



Combating the Financing of People Smuggling and Other Measures Bill 2011

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Law and Bills Digest Section

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Combating the Financing of People Smuggling and Other Measures Bill 2011

Date introduced: 9 February 2011

House: House of Representatives

Portfolio: Attorney-General

Commencement: Items 1—11, 14—48 and 53—57 of Schedule 1 commence on a day to be fixed by Proclamation but not later than six months after Royal Assent. All other provisions commence on the day of Royal Assent.

Links: The links to the [Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bills home page, or through <http://www.aph.gov.au/bills/>. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at <http://www.comlaw.gov.au/>.

Purpose

The aim of the Bill is to strengthen Australia's anti-money laundering and counter-terrorism financing (AML/CTF) regime by enhancing the regulation of the remittance sector. Alternative remittance systems are financial services, traditionally operating outside the conventional financial sector, where value or funds are moved from one geographic location to another.¹ This Bill also introduces measures for the Australian intelligence community to share financial intelligence prepared by AUSTRAC and allow businesses regulated under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) to use personal information held on an individual's credit information file for electronic verification of identity.

Background

In 1989 the [Financial Action Task Force \(FATF\)](#) was established.² It is an international organisation chiefly concerned with strengthening anti-money-laundering and anti-terrorist financing provisions in the global financial system, including through individual countries implementing appropriate legislative and enforcement measures. In the aftermath of the 11 September 2001 attacks, it adopted nine special recommendations for combating the financing of terrorism. In particular, with respect to the alternative remittance sector, special recommendation six states:

1. FATF, 'Combating the abuse of alternative remittance systems: International best practices', 20 June 2003, p. 3, viewed 11 March 2011, <http://www.fatf-gafi.org/dataoecd/39/17/34033713.pdf>.

Each country should take measures to ensure that persons or legal entities, including agents, that provide a service for the transmission of money or value, including transmission through an informal money or value transfer system or network, **should be licensed or registered and subject to all the FATF Recommendations that apply to banks and non-bank financial institutions**. Each country should ensure that persons or legal entities that carry out this service illegally are subject to administrative, civil or criminal sanctions.³ [Emphasis added].

An [Interpretive Note](#), issued to further explain this recommendation states (in part):

Money or value transfer systems have shown themselves vulnerable to misuse for money laundering and terrorist financing purposes. The objective of Special Recommendation VI is to increase the transparency of payment flows by ensuring that jurisdictions impose consistent anti-money laundering and counter-terrorist financing measures on all forms of money/value transfer systems, particularly those traditionally operating outside the conventional financial sector and not currently subject to the FATF Recommendations. This Recommendation and Interpretative Note underscore the need to bring all money or value transfer services, whether formal or informal, within the ambit of certain minimum legal and regulatory requirements in accordance with the relevant FATF Recommendations.⁴

A 2003 [International Best Practices](#) paper states that:

A core element of Special Recommendation VI is that jurisdictions should require licensing or registration of persons (natural or legal) that provide informal MVT [Money or value transfer] services... A key element of both registration and licensing is the requirement that the relevant regulatory body is aware of the existence of the business. The key difference between the two is that licensing implies that the regulatory body has inspected and sanctioned the particular operator to conduct such a business whereas registration means that the operator has been entered into the regulator's list of operators.⁵

However, it also emphasises that 'Government oversight should be flexible, effective, and proportional to the risk of abuse':

...Mechanisms that minimise the compliance burden, without creating loopholes for money launderers and terrorist financiers and without being so burdensome that it in effect causes MVT services to go "underground" making them even harder to detect should be given due consideration.⁶

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2. Financial Action Task Force (FATF), 'What is the FATF?', FATF website, viewed 11 March 2011, http://www.fatf-gafi.org/document/57/0,3746,en_32250379_32235720_34432121_1_1_1_1,00.html
 3. FATF, 'FATF IX Special Recommendations', FATF website, October 2001, viewed 11 March 2011, <http://www.fatf-gafi.org/dataoecd/8/17/34849466.pdf>
 4. FATF, 'Interpretative Note to Special Recommendation VI: Alternative remittance' FATF website, viewed 11 March 2011, http://www.fatf-gafi.org/document/4/0,3746,en_32250379_32236920_43755076_1_1_1_1,00.html
 5. FATF, 'Combating the abuse of alternative remittance systems: International best practices', op. cit.

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FATF conducted a mutual evaluation of Australia's financial arrangements in March 2005. Its [report](#), published on 14 October 2005, provided recommendations on how certain aspects of Australia's AML/CFT system could be strengthened.⁷ Consequently, the Government introduced the AML/CTF Act which obligates remittance providers to register with AUSTRAC, implement customer identification procedures, introduce AML/CTF programs, report to AUSTRAC annually and undertake ongoing customer due diligence.

In its submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the provisions of the Bill the Australian Crime Commission (ACC) acknowledged that a consequence of increased regulation as proposed in the Bill may be that a 'black market' may be created within the sector which would need to be monitored:

Registration of remitters would be a useful tool to increase the regulation of the remittance sector, however a potential consequence of increased regulation may be where illegitimate remittance providers might become more covert and move into a more unregulated and non-reporting environment than currently exists. This 'black market' would need to be carefully monitored over an extended period of time to identify what, if any, emerging methodologies might be used to facilitate financial crimes including money laundering activities or the financing of people smuggling/trafficking activities.⁸

Drawing upon research (including fieldwork) that it had completed in 2010, the Australian Institute of Criminology (AIC) has expressed doubts about the appropriateness of adopting a system requiring the assessment of suitability for practice of all dealers:

...the introduction of a system in which the suitability of remittance dealers is assessed by the regulator may be unnecessary and ineffective in that those dealers who seek to act illegitimately may simply remain outside the regulated sector and continue to act improperly. It is apparent that this is the case at present where illegitimate dealers remain unregistered with AUSTRAC and are, accordingly, unable to be monitored. It may also be difficult for a regulator to identify dealers who act illegitimately using the kinds of checks that a regulator would be able to undertake at a reasonable cost. The production of evidence of good character and other references could simply be fabricated, allowing at-risk dealers to be registered and approved as suitable. The cost of complying with a system requiring the assessment of suitability for practice of all dealers would, arguably, be excessive in comparison with the likely benefits to be derived from such a system in terms of its general deterrent effects for those in the entire sector.⁹

