

# 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.

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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.

