SENATE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

INQUIRY INTO THE ANTI-MONEY LAUNDERING AND COUNTER-TERRORISM FINANCING AMENDMENT BILL 2017 [PROVISIONS]

Question No. 1

Senator Pratt (Deputy Chair) asked the following question at the hearing on 20 September 2017:

Does the bill contain a prohibition on financial institutions entering into correspondent banking relationships with institutions that are then able to enter into relationships with shell banks?

The answer to the honourable Deputy Chair's question is as follows:

Section 95 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) prohibits a financial institution from entering into a correspondent banking relationship with a shell bank or a financial institution that has a correspondent banking relationship with a shell bank.

Section 96 of the Act also requires a financial institution to terminate a correspondent banking relationship if they become aware that a respondent bank has a correspondent banking relationship with a shell bank.

Under Part 8 of the AML/CTF Act and Chapter 3 of the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1) (AML/CTF Rules), financial institutions are required to:

- undertake a preliminary money laundering and terrorism financing (ML/TF) risk assessment before entering into a correspondent banking relationship
- perform a due diligence assessment if warranted by the ML/TF risk identified in the preliminary assessment
- conduct regular ML/TF risk assessments after entering into correspondent banking relationships, and
- conduct regular due diligence assessments if warranted by the risk identified in the ML/TF risk assessment.

Shell banks are globally recognised as posing high ML/TF risks.

The Financial Action Task Force (FATF) in its 2015 mutual evaluation of Australia's AML/CTF regime noted the prohibition under section 95, but considered that it was 'unclear' whether the prohibition extends to entering into a correspondent banking relationship with a financial institution that does not currently have a correspondent banking relationship with a shell bank, but would theoretically be permitted to engage in such a relationship in the future.

Section 96 of the Act is clear in requiring a financial institution to terminate a correspondent banking relationship if they become aware that a respondent bank has a correspondent banking relationship with a shell bank. The requirement for Australian financial institutions to conduct regular ML/TF risk assessments on their correspondent banking relationships means that they are reviewing their relationships on an ongoing basis and identifying new or emerging ML/TF risks associated with that relationship.

To remove doubt, Recommendation 10.3(c) of the statutory review of Australia's AML/CTF regime recommends that the AML/CTF Act articulate an explicit obligation on this issue. The review notes such an amendment would be unlikely to have a significant regulatory impact as it is already 'industry best practice for financial institutions to conduct due diligence on their respondent banks to ensure they do not enter into a correspondent banking relationship that may later expose their business to significant ML/TF risks.'

The current Bill implements a first phase of reforms arising from the statutory review. The correspondent banking amendments in the Bill are minor adjustments that are deregulatory and consistent with international banking practice. The more substantial reforms to the correspondent banking requirements, which will have a regulatory impact on industry, will be implemented under future phases.

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INQUIRY INTO THE ANTI-MONEY LAUNDERING AND COUNTER-TERRORISM FINANCING AMENDMENT BILL 2017 [PROVISIONS]

Question No. 2

Senator Pratt (Deputy Chair) asked the following question at the hearing on 20 September 2017:

I've got one that I will put on notice, which is to step through the difference between digital currency exchange providers and banks in relation to those questions, because I understand digital currencies will be regulated, similar to remitters.

The answer to the honourable Deputy Chair's question is as follows:

The AML/CTF Act and associated AML/CTF Rules establish a risk-based regulatory framework that applies in general to designated services rather than to specific industry sectors or business types. Any business that provides a designated service is subject to anti-money laundering and counter-terrorism financing (AML/CTF) compliance and reporting obligations and is a 'reporting entity' for the purposes of the AML/CTF Act.

The proposed new designated service in the Bill will apply the core AML/CTF obligations to any business at the point of exchanging digital currency for money and vice versa, where this is done in the course of carrying on a digital currency exchange business. Accordingly, these obligations will apply to a range of businesses from those primarily established to exchange digital currency through to financial institutions that provide digital currency exchange as one of their services.

The core AML/CTF obligations on reporting entities include requirements to: enrol with AUSTRAC as a reporting entity; undertake customer due diligence when entering into a new customer relationship and at other appropriate times; undertake ongoing customer due diligence; report suspicious matters, cash transactions equal to or above the $10,000 threshold, and other transactions depending on the nature of the service, to AUSTRAC; and keep certain records for seven years.

Similar to the obligations currently imposed on remittance service providers under the AML/CTF Act, digital currency exchange providers will also be required to register with AUSTRAC. A person seeking registration with AUSTRAC must provide information which will be used to assess their suitability to be registered. AML/CTF Rules will be made to exclude financial institutions that provide digital currency exchange services from the obligation to register as they are already subject to extensive licensing and prudential obligations under other legislation. The development of these Rules will involve consultation with stakeholders.