6. Ibid., p. 3.

7. FATF, 'FATF: Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism – Australia', 14 October 2005, FATF website, viewed 11 March 2011, <http://www.fatf-gafi.org/dataoecd/60/33/35528955.pdf>

8. AAC, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Combating the Financing of People Smuggling and Other Measures Bill 2011*, viewed 4 April 2011, http://www.apf.gov.au/Senate/committee/legcon_ctte/financing_people_smuggling/submissions.htm

9. AIC, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Combating the Financing of People Smuggling and Other Measures Bill 2011*, viewed 4 April 2011, http://www.apf.gov.au/Senate/committee/legcon_ctte/financing_people_smuggling/submissions.htm

Background on the Bill

Remittance dealers

On 9 April 2010, when the Government announced it was immediately suspending the processing of all new asylum applications from Sri Lankan and Afghan nationals due to the 'evolving circumstances' in both countries, it simultaneously announced a package of measures including that it was developing a proposal for a more comprehensive regulatory regime for remittance dealers. At the time, the Government foreshadowed that a new regime was likely to include:

- An application process, which includes a declaration by the applicant that they have never been found guilty or convicted of a criminal offence. An offence will also be created for the applicant including false and misleading information;
- Publication of the list of registered remitters and remitters whose registration has been cancelled or surrendered; and
- Power for the AUSTRAC CEO to invite a person on the Register to show cause why their registration should not be suspended or cancelled.¹⁰

It also announced that day that it was going to:

crack down on people smuggling by introducing measures to stop the flow of funds and support for people smuggling ventures. Tough new powers will result in the deregistration of remittance dealers that facilitate access to funds for people smuggling ventures and other unlawful activities...¹¹

It is worth noting the existence of section 136 of the AML/CTF Act which contains an offence for providing false or misleading information to AUSTRAC. Moreover, some four months prior to this announcement (on 18 December 2009) AUSTRAC had already drafted and released for consultation draft Anti-Money Laundering and Counter-Terrorism Financing Rules (AML/CTF Rules) that were designed to enable the AUSTRAC CEO to remove from or refuse to enter onto the Register of Providers of Designated Remittance Services (the Register), anyone who was believed to constitute an unacceptable money laundering or terrorism financing risk.¹² A person is prohibited from

10. C Evans (then Minister for Immigration and Citizenship), S Smith (then Minister for Foreign Affairs) and B O'Connor (then Minister for Home Affairs), *Changes to Australia's immigration processing system*, media release, 9 April 2010, viewed 14 April 2011, <http://www.foreignminister.gov.au/releases/2010/fa-s100409.html>

11. Ibid.

12. AUSTRAC, 'Draft AML/CTF Rules on refusing to enter or removing a person's name and registrable details from the Register of Providers of Designated Remittance Services', AUSTRAC website, viewed 17 February 2011, http://www.austrac.gov.au/files/draft_rule_register_pdrs.pdf. These draft rules are no longer available on this website—hard copy with author. See also: D Rees, 'Money laundering and terrorism financing risks posed by alternative remittance in Australia', Australian Institute of Criminology, report no. 106, 23 April 2010, viewed 17 February 2011, <http://www.aic.gov.au/publications/current%20series/rpp/100-120/rpp106.aspx>.

providing a registrable designated remittance service if the person's name and registrable details are not entered on the Register.¹³

On 16 April 2010 these new AML/CTF Rules came into effect.¹⁴ The new Rules enable the AUSTRAC CEO to remove a person's name and registrable details from the Register, if it is considered that having the person's name and registrable details on the Register would constitute an unacceptable money laundering or terrorism financing risk.¹⁵ The CEO's proposed ability to refuse to enter a person's name on the Register (put forth in the Draft Rules) was not subsequently adopted.¹⁶ Unlike the current Bill, the new AML/CTF Rules make no express mention of deregistering people who are believed to constitute a people smuggling financing risk.¹⁷

On 23 April 2010, the Minister for Home Affairs, the Hon Brendan O'Connor released a 6-page discussion paper entitled *Enhanced Regulation of Alternative Remittance Dealers* and invited submissions from the private sector on the proposals set out therein.¹⁸ The discussion paper identified five key weaknesses in the existing registration of remittance dealers. Namely:

- anyone can register – there is no suitability criteria that must be met
- any business can be a remitter – there are no conditions on the way a remitter operates
- there is no clear authority to refuse to register a remitter
- registered remitters are not obliged to update their information or identify their business associates and
- there are limited sanctions available.¹⁹

Broadly speaking, the Government proposed in response, to give the AUSTRAC CEO enhanced powers to:

13. Subsection 74(1) of the AML/CTF Act.

14. Section 229 of the AML/CTF Act provides that the CEO of AUSTRAC may make AML/CTF Rules. These Rules are legislative instruments.

15. *Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2010 (No. 1)* available at: <http://www.comlaw.gov.au/Details/F2010L00964>. See also: B O'Connor (Minister for Home Affairs), *Laws amended to prevent abuse of money transfer system*, media release, 16 April 2010, viewed 16 February 2011, http://www.ministerhomeaffairs.gov.au/www/ministers/oconnor.nsf/Page/MediaReleases_2010_SecondQuarter_16April2010-LawsAmendedtoPreventAbuseofMoneyTransferSystem

16. Existing section 76 of the AML/CTF Act contains no discretion in this regard. If a written application is made in the approved form, the CEO *must* enter the applicant's name and registrable details on the register.

