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Suppression of the Financing of Terrorism Bill
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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

Bills Digest
No.127 2001-02

Suppression of the Financing of Terrorism Bill 2002

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Law and Bills Digest Group
1 May 2002

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Suppression of the Financing of Terrorism Bill 2002

Date Introduced: 12 March 2002

House: House of Representatives

Portfolio: Attorney-General

Commencement: The legislation generally commences on Royal Assent. However the commencement of items 1 and 2 of Schedule 1, which amend the Criminal Code Act 1995, is contingent on identical provisions not being first enacted by other legislation. The amendments to *Charter of the United Nations Act 1945* commence on proclamation or no later than 6 months after Royal Assent

Purpose

This Bill is aimed at restricting the financial resources that are available to support the activities of terrorist organisations. It explicitly makes the financing of terrorism a criminal offence and substantially increases the penalties that apply where a person deals with suspected terrorist assets that have been frozen. The Bill also seeks to enhance the collection and use of financial intelligence by requiring cash dealers to report suspected terrorist financing transactions to the Australian Transaction Reports and Analysis Centre (AUSTRAC) and relaxes restrictions on the sharing of information regarding such transactions with the relevant foreign authorities.

These measures also address commitments Australia has made, or will assume, under United Nations Security Council Resolution 1373¹ and the International Convention for the Suppression of the Financing of Terrorism.²

Background

The Legislative Package

The Bill is part of a package of counter-terrorism legislation introduced by the Howard Government on 12 March 2002. The other Bills in the package are the Security Legislation Amendment (Terrorism) Bill 2002 [No.2]³, the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002, and the Border Security Legislation Amendment Bill

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2002. Other components of the anti-terrorism package are the *Criminal Code Amendment (Anti-hoax and Other Measures) Act 2002* and the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (the ASIO Bill).⁴ The Government has also introduced a Telecommunications Interception Legislation Amendment Bill 2002 which enables interception warrants to be granted to investigate ‘an offence constituted by conduct involving an act or acts or terrorism’.⁵ The ASIO Bill has been referred to the Parliamentary Joint Committee on ASIO, ASIS and DSD for report by 3 May 2002. The other five Bills⁶ have been referred to the Senate Legal and Constitutional Legislation Committee for report by the same date.

Readers of this Digest are referred to the Digests that have been or will be produced for each of these Bills and to two Parliamentary Library Research Papers, [Terrorism in Australia: Legislation, Commentary and Constraints](#) and [Terrorism and the Law in Australia: Supporting Materials](#).

The two Research Papers contain a detailed treatment of issues associated with legislating to counter terrorism. One relevant theme struck in those papers is that in enacting specific anti-terrorism laws a cautious and considered approach must be taken. If there was a thesis in the *Terrorism and the Law in Australia* project it was that there are dangers in *underestimating* our legislative and administrative preparedness and that there are difficulties in striking an appropriate balance between safety and liberty. The question of preparedness and the difficulty of balancing safety and liberty are considered in the *Legislation, Commentary and Constraints* Paper. Comparative approaches in the United Kingdom and United States are canvassed in the *Supporting Materials* Paper. In summary, the Paper observes that while precedents are useful, we will need our own views regarding the terrorist threat in Australia and whether the measures in question are necessary, sufficient and proportionate.

Also of note is the recent Leader’s Summit on Terrorism and Multi-Jurisdictional Crime. On 5 April 2002, the Prime Minister and State and Territory Leaders negotiated an Agreement on Terrorism and Multi-Jurisdictional Crime. In relation to terrorism, this included an agreement to:

... take whatever action is necessary to ensure that terrorists can be prosecuted under the criminal law, including a reference of power of specific, jointly agreed legislation, including roll back provisions to ensure that the new Commonwealth law does not override State law where that is not intended and to come into effect by 31 October 2002. The Commonwealth will have power to amend the new Commonwealth legislation in accordance with provisions similar to those which apply under Corporations arrangements. Any amendment based on the referred power will require consultation with and agreement of States and Territories, and this requirement to be contained in legislation.⁷

At present, the details and implications of the Agreement are not clear.

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International Action Terrorist Financing

In the aftermath of the September 11 attacks, the United States and other nations involved in the coalition against terrorism quickly moved to restrict the financial resources available to terrorist networks and in particular the *Al Qaida* network.⁸

On 24 September 2001, President Bush issued Executive Order 13224⁹ freezing the U.S. assets and blocking the U.S. transactions of alleged terrorists and entities suspected of supporting them. The executive order originally nominated 27 entities but has since been expanded to cover 189 individuals and organisations.

The United Nations Security Council passed resolution 1373 on 28 September 2001. Amongst other matters the resolution calls on States to:

- prevent and suppress the financing of terrorist acts;
- criminalize the financing of terrorist acts
- freeze the assets of persons who commit, or attempt to commit, terrorist acts and those associated with such persons.
- prohibit their nationals or any persons and entities within their territories from making any assets available to terrorists or entities associated with terrorism.

