



15 September 2017

Committee Secretary
Senate Legal and Constitutional Affairs Committee

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

Dear Committee Secretary

Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017

1. The Law Council of Australia welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee regarding the Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017 (**the Bill**).
2. The Law Council acknowledges the assistance of its Financial Services Committee (**FSC**) of the Business Law Section (**BLS**) and the Anti-Money Laundering Working Group in the preparation of this submission.

Digital currency exchange

3. A substantial part of the Bill would implement a new designated service and register in relation to digital currency exchange. A relatively short six-month implementation timeframe is proposed. In these circumstances it will be important, in the interest of limiting wasted investment, that the Australian Transaction Reports and Analysis Centre (**AUSTRAC**) 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 under paragraph 14.4 of the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)*).

'In the course of carrying on a business'

4. The Explanatory Memorandum (**EM**) for the Bill states that regulatory relief will be given by qualifying the term 'in the course of carrying on a business', pointing to widespread industry concern that the phrase 'in the course of carrying on a business' is excessively broad.¹ The Bill contains no change which addresses this concern. The same language is added to some places where it had not previously been included. The EM refers to the Replacement Explanatory Memorandum (**REM**) for the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth)* (**AML/CTF Act**) as demonstrating that the term 'in the course of carrying on a business' should not be construed in a manner that is excessively broad.

¹ Explanatory Memorandum, Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017 30.

5. However, the plain words of the legislation are inconsistent with the REM. AUSTRAC's Public Legal Interpretation No. 4 (**Public Interpretation**) states that 'business' is very broadly defined. However, in reliance on the *Acts Interpretation Act 1901* (Cth), the Public Interpretation also notes that the broad definition of 'business' in the AML/CTF Act contradicts clear statements in the REM that the defined business types are intended to confine reporting entity status to businesses with a 'core' function involving the designated service.² This inconsistency means (in AUSTRAC's view) that the statements in the REM are unable to be used in construing the effect of the contradictory provisions of the legislation.³ The legal result will therefore, on a traditional analysis, be opposed to the effect that was intended by the legislature.⁴ The same analysis would apply in the context of the current Bill.
6. The FSC has previously submitted that the AML/CTF Act itself 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 only applies when the specified business is a core function or a substantive part of the operations of the relevant entity.⁵ Instead, the decision seems to have been made to repeat exactly the initial error in this Bill.

Stored value cards

7. The FSC has previously stated that the current 'stored value card' definition is flawed.⁶ The Bill proposes to replace it. In particular, the 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').
8. The Law Council, having considered the EM, does not consider that the policy basis of drawing a distinction that is based not on functionality and only on the status of the issuer, has been comprehensively explained. The EM seems to seek to draw a distinction between 'stored value cards' and 'debit cards' which cannot in truth be distinguished, in circumstances where the majority of (to use value neutral terms) of 'gift cards' and 'travel cards', have value stored in and debited from an account with the issuer (albeit not an ordinary transaction account).
9. Certainty and even regulatory treatment would be fostered by declaring specifically that a stored value card issued by a financial institution is taken not to be a designated service Item 1-3 'account'. The *Competition and Consumer Act 2010* (Cth) (**CCA Act**) definition of a 'debit card' is unhelpful in this regard as it too is intended to be very broad, having regard to its purpose in that legislation. As a separate issue, the BLS

² AUSTRAC, *Public Legal Interpretation No. 4 of 2008* (July 2008)

<<http://www.austrac.gov.au/sites/default/files/pli04-reporting-entity-July-2008.pdf>> 5-6.

³ Ibid 6.

⁴ Law Council of Australia (Business Law Section), *Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act (Cth) 2006* (30 April 2014)

<<https://www.lawcouncil.asn.au/resources/submissions/statutory-review-of-the-anti-money-laundering-and-counter-terrorism-financing-act-cth--2006>> 10.

⁵ Ibid.

⁶ Ibid 11-12.

has previously noted that the AML/CTF Act definition of 'debit card' should refer to the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**), because the CCA Act definition excludes cards that are ASIC Act 'financial products'.⁷

Infringement notices

10. The Law Council has concerns about the proposal to give the AUSTRAC CEO the power to issue infringement notices for a greater range of regulatory offences. The Law Council has previously stated in relation to the AML/CTF Act that it does not support any increase in the use of non-judicial enforcement processes.⁸ This is particularly the case where the underlying regulatory regime is uncertain or definitions are overly broad, as in the AML/CTF Act. This means that an unfettered regulatory discretion becomes the main determinant of whether a penalty will or will not be levied.

Senate Standing Committee for the Scrutiny of Bills analysis

11. The Senate Standing Committee for the Scrutiny of Bills (**the Committee**) considered the Bill in its *Scrutiny Digest No. 10 of 17*.⁹ The Committee raised the following issues:

- Strict liability offences – the Committee is seeking advice as to the grounds for penalising persons lacking fault, in circumstances where a person could be subject to up to seven years imprisonment;
- Significant matters in delegated legislation – the Committee is seeking advice as to why details about suspension and renewal of registrations are left to delegated legislation rather than being set out in the bill;
- Civil penalty provisions – the Committee is seeking advice as to the appropriateness of making certain provisions, including a failure to notify of a change of circumstances, subject to civil penalties of up to 20,000 penalty units (or \$4.2 million) for an individual;
- Fair hearing rights and immunity from liability – the Committee is seeking advice as to the appropriateness of providing immunity from civil or criminal liability to the Commonwealth and AUSTRAC for making certain decisions, and why it is necessary to remove notification requirements in certain situations; and
- Seizure powers – the Committee is seeking the Minister's justification for expanding powers for police and customs officers to seize physical currency and bearer negotiable instruments without a warrant (rather than providing that the items be secured pending obtaining of a warrant).¹⁰

12. The Law Council agrees with the concerns raised by the Committee and considers that these matters ought to be addressed before the Bill proceeds.

⁷ Ibid 13.

⁸ Ibid 18.

⁹ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest*, No 10 of 2017, 6 September 2017, 1-9.

¹⁰ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny News*, No 11 of 2017, 7 September 2017, 1.

13. I trust that this information is of assistance. Please contact _____ with any questions.

Yours sincerely

Fiona McLeod SC
President