17. See new chapter 44 of the *Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2010 (No. 1)*, viewed 16 February 2011, <http://www.comlaw.gov.au/Details/F2010L00964>

18. B O'Connor, *Strengthening the fight against money laundering and people smuggling*, media release, 23 April 2010, viewed 16 February 2011, http://www.ministerhomeaffairs.gov.au/www/ministers/oconnor.nsf/Page/MediaReleases_2010_SecondQuarter_23April2010-StrengtheningtheFightAgainstMoneyLaunderingandPeopleSmuggling

19. Australian Transaction Reports and Analysis Centre (AUSTRAC) and Commonwealth Attorney-General's Department, *Enhanced regulation of alternative remittance dealers*, Attorney-General's Department website, viewed 16 February 2011, [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~remittance+dealers+discussion+paper.pdf/\\$file/remittance+dealers+discussion+paper.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~remittance+dealers+discussion+paper.pdf/$file/remittance+dealers+discussion+paper.pdf)

- assess the suitability of a person seeking registration on the basis of character (prior criminal convictions and so forth)
- impose conditions on registration
- refuse, suspend, or cancel the registration and publish a list of same and
- obtain information from third parties and share information with third parties.²⁰

In addition, the Government revealed that it was considering introducing registration requirements for those entities that provide the network infrastructure (systems and support) used by most of the 6500 or so remitters in Australia.²¹ The response by the sector to these proposed measures is not known as submissions received by Government were not made publicly available. However, according to the Minister for Home Affairs:

Members of the remittance sector expressed broad support for the proposed reforms and indicated an interest in engaging in the policy development process.²²

On 16 July 2010 the Minister for Home Affairs released another brief paper entitled [*Specific Proposals for an Enhanced AML/CTF Registration Scheme for the Remittance Sector*](#).²³ This paper contained a few more details of the proposed changes and formed the basis upon which consultations would be conducted as part of assessing the regulatory impact of the proposed changes.²⁴ The three key elements of the proposed enhanced scheme outlined in the paper included:

- introducing the concept of ‘remittance network provider’ into the AML/CTF Act so that they will become subject to all existing obligations arising under the Act
- enhancing the registration requirements for remitters (this includes an independent remittance dealer, remittance affiliate or remittance network provider) and
- extending the infringement notice scheme to cover certain breaches of registration requirements by remitters.²⁵

Again, the sector’s response is not ascertainable from publicly available information.

20. Ibid.

21. Ibid.

22. AUSTRAC and Commonwealth Attorney-General’s Department, *Specific proposals for an enhanced AML/CTF registration scheme for the remittance sector*, Attorney-General’s Department website, viewed 17 February 2011, [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(4CA02151F94FFB778ADAEC2E6EA8653D\)~Proposals+Enhanced+AML+Registration+Scheme+remittance+sector.pdf/\\$file/Proposals+Enhanced+AML+Registration+Scheme+remittance+sector.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(4CA02151F94FFB778ADAEC2E6EA8653D)~Proposals+Enhanced+AML+Registration+Scheme+remittance+sector.pdf/$file/Proposals+Enhanced+AML+Registration+Scheme+remittance+sector.pdf)

23. Ibid.

24. B O’Connor, *Strengthening the fight against money laundering and people smuggling*, media release, 16 July 2010, viewed 17 February 2011, http://www.ministerhomeaffairs.gov.au/www/ministers/oconnor.nsf/Page/MediaReleases_2010_ThirdQuarter_16July2010-Strengtheningthefightagainstmoneylaunderingandpeoplesmuggling

25. AUSTRAC and Commonwealth Attorney-General’s Department, *Specific proposals for an enhanced AML/CTF registration scheme for the remittance sector*, op. cit., p. 5.

On 11 November 2010 the Minister for Home Affairs released an [Exposure Draft](#) of the Bill and invited comments on the proposed reforms set out therein by 10 December 2011.²⁶ It is relevant to note that there are significant differences between the exposure draft released on 11 November 2010 and the Bill that was subsequently introduced into Parliament on 9 February 2011. For instance, the exposure draft of the Bill conferred an express power on the CEO to refuse an application for registration but this provision was not subsequently retained in the Bill (though the Bill does create discretion in this respect). In addition, the exposure draft did not provide for deemed refusal of registration in certain circumstances, nor did it contain any mention of expanding the list of designated agencies with which AUSTRAC can share its financial intelligence. Provisions to this effect have been included in the Bill. It is not clear whether these changes (and others) occurred as a result of sector consultation on the Bill or whether they were due to considerations that may have initially been overlooked by the Department.

Electronic verification of identity

The Australian Law Reform Commission considered the use of credit reporting information for electronic verification in its 2008 report entitled [For Your Information: Australian Privacy Law and Practice](#) in which it recommended that 'the use and disclosure of credit reporting information for electronic identity verification purposes to satisfy obligations under the AML/CTF Act should be authorised expressly under the AML/CTF Act'.²⁷ After extensive consultation, the ALRC formed the view that while the use and disclosure of credit reporting information for electronic identity verification would constitute a significant 'function creep', it should be authorised specifically under the AML/CTF Act because 'electronic identity verification provides significant advantages for both credit providers and individuals; electronic identity verification is less privacy intrusive than the need to present physical records to verify identity; and there are limited alternative sources of accessible data suitable for electronic identity verification'.²⁸ The Government subsequently asked Information Integrity Solutions Pty Ltd (IIS) to undertake a Privacy Impact Assessment (PIA) which involved consultations with 'affected private sector businesses and peak bodies, and privacy groups'.²⁹ The [PIA report](#), released on 8 October 2009 informed the development of this Bill.³⁰

26. The Exposure Draft of Combating the Financing of People Smuggling and Other Measures Bill 2010 is available at: [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(8AB0BDE05570AAD0EF9C283AA8F533E3\)~Exposure+Draft+for+the+Combating+the+Financing+of+People+Smuggling+and+Other+Measures+Bill+\(Attachment+A\).pdf/\\$file/Exposure+Draft+for+the+Combating+the+Financing+of+People+Smuggling+and+Other+Measures+Bill+\(Attachment+A\).pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(8AB0BDE05570AAD0EF9C283AA8F533E3)~Exposure+Draft+for+the+Combating+the+Financing+of+People+Smuggling+and+Other+Measures+Bill+(Attachment+A).pdf/$file/Exposure+Draft+for+the+Combating+the+Financing+of+People+Smuggling+and+Other+Measures+Bill+(Attachment+A).pdf)

27. Australian Law Reform Commission (ALRC), 'For Your Information: Australian Privacy Law and Practice', report no. 108, May 2008, viewed 5 May 2011, <http://www.alrc.gov.au/publications/57.%20Use%20and%20Disclosure%20of%20Credit%20Reporting%20Information/identity-verification>