On 31 October 2001, the Financial Action Task Force (FATF)¹⁰ on money laundering announced that it would focus its resources on the world-wide effort to combat terrorist financing. FATF agreed to a set of special recommendations on terrorist financing including that its members:

- take immediate steps to ratify and implement the relevant United Nations instruments
- criminalize the financing of terrorism, terrorist acts and terrorist organisations
- freeze and confiscate terrorist assets
- report suspicious transactions linked to terrorism
- provide the widest possible range of assistance to other countries law enforcement and regulatory authorities for terrorist financing investigations
- impose anti-money laundering requirements on alternative remittance systems¹¹
- strengthen customer identification measures in international and domestic wire transfers; and
- ensure that entities, in particular non-profit organisations, cannot be misused to finance terrorism

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Both the United States and the United Kingdom have strong legislation to suppress terrorist financing.¹² Since September 11, the U.S. has blocked \$US34.2 million in assets of terrorist organizations. Other nations have also blocked another \$US70.5 million.¹³

Australian Developments

On 3 October 2001 the Reserve Bank of Australia (RBA) announced that the Government had directed it to take steps under the *Banking (Foreign Exchange) Regulations* to block accounts which might be held by persons or organisations identified by the UN and the US. This list was updated on 17 October and 9 November and currently includes 46 entities and 16 individuals.¹⁴ The *Banking (Foreign Exchange) Regulations* have been deployed against the Taliban and Taliban associated entities since December 1999.

The RBA has written to institutions seeking details of accounts held by any of the listed institutions. According to published reports, no accounts held by terrorists or their associates have been frozen in Australia.¹⁵ While no assets have been frozen, it has been claimed that groups such as Hamas, Hezbollah, the Chechen Mujahedin, the Liberation Tigers of Tamil Eelam have been active in raising funds for their organisations in Australia.¹⁶

On 6 October 2001, AUSTRAC issued a notification to all cash dealers¹⁷ containing the names of suspected terrorist entities identified by President Bush in Executive Order 13224. Subsequent information circulars have been issued as the list of entities has been updated.¹⁸ Under the *Financial Transactions Reports Act 1988* (FTR Act) cash dealers must report to transactions to AUSTRAC that they suspect may be relevant to an investigation of a breach of Australian law.¹⁹

On 8 October 2001 the Government made the *Charter of the United Nations (Anti-terrorism Measures) Regulations 2001* (the Anti-Terrorism Regulations).²⁰ These regulations give effect to UN Security Council Resolution [1373](#) in Australia by preventing a person in Australia, or a citizen of Australia, from dealing with financial assets of persons or entities that engage in or support terrorism, or are under the direct or indirect control of such persons or entities.

The regulations allow the Minister (currently the Foreign Minister) to proscribe a person or entities suspected of involvement in terrorist acts. The Minister may also list assets or classes of assets that are owned or controlled by such persons. The regulations provide that a person (for example a bank) who holds assets that are owned or controlled by a proscribed person or entity must not use or deal with or allow an asset to be used or dealt with. A fine of up to \$5 500 applies for a breach of the regulations.

It is also an offence if a person makes an asset available to a proscribed person and is reckless as to whether or not the person or entity is proscribed. This Bill proposes to move these provisions from the regulations to the *Charter of the United Nations Act 1945*.

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On 21 December 2001 the Government listed in the Australian Government *Gazette* the names of terrorists and terrorist organisations whose assets must be frozen by the holder of those assets under the Anti-terrorism Regulations. This list was most recently updated on 17 April 2002.²¹

The Attorney-General and the Foreign Minister announced that Australia had signed the United Nations International Convention for the Suppression of the Financing of Terrorism on October 21.²² The Convention states that countries will take action against people or countries that provide or collect funds for terrorist purposes. It aims to starve terrorists of assets. The Government has announced that, in accordance with standard practice, the Convention will not be ratified and hence will not bind Australia until the Joint Committee on Treaties has examined it.²³ At the time of writing, the Convention has not yet been referred to the Committee.

Main Provisions

Financing Terrorism Offence

Schedule 1 contains amendments to the *Criminal Code Act 1995*. **Item 2** inserts elements of the **new part 5.3** into the Criminal Code which deals with terrorism. **Proposed section 100.1** which contains the relevant definitions and **proposed section 100.2** which sets out the claimed constitutional basis for the new part will only commence if this Bill receives Royal Assent prior to the Security Legislation Amendment (Terrorism) Bill 2002. That legislation contains provisions that are identical.

Proposed section 103.1 establishes the offence of financing terrorism. It provides that a person commits an offence if the person provides or collects funds and the person is *reckless* as to whether the funds will be used to facilitate or engage in a terrorist act.

The maximum penalty that can be imposed is imprisonment for life.²⁴ Fines of up to \$220 000 may be imposed on a natural person and up to \$1.1 million for a corporation. A person can be convicted under proposed section 103.1 regardless of whether or not the terrorist act occurs (**proposed section 103.1(2)**).

Australian statutes are generally presumed to extend only to the territorial limits of Australia, unless a contrary intention is expressed.²⁵ The presumption is rebutted by **proposed section 103.1(3)** which invokes the broad extra-territorial jurisdiction under section 15.4 of the Criminal Code. However, in the case where there is no link between the offence and Australia, the consent of the Attorney-General would be required before a prosecution could be commenced.

The term 'funds' is broadly defined in **proposed section 100.1** and it closely follows Article 1 of the Convention for the Suppression of the Financing of Terrorism. It is not

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limited to the supply of money but also captures the collection or provision of property including weapons and other equipment.

‘Terrorist act’ is defined in **proposed section 100.1**. The proposed definition of ‘terrorist act’ raises a number of serious legal issues. The reader is referred to Department of the Parliamentary Library Research Paper No.13 2001-02 - *Terrorism and The Law in Australia: Supporting Materials*, for a comprehensive analysis of issues relating to legal problems categorising terrorist acts.