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

INQUIRY INTO THE ANTI-MONEY LAUNDERING AND COUNTER-TERRORISM FINANCING AMENDMENT BILL 2017 [PROVISIONS]

Question No. 3

Senator Pratt (Deputy Chair) asked the following question of the Australian Federal Police at the hearing on 20 September 2017:

How many staff within the AFP have access to [search and seizure] powers in terms of being appropriately trained and auspiced to do that?

The answer to the honourable Deputy Chair's question is as follows:

Airport staffing varies depending on operational requirements (exact figures cannot be provided for security reasons). All AFP officers are trained in the use of search and seizure powers. Appropriate education and training will be provided to all AFP officers on the proposed expanded search and seizure powers should Parliament pass the Bill.

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

INQUIRY INTO THE ANTI-MONEY LAUNDERING AND COUNTER-TERRORISM FINANCING AMENDMENT BILL 2017 [PROVISIONS]

Question No. 4

Senator Pratt (Deputy Chair) asked the following question of the Australian Federal Police at the hearing on 20 September 2017:

What is the number of staff [working] on money laundering cases?

The answer to the honourable Deputy Chair's question is as follows:

A key strategy of the AFP in combatting serious crime is to remove the profit from crime and prevent its reinvestment in further criminal activity. Targeting the criminal economy is crucial to disrupting serious criminal activity.

The AFP views money laundering (ML) investigations as one component in a holistic strategy to disrupt serious criminal activity. All matters under investigation by the AFP with an economic crime component are examined from a ML perspective and assessed as to whether a concurrent financial investigation is warranted.

Operation Zanella is the AFP's primary response to the ML threat and is focused on the nexus between organised crime groups and their requirement to move funds for illicit purposes. This includes transnational money laundering networks that provide an overseas remittance service for organised crime groups. Operation Zanella is comprised of 32 investigators working within five teams located in Melbourne, Sydney and Canberra.

The Criminal Assets Confiscation Taskforce (CACT) is a multi-agency taskforce with primary responsibility for the investigation and litigation of Commonwealth proceeds of crime matters. The AFP component of the CACT is 66 investigators which includes forensic accounting specialists. Litigation under the *Proceeds of Crime Act 2002* is conducted nationally by the AFP's Criminal Asset Litigation practice, which consists of 38 lawyers.

In addition to Operation Zanella, and the specific focus of CACT, ML may be identified as part of other criminal investigations, led by the relevant functional area in AFP. In these cases, the functional area would pursue ML charges as part of the broader Brief of Evidence, drawing on the expertise of CACT as appropriate.

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

INQUIRY INTO THE ANTI-MONEY LAUNDERING AND COUNTER-TERRORISM FINANCING AMENDMENT BILL 2017 [PROVISIONS]

Question No. 5

Senator Pratt (Deputy Chair) asked the following question of the Commonwealth Director of Public Prosecutions at the hearing on 20 September 2017:

What is the number of criminal prosecutions for money laundering that are currently taking place under the Criminal Code?

The answer to the honourable Deputy Chair's question is as follows:

SECTION	PROSECUTIONS
400.3	25
400.4	35
400.5	8
400.6	20
400.7	4
400.8	2
400.9	64
Total	**158**

NOTES: Data in the table represents a total of 136 defendants, as a defendant may be charged with more than one money laundering offence.

Data extracted from CDPP's database on 27.09.2017.

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

INQUIRY INTO THE ANTI-MONEY LAUNDERING AND COUNTER-TERRORISM FINANCING AMENDMENT BILL 2017 [PROVISIONS]

Question No. 6

Senator Pratt (Deputy Chair) asked the following question of the Commonwealth Director of Public Prosecutions at the hearing on 20 September 2017:

How many people were prosecuted for money laundering offences in the Criminal Code for the last 2 complete financial years for the following offences:

i. 400.3 Dealing in proceeds of crime $1,000,000 or more
ii. 400.4 Dealing in proceeds of crime $100,000 or more
iii. 400.5 Dealing in proceeds of crime $50,000 or more
iv. 400.6 Dealing in proceeds of crime $10,000 or more
v. 400.7 Dealing in proceeds of crime $1,000 or more
vi. 400.8 Dealing in proceeds of crime – any value
vii. 400.9 Dealing with property reasonably suspected of being the proceeds of crime

The answer to the honourable Deputy Chair's question is as follows:

DEFENDANTS SECTION	FY FY2015/16	FY2016/17	Total
400.3	8	13	21
400.4	14	18	32
400.5	7	10	17
400.6	13	3	16
400.7	3	6	9
400.9	57	78	135
Total	**102**	**128**	**230**

NOTES: Data in the table represents a total of 204 (86 in 2015/16 and 118 in 2016/17) defendants, as a defendant may be charged with more than one money laundering offence.