28. Ibid.

29. Explanatory Memorandum, Combating the Financing of People Smuggling and Other Measures Bill 2011, p. 4.

30. Information Integrity Solutions Pty Ltd (IIS), 'Privacy Impact Assessment Report: Electronically Verifying Identity Under the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 using Credit Reporting Information', 8

Basis of policy commitment

The government's desire to enhance the regulation of the remittance sector appears to primarily stem from concerns expressed by Australian law enforcement agencies 'about the role the remittance sector can inadvertently play in facilitating payments for people smuggling'.³¹ The Australian Crime Commission has also emphasised that the sector has been used to deliberately fund illegal activity.³² Though the AIC recognises (on the basis of publicly available information) that 'Australian law enforcement bodies do have concerns regarding the operation of the remittance industry (both corporate and alternative remittance)', it is of the view that such bodies 'lack detailed knowledge because the remittance industry has not, until recently, received focused attention'.³³ While recognising that the role of the sector lends itself to use by criminal or terrorist elements, the Institute is of the view that 'on the basis of current research and consultations, it is apparent that most transactions are legitimate'.³⁴ However, it was noted that 'risks do exist that governments need to understand and respond to'.³⁵ And, it seems that the government is motivated by the gravity of the harm caused by the risk of misuse of the remittances sector.

According to AUSTRAC CEO, John Schmidt 'it is widely recognised that the money remittance sector is particularly vulnerable to the risk of being exploited for criminal purposes'.³⁶ Analysis of typologies and case study reports from 2007—10 have enabled AUSTRAC to analyse the environment within which money laundering and terrorism financing occurs in Australia. In particular, they have been able to identify trends in offence types and industries most commonly involved. Their analysis demonstrates that:

... money laundering and fraud were equally prevalent, and represented the two most commonly occurring offence types... fraud and money laundering combined constituted more than half (52 per cent) of all the offences identified in the case studies. The next most commonly identified offences were the importation of drugs (13 per cent), drug trafficking (8 per cent), structuring of financial transactions (8 per cent) and tax evasion (6 per cent).³⁷

October 2009, Attorney-General's Department website, viewed 5 May 2011, http://www.ema.gov.au/www/agd/agd.nsf/Page/Anti-money_laundering

31. B O'Connor, 'Second reading speech: Combating the Financing of People Smuggling and Other Measures Bill 2011', House of Representatives, *Debates*, 9 February 2011, pp. 9—10.
32. Australian Crime Commission (ACC), Submission to the Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Combating the Financing of People Smuggling and Other Measures Bill 2011*, p. 3, viewed 4 April 2011, http://www.aph.gov.au/Senate/committee/legcon_ctte/financing_people_smuggling/submissions.htm
33. D Rees, 'Money laundering and terrorism financing risks posed by alternative remittance in Australia', op. cit.
34. Ibid.
35. Ibid, Foreword.
36. J Schmidt, 'AUSTRAC 2009—10 Annual Report: Chief Executive Officer's review', AUSTRAC website, viewed 18 February 2011, http://www.austrac.gov.au/ar_2010.html
37. AUSTRAC, 'AUSTRAC typologies and case studies reports 2007—10: overview of trends', AUSTRAC website, viewed 18 February 2011, http://www.austrac.gov.au/files/typ_rpt_overview.pdf

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Interestingly, people smuggling constituted only 1% of all the offences identified in the case studies.³⁸ According to AUSTRAC, the industries most commonly used in money laundering and terrorism financing offences were:

the banking industry (involved in 45 per cent of case studies), **remittance services (18 per cent)**, gambling services (9 per cent) and professional services, consisting of accountants, solicitors and real estate agents (13 per cent). The vulnerability of the banking industry and remittance services correlates with the high incidence of account and deposit-taking services and remittance services being used by criminals to launder illicit funds.³⁹ [Emphasis added].

In its 2009—10 Supervision Strategy, AUSTRAC noted that many businesses in the sector do not have AML/CTF programs or adequate customer identification programs and do not conduct adequate risk assessments.⁴⁰ In its 2010—11 Supervision Strategy it noted that ‘a successful remitter registration campaign was undertaken to increase the level of registration of remitters with AUSTRAC. This resulted in an additional 900 remitters being registered with AUSTRAC’.⁴¹ AUSTRAC estimates that more than 94 per cent of remittance services are now currently registered.⁴²

Regulatory Impact Statement

A [Regulatory Impact Statement](#) (RIS) was prepared by the Attorney-General’s Department to assess the proposal to address problems associated with the existing regulatory regime.⁴³ To this end, the RIS identified four key problems with the current regime. Namely:

- the current registration scheme gives the AUSTRAC CEO no discretion to determine the suitability of a prospective remittance dealer for registration
- existing enforcement options are inflexible and have no review mechanisms
- the current regulatory regime does not reflect current business practices thus placing a greater compliance burden on remittance dealers and
- the current system does not adequately reflect the relationship between providers of remittance networks (PRNs) and affiliates and does not effectively manage the flow of information.⁴⁴

38. Ibid.

39. Ibid.

40. D Rees, ‘Money laundering and terrorism financing risks posed by alternative remittance in Australia’, op. cit, p. 66.

41. AUSTRAC, ‘AUSTRAC Supervision Strategy 2010—11’, AUSTRAC website, viewed 17 March 2011, <http://www.austrac.gov.au/files/supervision.pdf>

42. Attorney-General’s Department, ‘Enhanced AML/CTF regulation of the alternative remittance sector’, *Regulation Impact Statement*, Commonwealth of Australia, Canberra, October 2010, p. 14, viewed 17 March 2011, http://ris.finance.gov.au/files/2011/03/04_Remittance_Dealers_RIS.pdf (Note that all page references are to the RIS as contained in the Explanatory Memorandum).

43. Ibid.

44. Ibid., p. 7.

EXPLANATION OF KEY TERMS USED IN THE RIS

Independent remittance businesses operate independently utilising their own systems and processes. These providers cater mainly to individual cultural or ethnic groups within Australia. There are approximately 400 currently operating in Australia's remittance sector.

Remittance affiliates are normally in a business relationship with one or more remittance network providers. They normally include small businesses such as post offices, newsagents, convenience stores and so forth of which there are approximately 6100 currently operating in Australia.