Recklessness

Under the Criminal Code, offences are composed of fault elements²⁶ and physical elements. Fault elements define the state of mind of the accused in relation to the offence which must be established by the prosecution. Chapter 2 of the *Criminal Code* defines the fault elements of ‘intention’, ‘knowledge’, ‘recklessness’ and ‘negligence’.²⁷ The fault element in relation to **proposed section 103.1** is that the prosecution must establish that a person was reckless as to whether the funds collected or provided will be used to facilitate a terrorist act. A person will be reckless as to a particular circumstance if they have knowledge of a substantial risk that a circumstance exists (in this case that funds that have been collected or provided will be used to facilitate a terrorist act) and unjustifiably take that risk. Recklessness is a lower evidentiary burden for the prosecution to overcome than if it were required to establish actual knowledge or intention to commit a criminal act.

The Explanatory Memorandum states that the offence provisions implement Article 2 of the Convention for the Suppression of the Financing of Terrorism as well as UN Security Council Resolution 1373. However the proposed section appears to go beyond both the convention and the resolution in that proof of recklessness rather than intention is required to prove an offence.²⁸ The Convention states that it is an offence if the person ‘provides or collects funds *with the intention* that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out terrorist acts.’ The Resolution calls on member states to ‘criminalize the wilful provision or collection, by any means, directly or indirectly of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts.’

The proposed section may also be contrasted with US and UK Law. In the United States it is an offence to provide material support to terrorists or terrorist organisations knowing or intending that it will be used to facilitate specified offences. A maximum penalty of 10 years imprisonment applies.²⁹ The UK provision is closer in effect to **proposed section 103.1**, it states that a person commits an offence if the person is involved in fund raising and intends or has reasonable cause to suspect that it may be used for the purposes of terrorism.³⁰ The maximum term of imprisonment that can be imposed is 14 years.

The decision to use the fault element of recklessness rather than intention may make the operation of the law uncertain. It is possible to imagine a scenario where it is alleged in the press that an organisation that claims to be a charity is in fact diverting funds to a terrorist

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organisation. In such circumstances, would a person who donated money to the charity despite knowledge of the allegations be taking an unjustifiable risk? The allegation is unproven and may well be false. According to the Criminal Code, the question whether taking a risk is unjustifiable is one of fact.

Requiring actual knowledge or intention that funds were going to a terrorist organisation would provide greater certainty in the application of the law. Presumably the desire to avoid this uncertainty is one of the reasons why the international instruments have focused on intention. The counter argument to such an approach would be that a person might be wilfully blind to the activities of an organisation and that the use of the fault element of recklessness may capture such behaviour.

Comparison with Existing Law

To some extent conduct captured by the proposed financing of terrorism provision is already an offence under section 7 of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (the Foreign Incursions Act). That section makes it an offence to:

- give money or goods to, or perform services for, any other person or any body or association of persons or
- receive or solicit money or goods, or the performance of services

with the intention of supporting or promoting a person to

- enter a foreign State with intent to engage in a hostile activity in that foreign State; or
- engage in a hostile activity in a foreign State

Proposed section 103.1 differs from the section 7 of the Foreign Incursions Act in four key ways. Most significantly the prosecution has a lower burden in that it need only establish recklessness not intention to make out the offence. Secondly, the proposed section captures funds raised to facilitate domestic and foreign terrorist acts whereas section 7 of the Foreign Incursions Act is limited to assisting foreign activity.³¹ Thirdly, the maximum penalty in the case of section 7 is imprisonment for 10 years. Finally the potential for extra-territorial application is greater with **proposed section 103.1**. In the case of section 7 a person will not be taken to have committed an offence in relation to an act outside Australia unless, at the time of the doing of that act, the person was: an Australian citizen, ordinarily resident in Australia or present in Australia at any time during the period of one year immediately preceding the doing of that act for a purpose connected with the act. A prosecution under section 7 can only begin with the consent of the Attorney-General.³²

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Collecting and Sharing Financial Intelligence

Specific Reporting Obligation on Cash Dealers

The Australian Transaction Reports and Analysis Centre (AUSTRAC) was established by *Financial Transaction Reports Act 1988 (FTR Act)*. The FTR Act requires cash dealers to report transactions to AUSTRAC where they have reasonable grounds to suspect that information may be relevant to the evasion of tax law, the investigation or prosecution of a Commonwealth, State or Territory offence or the enforcement of *the Proceeds of Crime Act 1987*.³³ In addition cash dealers must report cash transactions of A\$10 000 or more and all international funds transfer instructions. AUSTRAC provides an intelligence role to Commonwealth, State and Territory law enforcement and revenue agencies by making available financial transaction reports (FTR) information.

Items 1 to 8 impose a specific obligation on ‘cash dealers’ to report to AUSTRAC transactions that may relate the financing of terrorism. The amendments formalise the practice that has been in place since October 2001 when AUSTRAC issued a circular to cash dealers alerting them to a list of entities suspected of being involved in terrorist activities.

Item 1 inserts **proposed subsection 16(1A)** requiring cash dealers to make a report to AUSTRAC if they have reasonable grounds to suspect that a transaction is preparatory to the commission of a *financing of terrorism offence* or would be relevant to the investigation or prosecution of such an offence. **Proposed subsection 16(6)** defines these offences as a contravention of **proposed section 103.1** of the *Criminal Code Act 1995* or **proposed sections 20 or 21** of the *Charter of the UN Act 1945* which provide for the freezing of assets.

