AUSTRAC CEO has given more than one notice, it's into a more aggravated category and it's a maximum of seven years. Given that there is no defence at common law—other than the defence of a reasonable mistake of fact, which carries with it certain requirements for the defence to establish—that is draconian.<sup>72</sup>

2.62 It was further observed by the Law Council that a strict liability offence does not differentiate between intentional behaviour and recklessness or reckless

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68 Nyman Gibson Miralis, *Submission 2*, p. 3.

69 Nyman Gibson Miralis, *Submission 2*, p. 3.

70 Nyman Gibson Miralis, *Submission 2*, p. 4.

71 Explanatory Memorandum, p. 19.

72 *Committee Hansard*, 20 September 2017, p. 27.

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indifference, which is usually of lesser culpability and thus reflected in a lesser sentence.<sup>73</sup>

2.63 The Scrutiny of Bills Committee also stated that strict liability offences should only be used where a clear justification can be provided for its application:

Under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have). When a bill states that an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant intended this, or was reckless or negligent. As the imposition of strict liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.<sup>74</sup>

2.64 The Explanatory Memorandum notes that section 9.2 of the Criminal Code:

...allows a defence of honest and reasonable mistake of fact to be raised for strict liability offences. Under this defence, a defendant must turn his or her mind to the existence of the facts and be under a mistaken, but reasonable, belief about those facts. This defence would be applicable to the strict liability provisions in the Bill.<sup>75</sup>

### **Digital currency exchange**

2.65 The bill seeks to introduce a new designated service and register in order to regulate digital currency exchange, to be introduced within six months of the bill's commencement.

2.66 AGD informed the committee that this aspect of the bill reflects technological advancements in digital currency. It noted that the current regulatory regime under the AML/CTF Act was designed in 2006 and applies only to an 'e-currency', which is 'backed by a physical thing. It excludes convertible digital currencies, such as Bitcoin, which are backed by a cryptographic algorithm'.<sup>76</sup>

2.67 The AGD also noted that the regulatory gap had an impact on the legitimacy and public perception of digital currency. It stated that it had been advised that many

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73 *Committee Hansard*, 20 September 2017, p. 27.

74 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11 of 2017*, 13 September 2017, p. 2.

75 Explanatory Memorandum, p. 11.

76 Attorney-General's Department, *Submission 7*, p. 5.

businesses and financial institutions hold concerns regarding the risks of dealing with digital currency and choose not to accept or use it as a method of payment.<sup>77</sup>

2.68 AGD observed that the Report on the Statutory Review recommended the application of the AML/CTF Act and the Regulations to digital currencies and digital exchange providers. It further pointed out that this recommendation was consistent with reports that considered best practice in oversight of digital currencies by the Senate Economics References Committee in 2015 and the Productivity Commission's 2015 report.<sup>78</sup>

2.69 The Law Council expressed concerns at the six-month timeframe proposed to introduce the reforms. It stated that AUSTRAC should be encouraged to:

...provide very early guidance on any proposed exemptions (such as the \$1,000 'low value' relief offered for over-the-counter physical currency exchange...<sup>79</sup>

2.70 Living Room of Satoshi submitted that the application of AML/CTF regulations on low value payments would be a significant hindrance to retail businesses that accept payments under \$1000 in digital currency form. It submitted that an exemption for low value payments should be included as part of the bill to limit the impact on small businesses.<sup>80</sup>

### **Jurisdictional scope**

2.71 Nyman Gibson Miralis stated in their submission that the bill is not clear on whether it will capture individuals exchanging a digital currency outside Australia. It notes in its submission that digital currencies could transcend Australian laws, and individuals may be able to circumvent the proposed amendments by seeking to exchange with a currency provider outside Australia's jurisdiction:

The proposed legislative amendments do not seem to contemplate for the likely scenario that an individual can simply choose to exchange with a digital currency provider outside of Australia's national jurisdiction, one where the rule of law and reporting requirements in according with [Financial Action Task Force] guidelines are not adhered to stringently. In light of the highly mobile nature of offshore criminal networks, this is a matter that does not appear to have been adequately considered.<sup>81</sup>

### **Committee view**

2.72 The committee understands that the bill's provisions would be the first phase in a multi-staged reform effort to update the Commonwealth anti-money laundering and counter-terrorism financing regime. As has been demonstrated by previous Senate

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77 Attorney-General's Department, *Submission 7*, p. 5.

78 Attorney-General's Department, *Submission 7*, p. 5.

79 Law Council of Australia, *Submission 8*, p. 1.

80 Living Room of Satoshi, *Submission 5*, pp. 1–2.

81 Nyman Gibson Miralis, *Submission 2*, p. 3.

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committee reports, the Productivity Commission's report and the Statutory Review into the AML/CTF Act, these reforms are sorely needed in order to adequately reflect the role digital currency plays in the modern economy.