Remittance network providers (PRNs) operate the infrastructure needed to transfer funds out of Australia. They include bigger corporate operators such as Western Union and Travelex but also small businesses operating as part of a multi-national company. They often provide AML/CTF support and assistance to their remittance affiliates but they are not legally required to do so. The RIS breaks this category down further into:

- Tier 2 remittance network providers —often have a contractual relationship with both remittance affiliates and tier 1 PRNs and thus could sometimes be said to represent the 'middle man' between the two. There are approximately 40 currently operating in Australia's remittance sector.
- Tier 1 remittance network providers—typically include global organisations whose primary purpose is likely to be the provision of remittance or related financial services. There are approximately 25 currently operating in Australia's remittance sector.

The two options explored in the RIS were:

Option 1 —enhanced registration for the remittance sector (including remittance affiliates and independent remittance businesses collectively known as 'providers of designated remittance services'). The AUSTRAC CEO would be given the ability to essentially conduct a 'fit and proper person' assessment of those seeking registration and the ability to refuse, suspend, cancel, or impose conditions on registration. The infringement notice scheme would be expanded to enable financial penalties to be imposed for breaches of key registration requirements. This option would involve increasing compliance costs for affiliates and independent remittance businesses. The net cost per entity in year one is an additional \$260 for affiliates and \$331 per independent remittance business.

Option 2—enhanced registration for the remittance sector as outlined in option 1. In addition, the concept of a remittance network provider would be introduced into the AML/CTF Act thereby making PRNs subject to existing AML/CTF obligations relating to customer due diligence, reporting, developing and maintaining AML/CTF programs and record keeping. PRNs would be responsible for

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their registration as well as the registration of their remittance affiliates while independent remittance businesses would be responsible for their own registration. Option 2 also proposes to enable reporting obligations to be imposed on PRNs instead of, or in addition to, remittance affiliates.

On the basis of the analysis of benefits and costs, the RIS identified Option 2 as the preferred option.

Rejection of option 1

Significantly, the RIS concluded that the extent to which this option (in other words, an enhanced registration regime) would reduce the relevant risks 'is uncertain'.⁴⁵ It noted that many of the enforcement challenges present within current arrangements would remain. Notwithstanding the proposed introduction of infringement notices—a move designed to not only create a greater compliance incentive but also a mechanism by which AUSTRAC can respond to breaches more efficiently and proportionately, the RIS identified other enforcement challenges. Namely:

- it is difficult for AUSTRAC to regulate such a large sector comprising more than 6000 remitters
- arrangements put in place by some PRNs to support the compliance of their remitters may be in breach of the law, for example where a PRN provides assistance and advice to remitters about suspicious matter reporting, the tipping off provisions of the AML/CTF Act may be breached and
- current regulator arrangements prevent AUSTRAC from disclosing breaches of the AML/CTF Act and other regulatory issues with the PRN of a remittance agent.⁴⁶

Benefits of option 2

The RIS identified option 2 as the preferred option on the basis of the analysis of benefits and costs. The RIS estimated that this option would deliver a net benefit of between \$169 million and \$183 million in Net Present Value (NPV) over ten years. This figure is an over-estimation as it does not take into account costs to be borne by PRNs.

The RIS concluded that the adoption of option 2 would place better controls in place to minimise the risk of the sector being used for criminal activity, would reduce the compliance costs for 6100 affiliates, would formalise and extend existing relationships between PRNs and affiliates, and make enforcement more straight forward for Government.

However, it is also worth highlighting that under this option:

- independent remittance businesses will not experience any reduction in compliance costs. They will also not benefit from PRNs assuming a regulatory responsibility
- there will be compliance costs for PRNs which might include additional staff, new and enhanced IT systems, development of systems and processes and staff training. This could potentially

45. Ibid., p. 43.

46. Ibid., p. 22.

involve significant costs for businesses—especially those few that are small businesses with a local focus and limited support infrastructure. The RIS thus acknowledged that PRNs may subsequently seek to recover some of their increased compliance costs from their affiliates who in turn may pass the costs on to customers. It also noted that the cost of becoming a PRN would increase the barriers to entry into the sector

- implementation of the enhanced registration regime will have resource implications for AUSTRAC. The RIS estimated that the cost to Government of option 2 to be \$14.9 million over four years.

Committee consideration

Senate Standing Committee for the Scrutiny of Bills

On 2 March 2011 the Senate [Standing Committee for the Scrutiny of Bills](#) sought further advice from the Attorney-General, the Hon Robert McClelland MP on numerous aspects of the Bill.⁴⁷ On 21 March 2011—the same day the Senate Legal and Constitutional Affairs Legislation Committee tabled its report on the inquiry into the provisions of the Bill (discussed below) the Minister for Home Affairs, the Hon Brendan O’Conner MP provided a [response](#) to the Scrutiny of Bills Committee.⁴⁸ The information sought and advice received is summarised as follows:

Firstly, the Committee asked whether the power of AUSTRAC in **proposed section 49** to request further information in relation to a suspicious matter should be subject to a requirement that the AUSTRAC CEO forms a reasonable belief that the person asked to produce further information has knowledge, or custody or control of documents or information which will assist in the administration of the legislative scheme. The Minister agreed and advised that amendments will be moved in the Senate to this effect.

The Committee further inquired whether consideration had been given to the fact that the Bill was extending the power to require information beyond a reporting entity to ‘any person’ and did not specify a minimum time period for the giving of such information. In response, the Minister noted that a period specified in a notice of less than 14 days is appropriate in certain circumstances and that the requirement in section 49 is consistent with the existing policy in the AML/CTF Act. In response, the Committee noted that ‘the proposed amendment will extend the power to obtain information beyond reporting entities to ‘any person’ and leaves to the Senate as a whole the question of whether the proposed approach is appropriate’.⁴⁹

47. Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, no. 2 of 2011, 2 March 2011, pp. 6—10, viewed 3 March 2011, <http://www.aph.gov.au/Senate/committee/scrutiny/alerts/2011/d02.pdf>

48. Senate Standing Committee for the Scrutiny of Bills, *Third report of 2011*, 23 March 2011, pp. 171—173, viewed 28 March 2011, <http://www.aph.gov.au/Senate/committee/scrutiny/bills/2011/b03.pdf>

49. *Ibid.*, p. 110.