Cash dealers must send a report to the Director of AUSTRAC as soon as practicable after they have formed a suspicion. **Item 21** states that the new reporting obligation only applies to transactions completed on or after the day on which the Act receives Royal Assent. The Federal Police (AFP) have called for the omission of this item and argued that the reporting requirements should be retrospective. It would like cash dealers to be required to report transactions that they suspect to be related to a financing of terrorism offence regardless of whether the transaction occurred before or after the commencement of this legislation.³⁴ The Attorney-General’s Department has suggested that this would impose a ‘very onerous obligation’ on cash dealers to review past transactions.³⁵

Items 2 to 7 contain consequential amendments which amongst other matters, ensure that cash dealers cannot disclose information contained in reports to AUSTRAC and provide that reports cannot be used in legal proceedings. The treatment is the same that applies to other reports made by cash dealers under the existing legislation.

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Information Sharing

Section 27 of the FTR Act governs access to FTR information. Existing paragraph 27(1)(d) allows the Attorney-General to access FTR information for the purpose of dealing with a request made by a foreign country for international assistance in a criminal matter. Part VIA of the *Mutual Assistance in Criminal Matters Act 1987* permits the Attorney-General to require the Director of AUSTRAC to give the Attorney-General access to FTR information.

The Government has come to the view that this process is too cumbersome and has argued that 'to be effective financial intelligence needs to be provided urgently'.³⁶ The proposals contained in the Bill to facilitate quicker exchange of financial intelligence respond to the call of the Financial Action Task Force in 1996 that:

Each country should make efforts to improve a spontaneous or "upon request" international information exchange relating to suspicious transactions, persons and corporations involved in those transactions between competent authorities. Strict safeguards should be established to ensure that this exchange of information is consistent with national and international provisions on privacy and data protection.³⁷

UN Resolution 1373 also calls on States to 'find ways of intensifying and accelerating the exchange of operation information.'

In order to expedite the process of information sharing the Bill shifts responsibility for the disclosure information from the Attorney-General to the director of AUSTRAC, the Commissioner of the AFP and the Director-General of ASIO.

Item 9 inserts a **new paragraph 27(1)(d)** which enables the Director of AUSTRAC to authorise³⁸ the Commissioner of the AFP to have access to FTR information for the purposes of communicating the information to a foreign law enforcement agency. **Item 14** permits the Director to communicate FTR information to a foreign country.

The communication of information by the Director and the Commissioner is governed by **proposed sections 27(11A) and 27(11B)** respectively. In each case, the Director or Commissioner must be satisfied that appropriate undertakings have been given to:

- protect the confidentiality of the information and
- control the use of the information.³⁹

In addition, the Director or the Commissioner may only communicate the information when it is 'appropriate in all the circumstances'. The Explanatory Memorandum gives some guidance on when a disclosure will be appropriate. It states that the Commissioner may have to take into account factors such as whether the request was made for the purpose of persecuting or punishing a person on the ground of sex, race, nationality or religion and whether granting the request would prejudice the national interest.⁴⁰

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Some may query whether unelected officials such as the Commissioner or Director are best placed to make assessments of such sensitive issues and whether these matters should remain the responsibility of the Minister who in turn is accountable to the Parliament. This concern must be balanced against the internationally recognised desire to transfer the relevant financial intelligence quickly.

Where the AFP obtains access to information for the purposes of communicating it to overseas agencies which is not relevant to the AFP's functions, the AFP cannot keep the information for its own purposes (**proposed section 27 (11D)**).

ASIO Access

Section 27AA of the FTR Act deals with the ability of ASIO to obtain access to FTR information and governs the use that may be made of it. It provides that the Director of AUSTRAC may authorise ASIO to have access to the information for the purpose of performing its functions. Currently ASIO officers are not permitted to communicate FTR information to foreign intelligence agencies. **Item 17** inserts **new paragraph 27AA(4)(a)(iv)** to remove this restriction. The Director-General of Security or their delegate may communicate the information to a foreign intelligence agency if they are satisfied that the agency has given appropriate undertakings to:

- protect the confidentiality of the information and
- ensure that it is used in the performance of the agency's functions

The communication must also be appropriate in all the circumstances of the case. The factors relevant to the question of whether a communication is appropriate are the same as those discussed above.

Item 22 repeals Part VIA of the *Mutual Assistance in Criminal Matters Act 1987*. This part deals with the ability of the Attorney-General to ask the director of AUSTRAC to provide information to comply with a request by a foreign country. In light of the new regime for information sharing introduced by the Bill responsibility for such matters now rests with AUSTRAC.

Review of the Amendments to the FTR Act

Item 23 requires that after the amendments to the FTR Act have been in force for two years the Attorney-General must establish a review to examine:

- the extent to which the amendments facilitate the enforcement of the financing of terrorism offences
- whether the amendments sufficiently regulate the sharing and use of FTR information and

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- whether the privacy of persons identified in FTR information is adequately protected.

The Bill is silent on the question of how the review will be conducted. There is no indication of whether there will be any public hearings or whether submissions from the public will be invited.

The Review will be conducted by a Committee comprised of the Privacy Commissioner and nominees of the:

- Commissioner of the AFP
- Director-General of Security
- Inspector General of Intelligence and Security
- Director of AUSTRAC and the
- Attorney- General

Sub-item 23(3) provides that the Attorney-General is entitled to reject nominations if he or she is satisfied that the nominee does not have the necessary qualifications to carry out the review or appropriate security clearance. In the event that the Attorney-General rejects a nomination the nominating officer can put another person forward (**sub-item 23(4)**).

The Committee is charged with providing the Attorney-General with a written report which must be tabled in both Houses of Parliament within 15 sitting days of it being given to the Attorney General. There is no guarantee however that members of Parliament will receive an unedited version of the report. **Sub-item 23(7)** enables the Attorney-General to remove information from the report if, after advice from Commissioner of the AFP and the Director-General of Security, the Attorney-General is satisfied that information in the report may:

- endanger a person's safety
- prejudice an investigation or prosecution or
- compromise the activities of ASIO or the AFP.