Data extracted from CDPP's database on 27.09.2017.

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

INQUIRY INTO THE ANTI-MONEY LAUNDERING AND COUNTER-TERRORISM FINANCING AMENDMENT BILL 2017 [PROVISIONS]

ADDITIONAL INFORMATION

The Attorney-General's Department provides the information below in response to specific issues that were discussed during the course of the public hearing on 20 September 2017.

1. Correspondent banking – implementation of the recommendations of the statutory review of Australia's AML/CTF regime

(a) Recommendation 10.2 – quality of ML/TF supervision

Recommendation 10.2 of the statutory review of Australia's anti-money laundering and counter-terrorism financing (AML/CTF) regime states that the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1) (AML/CTF Rules) should be amended to require financial institutions to consider the quality of the money laundering and terrorism financing (ML/TF) supervision conducted in the country of the respondent institution as part of a due diligence assessment.

The obligations relating to correspondent banking relationships are set out in Part 8 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) and Chapter 3 of the AML/CTF Rules and require financial institutions to:

- undertake a preliminary ML/TF risk assessment before entering into a correspondent banking relationship
- perform a due diligence assessment if warranted by the ML/TF risk identified in the preliminary assessment, including an assessment of the existence and quality of any AML/CTF regulation in the respondent institution's country of domicile
- conduct regular ML/TF risk assessments after entering into correspondent banking relationships, and
- conduct regular due diligence assessments if warranted by the risk identified in the ML/TF risk assessment.

The statutory review recommended a broad suite of reforms to simplify and clarify the correspondent banking obligations in the AML/CTF Act and Rules. As part of this process, the requirement for financial institutions to conduct a preliminary risk assessment will be consolidated with a new, mandatory requirement to conduct a holistic due diligence assessment before entering into any correspondent banking relationship.

This new obligation would include a requirement to consider the quality of ML/TF supervision conducted in the country of the respondent institution, in addition to the existence and quality of any AML/CTF regulation, as part of the due diligence assessment. Given

recommendation 10.2 is linked to this broader set of reforms to the correspondent banking provisions in Australia's AML/CTF regime, it will be progressed as part of a future phase of reforms arising from the statutory review.

(b) Recommendation 10.3(b) – 'payable-through' accounts

Recommendation 10.3(b) of the statutory review states that the AML/CTF Act should be amended to include specific due diligence measures for payable-through accounts that are consistent with the FATF standards to address the ML/TF risks associated with these types of accounts.

While it is not currently an explicit requirement for financial institutions conducting a due diligence assessment for correspondent banking arrangements to consider payable-through accounts, AUSTRAC has issued guidance which indicates that this could be a consideration in any due diligence assessment.

The proposed amendments to the correspondent banking provisions of the AML/CTF Act and Rules outlined above, which will progress as part of a future phase of reforms, will make this obligation mandatory.

2. Objects of the AML/CTF Act

The current objects of the AML/CTF Act focus on ensuring compliance with the international standards for combating ML, TF and other international obligations.

The statutory review of Australia's AML/CTF regime recommends the inclusion of additional objects to better articulate the intent of AML/CTF regulation at the domestic level. Expanding the objects in this manner will clarify the policy intent of the legislation, assisting with the interpretation of specific provisions. The change to the objects clause is not intended to impose a regulatory burden or create additional requirements for reporting entities.

Following consultations with industry, the new overarching object in the Bill, paragraph (aa), was limited to measures to detect, deter and disrupt money laundering, the financing of terrorism, and other 'serious *financial* crimes'. This reference acknowledges that the primary focus of the AML/CTF Act is to prevent financial crime.

However, government agencies have a broader remit to prevent all serious crimes and protect the integrity of the Australian financial system. References to 'other serious crimes', rather than 'other serious financial crimes', have been included in the remaining new objects to acknowledge that information collected through the AML/CTF regime assists in the prevention of such other 'serious crimes'.

These new objects also acknowledge that money laundering and terrorism financing are closely connected to, and enable, a range of other criminal activity.

For example, section 41 of the AML/CTF Act obliges reporting entities to make a suspicious matter report to AUSTRAC in a range of circumstances. This includes instances where there is a suspicion that the reporting entity possesses information that may be relevant to the

investigation of, or prosecution of a person for, an offence against a law of the Commonwealth or of a State of Territory. For this reason, reporting entities should already be considering this range of crime types (including 'serious crimes') in carrying out their obligations under the AML/CTF Act. Additionally, Australia adopts an 'all crimes' approach to predicate offences for money laundering, i.e. under Division 400 of the Criminal Code, any indictable offence against a law of the Commonwealth, State or Territory, of foreign country, is a predicate offence for money laundering. The change to the objects clause to include 'serious crimes' makes explicit the domestic objectives of the AML/CTF Act that have been part of the Act since its inception in 2006.