Secondly, the Committee inquired whether consideration had been given to whether **proposed sections 75C, 75G and 75H** could contain an exhaustive list of matters relevant to the making, cancellation and suspension of a registration could be included in the primary legislation. In response the Minister advised that in his view it was appropriate that such matters be contained in the AML/CTF Rules to effectively give the regime more flexibility.

Thirdly, the Committee queried whether the further matters (with respect to which a registered person must advise AUSTRAC of material changes in **proposed section 75M**) to be specified in the AML/CTF Rules could be specified in the primary legislation. In addition, the Committee requested clarification as to how a registered person stays informed about the content of the AML/CTF Rules. In response, the Minister advised that he was of the view that it is appropriate to specify such matters in the AML/CTF Rules because amongst other things, it would effectively give the regime flexibility and be consistent with the broader approach of the AML/CTF regime. In addition, the Minister outlined the consultation procedures that are followed to keep the sector informed of changes to the AML/CTF Rules.

Fourthly, the Committee queried the justification for placing the evidentiary onus of proof on a defendant in relation to offences imposed for the unauthorised access to verification information and the disclosure or unauthorised use of such information in **proposed sections 35H and 35K**. In response, the Minister advised that there are instances where access, use or disclosure of information is justified and it will be for the defendant to raise evidence about how access, use or disclosure was authorised. The offence is structured in a way that will act as a strong deterrent against unauthorised access.

Lastly, the Committee queried whether **proposed subsection 41A(5)** of the FTR Act (which enables the AUSTRAC CEO, by written instrument, to exempt a person from one or more provisions of the FTR Act) is intended to be a substantive exemption from the *Legislative Instruments Act 2003* and if so, the justification for this approach.⁵⁰ The Minister advised that the proposed exemption instrument is not of a legislative character and is 'not reflective of a substantive exemption from the LIA'.⁵¹

Senate Legal and Constitutional Affairs Legislation Committee

On 3 March 2011 the Senate Selection of Bills Committee referred the provisions of the Bill to the Senate Legal and Constitutional Affairs Legislation Committee for [inquiry](#).⁵² The Committee outlined the reasons for referral and the principal issues of consideration as:

50. Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, no. 2 of 2011, op. cit.

51. Senate Standing Committee for the Scrutiny of Bills, *Third report of 2011*, op. cit., p. 173.

52. Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Combating the Financing of people Smuggling and other Measures Bill 2011*, The Senate, Canberra, March 2011, viewed 21 March 2011, http://www.aph.gov.au/Senate/committee/legcon_ctte/financing_people_smuggling/report/index.htm

The Bill imposes a substantially heavier regulatory burden on the alternative remittance sector and raises privacy concerns arising from the enhanced information sharing provisions and the use of credit reporting data.⁵³

The Committee received only ten submissions (including one confidential submission) and only one submission was received from an existing reporting entity—ING DIRECT. On 16 March 2011 the Committee held a public hearing of approximately one hour duration attended by representatives of three government agencies—the Attorney-General’s Department, AUSTRAC and the Australian Crime Commission (ACC).

In its report subsequently tabled on 21 March 2011, the Committee noted that most of the submitters broadly supported the measures proposed in the Bill. However, it also acknowledged that concerns were raised in relation to a number of issues (discussed below). Nonetheless, the Committee expressed the view that ‘the Bill appropriately balances the need for regulation with the interests of the businesses which operate in the remittance sector and the many Australians who legitimately utilise these services to transfer funds’.⁵⁴ Though it acknowledged that the establishment of MOUs is not an explicit requirement under the proposed legislation, the Committee was of the view that MOUs ‘should be completed as a matter of priority between AUSTRAC and the other relevant government agencies’.⁵⁵ With respect to the amendments contained in Schedule 3, the Committee considered the facilitation of electronic identity verification to be a measure with benefits for regulators, businesses and consumers.⁵⁶ It subsequently recommended that the Senate pass the Bill and that:

- as a matter of priority, AUSTRAC establish appropriate memoranda of understanding for the sharing of intelligence with the new designated agencies outlined in the Bill
- the Attorney-General’s Department review relevant options with a view to introducing an appropriate oversight mechanism to monitor the handling of credit information for the electronic verification of identity pursuant to the Bill.⁵⁷

Additional comments provided by two Liberal Party senators are discussed immediately below.

Policy position of non-government parties

Two Liberal Party Senators—Senator Barnett and Parry, issued [additional comments](#) in the Senate Legal and Constitutional Affairs Legislation Committee Report inquiry into the provisions of the Bill. Though they expressed in-principle support for the key measures contained in the Bill they deferred such support until the following matters are addressed:

53. Senate Selection of Bills Committee, *Report No. 2 of 2011*, 3 March 2011.

54. Senate Legal and Constitutional Affairs Legislation Committee, *op. cit.*, p. 17.

55. *Ibid.*

56. *Ibid.*

57. *Ibid.*, p. 18.

- the misleading title of the Bill
- the public release and consideration of the AML/CTF Rules
- the establishment of appropriate memoranda of understanding for the sharing of intelligence between AUSTRAC and the new designated agencies
- a reassessment of the regulatory burden imposed by the Bill on businesses in the remittance sector and a clarification as to whether the proposed changes create efficiencies or merely shift costs within the sector and
- the areas of concern highlighted by the Senate Scrutiny of Bills Committee.⁵⁸

Position of major interest groups

The Senate Legal and Constitutional Affairs Legislation Committee report noted that ‘most of the evidence received by the Committee during the inquiry broadly supported the measures proposed in the Bill’.⁵⁹ It also noted that there was broad support expressed in submissions for the privacy safeguards which had subsequently been incorporated into the Bill. However, it must be borne in mind that of the non-confidential submissions received (one submission was confidential) none were from independent remittance dealers, affiliates or network providers. The absence of sector feedback on the proposed reforms may indicate that the two-week Senate inquiry period was insufficient or it may even reflect varying levels of consultation fatigue (especially on behalf of the larger corporate entities). It may also be reflective of a diverse and fractured sector that has limited interest or knowledge of the proposed reforms and likely impacts. Of course, it may also be due to the sector being satisfied with earlier consultations that have taken place.