If the tabled report identifies inadequacies in the operation of the FTR Act the Attorney-General must commission a further review within two years to determine if they have been dealt with effectively (**sub-item 23(8)**). Significantly however, any further review will only address deficiencies identified in the *tabled report*. Given that all the members of any subsequent review committee should have security clearance, it may be considered appropriate that the Committee should also examine deficiencies identified in the 'unedited' version of the original review.

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Freezing Assets

Schedule 3 inserts a new part into the *Charter of the United Nations Act 1945* (the UN Act). The new part in large measure, brings the provisions of the *Charter of United Nations (Anti-Terrorism Measures) Regulations 2001* into the principal Act.

The new part, which is entitled ‘Offences to give effect to Security Council decisions’, provides a legislative scheme for freezing of assets linked to terrorist activity. The scheme is based on proscribing persons, entities and assets.

Two ‘Proscription’ Mechanisms

A person or entity may be proscribed either by being listed by the Minister under **proposed section 15** or through regulations made by the Governor-General under **proposed section 18**.⁴¹ Assets may only be listed by the Minister. The proscription procedures proposed for the UN Act differ significantly from those proposed for the Criminal Code Act. An analysis of these distinctions is contained in the Bill Digest for the Security Legislation Amendment (Terrorism) Bill 2002.

The Ministerial Path

Proposed section 15 provides that the Minister must list a person, entity or asset in the *Gazette* if satisfied of the ‘prescribed matters’. These matters are to be determined by regulations made by the Governor-General. **Proposed subsection 15(5)** provides some restriction on the scope of matters that may be prescribed. They must be related to a decision:

- that the Security Council has made under Chapter VII⁴² of the Charter of the UN and
- article 25⁴³ requires Australia to carry out and
- relates to terrorism and dealings with assets.

The proposed section contains no definition of terrorism so some discretion remains with the Governor-General to determine whether a particular resolution made by the UN is within the regulation making power. While this matter could be subject to review by the Courts, each House of Parliament also has the capacity to prevent the prescription of inappropriate matters by disallowing the regulations.

Proposed section 16 states the Minister *may* revoke a listing by a notice in the *Gazette* if the Minister is satisfied that it is no longer necessary to give effect to the relevant Security Council decisions. The use of the word *may* carries the implication that the Minister retains some discretion to retain the listing despite the fact that it is no longer necessary to implement a UN resolution. While it must be considered very unlikely that a Minister would ever take such a view, there would seem to be a strong case for an amendment that would require the Minister to revoke a listing in such circumstances.

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Unlike the current regulations, the Bill provides that Ministerial decisions relating to the listing of persons and entities may be reviewed on the merits by the Minister. **Proposed section 17** permits a listed person or entity to write to the Minister setting out the reasons why a listing should be revoked. According to the Explanatory Memorandum, the sort of information that should be provided is evidence that the person or entity is not associated with terrorist activities.

There is no provision for the owner of assets to ask the Minister to review a decision to have the assets listed.

Judicial Review of Ministerial Listings

In principle, the decision of the Minister that he or she is 'satisfied' that the prescribed matters have been met is subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1975 (AD(JR) Act)*. This legislation allows for the review of 'decisions of an administrative character' on grounds such as denial of natural justice, failure to take into account relevant considerations, taking into account irrelevant considerations, improper purpose and error of law.⁴⁴

The language of the statute under which the decision is made may however affect the scope of judicial review. In the case of **proposed section 15** the use of the word 'satisfied' without further qualification may mean for example that the Minister is largely unconstrained in deciding the grounds upon which he or she is satisfied.⁴⁵ In contrast to the present Bill, the proscription provisions contained in the Security Legislation Amendment (Terrorism) Bill 2002 state that the Attorney-General may proscribe an organisation if 'satisfied on reasonable grounds' of certain specified matters.⁴⁶

Judicial authorities suggest that a requirement that a decision-maker be 'satisfied' only permits the court to inquire as to whether the opinion could be considered as having been 'formed by a reasonable man who correctly understands the meaning of the law under which he acts'.⁴⁷ In all other respects the opinion of the decision-maker is decisive. Where however a statute provides that a decision is to be made 'on reasonable grounds' some dicta suggests that this is a reference to objective criteria and allows the courts to examine whether they have been met.⁴⁸

It could be contended that the absence of the expression 'on reasonable grounds' in **proposed section 15** implies that the opinion of the Minister is to be decisive. The policy justification for a distinction in the scope of judicial review between the two proscription procedures is not clear. Issues related to the judicial review of proscription are considered more extensively in the Bills Digest for the Security Legislation Amendment (Terrorism) Bill 2002.⁴⁹

Proscription by the Governor-General

Proposed section 18 permits the Governor-General to proscribe a person or entity if that person or entity is identified in a relevant UN Security Council decision. **Proposed**

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subsection 18(3) permits the regulations to incorporate lists of persons or entities identified by the UN. The regulations may incorporate such lists as they are updated. Unlike the ministerial listing, there is no mechanism to apply for a merits review where a person is prescribed by the regulations.

Listings and proscriptions are automatically revoked when the UN decision no longer binds Australia (**proposed section 19**).