3. Prohibitions on certain transactions under Australia's AML/CTF regime

With respect to transactions that a reporting entity suspects may involve criminality, the focus of obligations under the AML/CTF Act is on ensuring law enforcement agencies have timely access to actionable intelligence to initiate or support an investigation. There is no express prohibition on any reporting entity, whether a digital currency exchange provider or another regulated business, from conducting a transaction or providing a service following its submission of a suspicious matter report to AUSTRAC.

Suspicious matter reports are based on a subjective assessment by the regulated entity of a 'suspicion on reasonable grounds' of various matters, including that information that the reporting entity has holds may be relevant to the investigation of an offence against the law of the Commonwealth, or of a State or Territory.

Such suspicions should not be equated with a definitive assessment by the reporting entity that a crime is being, or would be, committed. Staff members of reporting entities who report a transaction or activity as suspicious are not necessarily expected to know or to establish the exact nature of any criminal offence the customer may be involved in. Further, reporting entity staff would not be expected to know or to establish that particular funds or property has been acquired through illicit or criminal means.

In accordance with the principles of the risk-based approach, a reporting entity may choose not to undertake a transaction in line with its obligations under other legislation (e.g. criminal or sanctions laws), its own commercial interests and/or its own risk appetite. However, imposing an express prohibition on continuing with a transaction following the submission of a suspicious matter report, without the approval of law enforcement, would be inconsistent with the purpose of such reports and would potentially undermine their usefulness as providing actionable intelligence for law enforcement agencies.

Requiring discontinuation of a transaction may, in some instances, amount to 'tipping off' a customer that a report has been submitted and/or place reporting entity personnel at risk. It may also lead, in practice, to reporting entities raising the threshold of suspicion at which they are comfortable to submit a suspicious matter report. Finally, given AUSTRAC receives a large number of suspicious matter reports (e.g. 78,000 in financial year 2015-16), the resources required to review and approve transactions on a timely basis would be significant.

4. Qualifying the term 'carrying on a business'

AUSTRAC bases its interpretation of the term 'in the course of carrying on a business' on the definition of 'business' in the AML/CTF Act, which is as follows:

> **business** includes a venture or concern in trade or commerce, whether or not conducted on a *regular, repetitive or continuous* basis [emphasis added]

AUSTRAC has given this definition its ordinary meaning in its Public Legal Interpretation No. 4. While the 2006 Replacement Explanatory Memorandum indicates that 'as a general proposition, designated services are limited to services provided to a customer in the course of carrying on the core activity of a business...' this general statement of principle cannot override the ordinary meaning of the AML/CTF Act.

It should be noted that the Replacement Explanatory Memorandum also stated that:

> some particular items in Table 1 [of subsection 6(2)] specifically limit the designated service…where it would be possible for the service to be provided in a non-commercial manner. For example item 6 limits making of a loan to where the loan is provided in the course of carrying on a loans business so that loans provided for non-commercial purposes, for example within a family, are excluded, and also loans made by a business whose core activity is not the provision of a loan are not captured. However some business may have more than one core activity and whether an activity is a core activity of the business will be determined by the circumstances in each case.

The Bill proposes to extend the specific limitations for certain designated services, namely items 1 and 2 of the table in subsection 6(3) relating to bullion-dealing businesses, and items 1, 2, 3, 4, 6, 9, 11, 12 and 13 of the table in subsection 6(4) relating to gambling businesses. This will provide greater clarity for businesses providing these services.

It would be inappropriate to impose similar specific limitations on all designated services due to the potential to inadvertently open a legislative loophole whereby a business could structure itself to provide basic financial services without triggering corresponding obligations under the AML/CTF Act.

5. Stored value cards

The statutory review of Australia's AML/CTF regime examined the definition of 'stored value card' in the AML/CTF Act.

In response to feedback from stakeholders, the report recommended that the definition should be further clarified for industry. However, given the wide range of products on the market, it is not practicable or desirable to provide a definitive list of relevant products in the AML/CTF Act itself. Therefore, the new definition of stored value card in the Bill has been drafted in an inclusive, technologically-neutral manner. It also provides some additional specific carve-outs, most of which are regulated under other 'designated services' in the AML/CTF Act.

In particular, the amended definition will include flexible new powers for AUSTRAC to declare that a thing is or is not a stored value card in the AML/CTF Rules for the purposes of the AML/CTF Act. A relevant consideration in deciding whether something should be included or excluded from the definition of stored value card is the level of ML/TF risk involved with any particular product or technology.