Regulatory Impact Analysis stakeholder consultation

As previously mentioned, the extent of sector consultation or the outcome of the sector consultation following the release of the Attorney-General’s discussion paper on 23 April 2010 and specific proposals paper on 16 July 2010 is not fully known. Nonetheless, the information gathered through those consultations was used in the development of the RIS.⁶⁰ In addition, the Department engaged in further consultations during the period July to August 2010, as outlined below.

58. Liberal Senators, Additional Comments, Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Combating the Financing of people Smuggling and other Measures Bill 2011*, The Senate, Canberra, March 2011, viewed 21 March 2011, http://www.aph.gov.au/Senate/committee/legcon_ctte/financing_people_smuggling/report/index.htm

59. Senate Legal and Constitutional Affairs Legislation Committee, op. cit., p. 9.

60. Attorney-General’s Department, ‘Enhanced AML/CTF regulation of the alternative remittance sector’, *Regulation Impact Statement*, op. cit., p. 15.

Remittance network providers

According to the RIS, the Attorney-General's Department consulted five remittance network providers (of varying sizes and varying levels of AML/CTF activity) to ascertain the impact the proposed reforms would have on them. While the RIS notes that 'in general, the PRNs consulted could see the merit of the purpose of the proposed reforms', it also concluded that 'PRNs will have different levels of ability to accommodate the proposed reforms'.⁶¹ With respect to the enhanced regulatory-burden to be placed on the sector, the consultations revealed that:

Many discussions concluded that even with the proposed new AML/CTF obligations on PRNs, there would not be a wholesale shift of responsibility from affiliates to PRNs, and that affiliates would still be relied upon to provide information to PRNs, such as for registration and re-registration applications. Accordingly, the administrative burden would not be lifted entirely from affiliates. **Given the level of regulation already imposed on the remittance sector, concern was raised during consultation discussions that the proposed reforms will add to, and not reduce, the sector's current overall regulatory burden...** Furthermore, discussions indicated that enforceability would remain an issue as there is concern that many affiliates remain unaware of the full extent of their current AML/CTF obligations or the risks involved in remittance services.⁶² [Emphasis added].

Providers of designated remittance services

As previously mentioned, of the estimated 6500 remittance service providers in Australia, the sector is comprised of approximately 6100 remittance affiliates and 400 independent remittance businesses. The Attorney-General's Department sent a web-based survey to 3760 remittance affiliates and independent remittance businesses (registered with AUSTRAC) to ascertain the impact the proposed enhanced regulatory regime would have on them.⁶³ A copy of the survey is available at Appendix C of the RIS. The Government received only 348 completed surveys from 207 remittance affiliates, 85 independent remittance businesses and 56 businesses comprising a combination of the two. It must be remembered that many affiliates are small businesses within which money remittance services are a relatively small part of their overall business. In addition, many businesses are owned and operated by people who have English as a second language.⁶⁴

The survey appears to have primarily collected information about complying with the existing regulatory regime. This not only serves to highlight that there is a great divergence of practice within the sector but also that little is known about the sector and how the current regulatory regime is implemented. It appears the analysis of the survey responses was thus primarily used to conduct an analysis of the base case or status quo.⁶⁵ Nonetheless, such analysis was able to determine that the

61. Ibid., pp. 57—58.

62. Ibid., pp. 58—59.

63. 4500 were originally sent but 740 were returned with a non-delivery notification: Ibid., p. 59.

64. Ibid., p. 22.

65. Ibid., see Appendix A for analysis of survey responses at pp. 68—70.

net cost per entity in the first year would be an additional \$260 for affiliates and \$331 per independent remittance business.⁶⁶

E-Verification Privacy Impact Assessment stakeholder consultation

The PIA with respect to electronic identity verification considered the proposal put forth by the Department including amendment of the AML/CTF Act and options in relation to some aspects of the proposal and a range of privacy safeguards; the issues identified by the ALRC in its report as needing further consideration, and by key submitters to that report including the Office of the Privacy Commissioner (OPC); and the views of stakeholders consulted in the course of the PIA.⁶⁷ The assessment noted that:

...some industry stakeholders consider the proposal as framed is quite restrictive and as such is not a proportional response to the privacy risks identified. However IIS considers that a more open approach would raise possibly different privacy and policy issues and would need to be subject of a further review and consultation process.⁶⁸

However, IIS ultimately formed the view that:

... the proposal as circulated raises some significant privacy issues and that these need to be addressed. However, IIS considers that if the proposal is introduced in the limited way set out in the AGD proposal, and subject to the recommendations it makes in this PIA, then on balance the proposal is likely to have reasonably significant benefits, including privacy benefits, to individuals and the community.⁶⁹

Financial implications

The Explanatory Memorandum states that AUSTRAC will meet the ongoing costs of administering the new measures within existing resources.⁷⁰ The RIS notes that implementation of the enhanced registration regime is estimated to cost AUSTRAC \$14.9 million over four years.⁷¹

66. Ibid., p. 43.

67. The Department's proposal is outlined on p. 16: IIS, Privacy Impact Assessment report, op. cit.

68. IIS, Privacy Impact Assessment report, op. cit., p. 6. Appendix 2 of the PIA contains a full list parties who were consulted for the PIA.

69. Ibid.

70. Explanatory Memorandum, op. cit., p. 5.

71. Attorney-General's Department, 'Enhanced AML/CTF regulation of the alternative remittance sector', *Regulation Impact Statement*, op. cit., p. 65.

Main issues

In its consideration of the Bill, the Senate Legal and Constitutional Affairs Legislation Committee identified and briefly discussed a number of 'key issues' from the written submissions it received. Broadly speaking, they were as follows:

- whether the title of the Bill accurately reflect its intent and content
- whether there is a need for the enhanced regulation of the remittance sector
- whether the expanded powers of the AUSTRAC CEO are appropriate
- the extent/appropriateness of the regulatory burden to be imposed on the sector
- the appropriateness of sharing AUSTRAC intelligence with a greater number of designated agencies within the Australian intelligence community and the development of memoranda of understanding (MOUs) to facilitate and govern the sharing of such information and
- whether there are sufficient privacy safeguards regarding electronic identity verification

These and other issues are discussed in further detail below under the heading 'Key provisions'.