Offence Provisions

Proposed section 20 prohibits a person who holds a ‘freezeable asset’ from unauthorised use or dealing with the asset or otherwise allowing or facilitating its use or dealing. A freezeable asset is defined in **proposed section 14** as an asset that is owned or controlled by a prescribed entity, a listed asset, or an asset that is generated by such assets. A person will not commit an offence if the use or dealing has been authorised by the Minister under **proposed section 22**. According to the Explanatory Memorandum it is intended that this power will only be used in exceptional circumstances, for example, to protect the rights of third parties.⁵⁰ Use or dealing with a freezeable asset to maintain its value is permitted.⁵¹ However the burden of proving that this was the purpose of the dealing rests with the defendant (**proposed subsection 20(3)**).

Proposed section 21 prohibits a person from, without ministerial authorisation, directly or indirectly making an assets available to prescribed persons or entities. ‘Assets’ are defined broadly in **proposed section 14** as including ‘property or any kind’ as well as legal documents or instruments evidencing title to property.

Proposed sections 20 and 21 are similar to existing regulations 9 and 10 of the Charter of the United Nations (Anti-Terrorism Measures) Regulations 2001. The principal difference is that the maximum penalty is substantially increased from a fine of \$5 500 to 5 years imprisonment.⁵² The maximum fine is \$33 000 for a natural person or \$165 000 for a corporation.⁵³

Fault elements

Under the Criminal Code every offence is composed of physical elements and fault elements. Fault elements relate to the mental state that needs to be demonstrated in order to make out an offence. Section 5.6 of the Criminal Code states that where, as in the case of **proposed sections 20 and 21**, there is no fault element specified for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element. As a consequence, the prosecution does not need to prove that the defendant knew:

- that the asset was a freezeable asset to establish an offence under **proposed section 20**
or

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- that the person or entity to whom the asset was made available was a proscribed entity to establish an offence under **proposed section 21**.

It is sufficient if they can demonstrate that the person was reckless. The provision would seem to require institutions such as banks to thoroughly examine their accounts and have appropriate systems in place to ensure that they do not permit any dealings with freezable assets or make assets available to proscribed entities.

It will be no defence, under either **proposed sections 20 or 21**, for a person to claim that they did not know that the use or dealing with an asset or making the asset available was not authorised by the Minister. **Proposed subsections 20(2) and 21(2)** state that strict liability applies to this element of the offence meaning that the prosecution is not required to prove a fault element in relation to this aspect of the offence. Nevertheless the defence of mistake is still available⁵⁴ where the person considered whether the action was authorised and reached a mistaken but reasonable belief that it was.

Extra-territoriality

Proposed subsections 20(4) and 21(3) apply section 15.1 of the Criminal Code to the offence provisions giving them some extra-territorial application. Australian citizens or bodies corporate who deal in freezable assets or make assets available to proscribed entities in foreign countries will be liable for prosecution.

Compensation

Proposed section 25 provides for the payment of compensation by the Commonwealth where the owner of an asset suffers loss as a result of the failure of the holder of an asset to comply with an instruction in purported compliance with the law and the asset was not a 'freezable asset'. It is intended to cover situations where a bank freezes the funds in a person's account in the mistaken but honest belief that the person is a listed person or entity.⁵⁵

The provision effectively only provides for compensation when the holder of asset makes a mistake. It does not provide for any compensation when a mistake has been made by the Minister or the Governor-General in proscribing a person or entity. This is because assets owned or controlled by such persons will come within the definition of 'freezable assets' in **proposed section 14** even if they have been wrongly proscribed.

Unintended Consequences of Asset Freezing

There has already been an instance where the asset freezing powers conferred by the anti-terrorism regulations have been crudely applied. Evidence given to the Senate Legal and Constitutional Committee revealed that the Commonwealth Bank (CBA) froze the bank accounts of a Melbourne music business for 26 days solely because the business shared its name with a Peruvian terrorist organisation - the Shining Path.

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The Minister of Foreign Affairs gazetted the Shining Path as a prescribed entity on 21 December 2001. Following the gazettal, the CBA notified the AFP that it had an account matching the name of a proscribed entity. The AFP informed the bank that it was a match in name only and that it was up to the bank to decide whether they would still deny access to the account. The AFP told the Senate Legal and Constitutional Legislation Committee that ‘the AFP is not in a position to tell an institution that an account is a terrorist account or not.’⁵⁶

At the very least the incident demonstrates the need for improved administrative arrangements, if not an amendment to the Bill, to deal with cases of mistaken identity more quickly. The existing framework leaves financial institutions in the difficult situation of having to determine whether an account is associated with terrorism. Once a match in name has been established, there would seem to be a strong case for ensuring that the investigatory burden shifts to the AFP to speedily determine whether or not the assets should be frozen.

Concluding Comments

The Bill provides a mechanism for freezing terrorist assets once they have been identified. The effectiveness of the Bill however will depend upon whether intelligence and law enforcement agencies are able to identify the right people and entities.

It would appear that to date no terrorist assets with Australian institutions have been frozen as a result of the measures taken by the Government since September 11. This outcome may be surprising in view of claims of fundraising activity by terrorist organisations in Australia and gives rise to a number of questions. For example, is it really likely that there are no terrorist assets in Australia? Are institutions adequately complying with instructions to block accounts? Is excessive reliance being placed on lists compiled by the UN or the US government rather than seeking out Australian operatives? What measures are being taken against alternative remittance systems operating in Australia?

If, as is probable, the list of suspect persons and entities presently being employed by the authorities are incomplete, what measures can be taken to complete those lists? For example do we need legislation to identify the beneficial owners of interests in trusts or partnerships?⁵⁷

It is possible that more resources will need to be allocated to investigative agencies to ensure that the mechanisms for restricting the flow of funds to terrorist organisations contained in this Bill are deployed to full effect.