2.73 The committee notes that submitters were generally positive about the intent and provisions of the bill, and the contribution it would make to preventing money-laundering and terrorism financing, in addition to improving the legislative framework governing digital currency.

2.74 The committee also heard from some submitters who expressed concern about the changes to definitions and potential resulting uncertainty. Considering the intention of the reforms is in part to provide clarity in the AML/CTF Act, the committee is of the view that these definitional issues should be addressed prior to the bill's passage, and recommends that the government consider whether the terms over which concerns were raised could be better defined.

### **Recommendation 1**

**2.75 The committee recommends that the government consider whether the terms 'article', 'stored value card' and 'in the course of carrying on a business' in the bill and Explanatory Memorandum, could be better defined with a view to addressing the uncertainty expressed by some submitters, and amendments where relevant.**

2.76 The committee notes the concerns raised by submitters regarding the breadth of the powers granted under the bill to police and customs officials at the border. However, the committee observes that this expansion of powers was recommended by the Report on the Statutory Review to ensure that police and customs officials are able to efficiently seize laundered funds or money intended for terrorism-related purposes. It therefore considers that these powers strike an appropriate balance between the right to privacy and the need to effectively detect and prosecute money-laundering and terrorism.

2.77 The committee also recognises the concerns put forward by submitters regarding the expanded powers of the AUSTRAC CEO.

2.78 The committee understands that the new powers granted to the AUSTRAC CEO, including the power to make rules, would be subject to review and oversight in several ways.

2.79 Most importantly, the committee understands from the Explanatory Memorandum that all AML/CTF Rules must be tabled in Parliament therefore subject to disallowance by either house, and this would allow appropriate scrutiny, review and safeguards to be put in place.

2.80 The committee also understands that many of decisions made by the AUSTRAC CEO regarding imposing conditions, the issue of civil penalties, or cancelling or preventing registrations would be reviewable, including under the review provisions of Part 17A of the AML/CTF Act. Regarding concerns raised by submitters on strict liability, the committee understands that this would not preclude the defence of honest and reasonable mistake of fact to be raised, as is made clear by

the Explanatory Memorandum, and are so compatible with Commonwealth guidelines.

2.81 On balance, the committee considers that the bill would bring about an improvement in the operation of the AML/CTF Act, and thereby assist in Australia's efforts to combat money laundering and terrorism financing, and so should be passed.

**Recommendation 2**

**2.82 The committee recommends that the bill be passed.**

**Senator David Fawcett**

**Chair**

# Appendix 1

## Public Submissions

- 1 Australian Bankers' Association INC.
- 2 Nyman Gibson Miralis
- 3 Uniting Church in Australia
- 4 Mr Graeme Shea
- 5 Living Room of Satoshi Pty Ltd
- 6 King & Wood Mallesons
- 7 Attorney-General's Department
- 8 Law Council of Australia
- 9 Transparency International Australia





## **Appendix 2**

### **Additional information and answers to questions on notice**

#### **Additional information**

1. Additional information (opening statement) provided by Mr Aidan O'Shaughnessy, Australian Bankers Association, 21 September 2017

#### **Answers to questions on notice**

1. Australian Bankers' Association Inc. - Answers to questions on notice 20 September 2017 (received 25 September 2017)
2. Attorney General's Department - Answers to questions on notice 20 September 2017 (received 4 October 2017)

## **Appendix 3**

### **Public hearing and witnesses**

**Wednesday 20 SEPTEMBER 2017 – Canberra**

Breen, Mr Adrian, Assistant Secretary, Transnational Crime Branch, Attorney General's Department

Brown, Mr Bradley, Acting Deputy CEO, International and Policy, AUSTRAC

Bunting, Mr Richard, Director, Strategic Intelligence and Policy

Dametto, Cmdr Stephen, Acting Manager of Criminal Assets, Fraud and Anti-Corruption, Australian Federal Police

De Crespigny, Mr Mark, Deputy Director, Illegal Imports and Exports/Human Exploitation and Border Protection

Grant, Mr Richard, Ag Executive Director Intelligence, Australian Criminal Intelligence Commission

Hawkins, Mr Murray, Director, Regulatory Policy and Research, Law Council of Australia

McGoldrick, Senior Financial Investigator and Ag Head of Determination, Targeting Criminal Wealth No. 2, Australian Criminal Intelligence Commission

Moreland Bailes, Mr Charles, President Elect, Law Council of Australia

Munsie, Ms Laura, Director, Financial Crime Section, Attorney General's Department

O'Shaughnessy, Mr Aidan, Executive Director, Industry Policy (Acting), Australian Bankers' Association INC.

Sengstock, Mrs Elsa, Coordinator, Legislation Program, Australian Federal Police

Walter, Mr Andrew, First Acting Assistant Secretary, Criminal Justice Policy and Programmes Division, Attorney General's Department

Zirnsak, Dr Mark, Director, Social Justice, Uniting Church in Australia