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Endnotes

- 1 The full text of UN Security Council Resolution 1373 is available at the following link: <http://www.un.org/Docs/scres/2001/res1373e.pdf>.
- 2 The text of the convention is available at <http://www.un.org/law/cod/finterr.htm>
- 3 Introduced on 13 March 2002. The original Bill [the Security Legislation Amendment (Terrorism) Bill 2002], which was introduced on 12 March 2002, was withdrawn on 13 March 2002 and the [No.2] Bill was substituted. The reason was that the Office of Parliamentary Counsel had drawn the Government's attention to a discrepancy between the title of the original Bill and the title referred to in the notice of presentation given by the Attorney-General. This discrepancy meant that the Bill's introduction was inconsistent with House of Representatives' Standing Orders. The withdrawal and re-introduction were designed to address this problem. See Mr Peter Slipper MP, House of Representatives, *Hansard*, 13 March 2002, pp.1138–9.
- 4 Introduced into the House of Representatives on 21 March 2002.
- 5 See **item 7, Schedule 1**, Telecommunications Interception Legislation Amendment Bill 2002.
- 6 As stated above, the Anti-hoax Bill has received Royal Assent.
- 7 Attorney-General, *News Release*, 'National Move to Combat Terror', 7 April 2002. The Attorney's News Release can be found at http://www.ag.gov.au/aghome/agnews/2002newsag/37_02.htm (accessed 15 April 2002).
- 8 While there has been much activity since September 11, concern about the financial resources available to terrorists predates that incident, for example, the United Nations General Assembly adopted International Convention for the Suppression of the Financing of Terrorism in 1999. As of 2 April 2002, 132 countries had signed the Convention, and 26 countries had completed the ratification process.
- 9 Executive Order 13224 can be viewed at the following link: <http://www.nara.gov/fedreg/eo2001b.html>. The US government has previously used executive orders to freeze the assets of those who threaten to disrupt the middle east peace process including Osama bin Laden (see Executive Orders 12947, 13099). The order against bin Laden had no apparent effect since he was found not to have any assets in the US. In 1999, President Clinton froze the US assets of the Taliban under Executive Order 13129. It has been reported that \$254 million was frozen as a result. See R. Huang, 'The Financial War Against Terrorism' Columbia International Affairs Online <http://www.ciaonet.org/wpsfrm.html>
- 10 FATF is an inter-governmental body whose purpose is the development and promotion of policies, both at national and international levels, to combat money laundering. Australia is a member of FATF.
- 11 This recommendation is intended to cover informal money or value transfer systems which operate outside the regulated financial sector such as the Hawala system. This is a paperless dealing system operated on the basis of trust among money brokers. Brokers advance funds to depositors on a nod or a handshake, leaving no paper or electronic trails. Those involved often have no formal 'office' from which to conduct transactions. It has been reported that Al Qaida relies heavily on this system. The US Government moved to shut down two hawalas, Al Barakaat and Al Taqwa, in November 2001. See R. Huang, 'The Financial War Against Terrorism' Columbia International Affairs Online <http://www.ciaonet.org/wpsfrm.html>
- 12 See USA PATRIOT Act 2001, Terrorism Act 2000 (UK) and Anti-Terrorism, Crime and Security Act 2001 (UK). This legislation is summarised in N. Hancock (ed), *Terrorism and The Law in Australia: Supporting Materials*, Parliamentary Library *Research Paper* No.13 2001–02. <http://www.aph.gov.au/library/pubs/rp/2001-02/02rp13.htm>

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- 13 Campaign Against Terrorism: A Coalition Update, 11 March 2002.
<http://www.whitehouse.gov/march11/coalition/>
- 14 The list is available at the following link:
http://www.rba.gov.au/MediaReleases/2001/mr_01_22_annex.pdf
- 15 See Morgan Mellish, 'Banks hunt for bin Laden links', *Australian Financial Review*, 4 October 2001. However assets with no association to a terrorist group have been mistakenly frozen as a result of the Charter of the United Nations (Anti-Terrorism Measures) Regulations 2001. The accounts of a Melbourne business that operated under the name 'Shining Path' were frozen for 26 days by the Commonwealth Bank: See Brian Toohey, 'A-G's war swings from tragedy to farce' *Australian Financial Review* 9 March 2002.
- 16 Dr Rohan Gunaratna quoted in B. Freedman, 'Hezbollah, Hamas active in Australia' *Australian Jewish News*, 5 October 2001.
- 17 Cash dealers include financial institutions, insurers, trustees, bookmakers and other person listed under section 3 of the *Financial Transactions Reports Act 1988*.
- 18 See AUSTRAC information circulars 22, 23, 24. These circulars may be found at the following link:
<http://www.austrac.gov.au/guidelines/circulars/index.htm>.
- 19 While there is currently no specific offence of financing terrorism, cash dealers should be alert to transactions that may be related to offences under laws covering similar conduct such as the Crimes (Foreign Incursions) Act 1978. Section 7 of this Act, *inter alia*, prohibits giving money to a person for the purpose of supporting or promoting a person to engage in hostile activity in a foreign state.
- 20 Section 6 of the *Charter of the United Nations Act 1945* provides that the Governor-General may make regulations for and in relation to giving effect to certain decisions of the UN Security Council.
- 21 The lists are available at the following link: <http://www.dfat.gov.au/icat/index.html>
- 22 The Hon. Alexander Downer and the Hon. Daryl Williams, 'Australia signs terrorist financing convention', *Media Release*, 21 October 2001.
- 23 The Joint Committee was established in 1996 to review and report on treaty actions action proposed by the Government before action is taken which binds Australia to the terms of the treaty. The Hon. Alexander Downer and the Hon. Daryl Williams, 'Government announces reform of treaty making', *Media Release*, 2 May 1996.
- 24 The Government has increased the maximum penalty since it first announced that it would be creating the financing of terrorism offence. In December 2001, the Attorney-General stated that the offence would carry a maximum penalty of 25 years imprisonment. See The Hon. Daryl Williams MP, 'Upgrading Australia's Counter-Terrorism Capabilities', *Media Release*, 18 December 2002.
- 25 See section 14.1 of the Criminal Code Act.
- 26 Except in the case of strict or absolute liability offences.
- 27 Sections 5.2, 5.3, 5.4 and 5.5.
- 28 The fact that the proposed section departs from the text of the international instruments does not affect its validity to the extent that the provision is enacted in reliance on the external affairs power. When a law purports to give domestic effect to an international instrument, the primary question to be asked is whether it has selected means that are 'reasonably capable of being considered appropriate and adapted to implementing the treaty' (*Victoria v. Commonwealth* (1996) 187 CLR 416 at 487). However, the power is not confined to the implementation of treaties or treaty obligations. It will support measures

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that address matters of international concern, at least where that concern is reasonably concrete (*Koowarta v. Bjelke-Petersen* (1982) 153 CLR 168 per Murphy J at p. 242; *Polyukovich v. Commonwealth* (1991) 172 CLR 501 per Brennan J at pp. 560-562 and Toohey J at pp. 657-658.) It probably extends also to measures that implement recommendations of international agencies and may extend to measures that pursue agreed international objectives (See generally, *R v. Burgess, Ex Parte Henry* (1936) 55 CLR 608 per McTiernan J at p. 687; *Commonwealth v. Tasmania* (1983) 158 CLR 1 per Deane J at pp. 258-259 and Murphy J at pp. 171-172.)

- 29 18 USC 2339A.
- 30 Section 15.Terrorism Act 2000,
- 31 Domestic acts may however be captured by offences relating treason, treachery under sections 24 and 24AA of the *Crimes Act 1914*.
- 32 Section 10, Foreign Incursion Act.
- 33 Section 16 FTR Act
- 34 Mr Colvin, Senate Legal and Constitutional Legislation Committee, *Evidence*, 19 April 2002, p. 191–192.
- 35 Ms Chidgey, Senate Legal and Constitutional Legislation Committee, *Evidence*, 19 April 2002, p. 210.
- 36 The Hon. Daryl Williams, Second Reading Speech, House of Representatives, *Hansard*, 12 March 2002, p. 973.
- 37 See [Recommendation 32](#)
- 38 According to Explanatory Memorandum this authority will take the form of a Memorandum of Understanding between AUSTRAC and the AFP.
- 39 In the case of information to be communicated to foreign law enforcement agency, the Commissioner must be satisfied that the information will be used to perform the agency’s functions.
- 40 Explanatory Memorandum, p. 11.
- 41 See **proposed section 14**.
- 42 This chapter deals with action with respect to threats to the peace, breaches of the peace, and acts of aggression.
- 43 Article 25 provides that the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter
- 44 The grounds of review generally correspond to those available at common law.
- 45 Other grounds of review would still be open however. For example, a decision could still be reviewed if it was so devoid of any plausible justification that no reasonable person could have come to it in the circumstances. See *Associated Provincial Picture Houses v. Wednesbury Corporation* (1948) 1 KB 223.
- 46 **Proposed section 102.2.**
- 47 *R v Connell; Ex parte The Hetton Bellbird Collieries* (1944) 69 CLR 407 per Latham CJ at p. 430.
- 48 *Liversidge v. Anderson* [1942] AC 206 per Atkin LJ at pp. 228–229. His Lordships reasoning was endorsed in *Nakkuda Al v. Jayaratne* (1951) AC 66
- 49 See <http://www.aph.gov.au/library/pubs/bd/2001-02/02bd126.pdf>

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- 50 p. 20.
- 51 This provision emphasises that this Bill is not about the confiscation of assets. That issue is addressed by the Proceeds of Crime Bill 2002.
- 52 This maximum penalty sits between the penalties which apply for similar offences in the US and UK. In the UK the maximum penalty is two years (Paragraph 7, Schedule 3 Anti-terrorism, Crime and Security Act 2001) and in the US 10 years imprisonment (22 USC 287, 50 USC 1705).
- 53 The penalty under the existing regulations reflects a ceiling imposed by section 12 of the *Charter of the United Nations Act* which restricted penalties for a breach of the regulations to a maximum of 50 penalty units.
- 54 Section 9.2 of the Criminal Code Act.
- 55 Explanatory Memorandum, p. 25.
- 56 Mr Croll, Senate Legal and Constitutional Legislation Committee, *Evidence*, 19 April 2002, p. 198
- 57 There is no requirement for trusts and partnerships to be registered with a public authority under as companies are obliged to do under the Corporations Act 2001. The magnitude of the problem of identifying beneficiaries of trusts for taxation purposes was highlighted by the Australian National Audit Office (ANAO) in its report, *Managing Tax File Numbers*, April 1999. It states that 45 percent of the 430,572 trust tax returns for 1997 did not include the tax file numbers (TFNs) of the beneficiaries of trust distributions. Further, TFNs were not provided for 370,764 beneficiaries of trusts in 1997. See N. Hancock (ed), 'Terrorism and the Law in Australia: Legislation, Commentary and Constraints', *Research Paper No.12* 2001-02, p. 33/34.

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