Key provisions

Title of the Bill

This Bill significantly amends the AML/CTF Act. The proposed Act is to be cited as the *Combating the Financing of People Smuggling and Other Measures Act 2011*. As its name suggests, the aim of the AML/CTF Act is to (amongst other things) fulfil Australia's international obligations to combat money laundering and the financing of terrorism. This Bill contains amendments that will undoubtedly assist government agencies to more effectively detect, monitor and combat the financing of people smuggling and other illegal activity through use of the remittance sector. However, it is difficult to overlook that the Bill's primary purpose is clearly to enhance the regulation of the remittance sector because of significant problems within the existing legislative and regulatory regime which allegedly makes it a high-risk sector for money laundering and terrorism financing.⁷² That is not to understate the significance of the broader related policy objectives of the Bill but the Office of Parliamentary Counsel drafting guidelines do state:

...as a general rule, you should take particular care when naming Bills to ensure that the names you choose are as informative as possible (within reason) and do not cause unnecessary confusion to the Parliament or to any other users of legislation.⁷³

72. Ibid., p. 6.

73. Office of Parliamentary Counsel (OPC), 'Drafting Direction No. 1.1 Long and short titles of Bills and references to proposed Acts', May 2006, viewed 7 March 2011, http://www.opc.gov.au/about/drafting_series/DD%201.1.pdf

Schedule 1—Remittance dealers

Items 2 to 11 insert new definitions into section 5 of the AML/CTF Act. Most notably, the terms *registered independent remittance dealer*, *registered remittance affiliate*, and *registered remittance network provider* are defined. For ease of reference, this analysis of the key provisions will instead use the terms independent dealer, affiliate and network provider.

Items 16—19 expands the ability of the AUSTRAC CEO to request further information from ‘any person’ in relation to information communicated to it about a suspicious matter, a threshold transaction, or an international funds transfer instruction (pursuant to existing sections 41, 43, and 45). According to the Explanatory Memorandum, ‘this is consistent with information gathering powers of a number of government agencies’ such as the Australian Competition and Consumer Commission (ACCC), the Australian Securities and Investment Commission (ASIC), and the Australian Taxation Office (ATO).⁷⁴ As previously mentioned, the Minister advised the Senate Standing Committee for the Scrutiny of Bills that in response to concerns raised by the Committee, amendments would be moved in the Senate to the effect that the power to request further information would be subject to a requirement that the AUSTRAC CEO form a reasonable belief that the person asked to produce such further information has knowledge, or custody or control of documents or information which will assist in the administration of the legislative scheme.

Shifting or sharing the regulatory burden?

As noted in the Minister’s second reading speech, ‘... large entities that are profiting from providing remittance networks that enable money transfers to and from Australia are not responsible for addressing money laundering and terrorism-financing risk within the network’.⁷⁵ The term ‘reporting entity’ is defined in existing section 5 of the Act to mean ‘a person who provides a designated service’. **Item 12** amends table 1 in existing section 6 of the AML/CTF Act which defines the term ‘designated service’ to incorporate services provided by network providers in operating a network of affiliates who undertake the services (as mentioned in items 31 and 32 of the table) using the systems, processes and other support provided by the network provider. This is a significant amendment because it means network providers ‘will become subject to all of the obligations in the AML/CTF Act including conducting customer due-diligence, reporting obligations, developing and maintaining an AML/CTF Program and record keeping’.⁷⁶ However, **item 52** delays the imposition of certain AML/CTF Act obligations on network providers for twelve months from the date of Royal Assent.⁷⁷

74. Explanatory Memorandum, op. cit., p. 94.

75. B O’Connor, ‘Second reading speech: Combating the Financing of People Smuggling and Other Measures Bill 2011’, op. cit., p. 136.

76. Ibid., p. 106.

77. These include: identification procedures (Part 2); compliance reports (Division 5 of Part 3); AML/CTF Programs (Part 7); and record keeping (Divisions 3 and 5 of Part 10).

Item 14 essentially provides that the ongoing customer due diligence obligation contained in existing section 36 of the AML/CTF Act imposed on an affiliate *may* be discharged by their network provider.⁷⁸ Similarly, **item 20** inserts **proposed new section 49A** which provides that the AML/CTF Rules may make provision for reporting obligations imposed on affiliates under Part 3 of the AML/CTF Act be *instead, or in addition*, imposed on their network provider.⁷⁹ **Proposed paragraph 49A(2)(b)** clarifies that such an obligation imposed on an affiliate *may* be discharged by their network provider. On 27 April 2011 AUSTRAC released for public consultation draft AML/CTF Rules for the purposes of **proposed subsections 49A(1) and 49A(2)**. They require network providers to report threshold transactions and international funds transfer instructions on behalf of their affiliates and allow network providers to lodge suspicious matter reports on behalf of their affiliates subject to a written agreement being in place.⁸⁰

Item 24 repeals existing subsection 74(1) and replaces it with **proposed new subsections 74(1), (1A), and (1B)**. These provisions provide that a network provider must be registered in order to provide a ‘registrable remittance network service’ and must only provide such a service to their registered affiliates. Independent dealers and affiliates are similarly required to be registered in order to provide a ‘registrable designated remittance service’. **Proposed new subsection 74(1C)** provides that a person must not breach a condition of their registration (which may be imposed under **proposed new section 75E**).

Items 25—28 insert **proposed new subsections 74(1A), (1B), and (1C)** into existing offence provisions in the AML/CTF Act contained in existing subsections 74(2) to (9). **Item 29** incorporates the above new subsections into existing subsection 74(10) thereby making them civil penalty provisions.⁸¹ **Item 30** repeals subsections 74(11) and (12) which contain defences that will cease to apply under the new registration process.

Though reporting entities are required under existing section 81 to adopt and maintain an AML/CTF program, the RIS notes that ‘observations from AUSTRAC’s supervisory activity are that many businesses do not have a written or appropriate AML/CTF program’.⁸² **Item 32** inserts **proposed new subsection 84(5A)** into the AML/CTF Act. This amendment places an obligation on network providers to make available to their affiliates a standard AML/CTF program. However, they are not precluded

78. See also **item 49** which contains a transitional provision with respect to this obligation.

79. The reporting obligations imposed by Part 3 include reports of suspicious matters (section 41), reports of a threshold transaction (section 43), reports of an international funds transfer instructions (section 45), and AML/CTF compliance reports (section 47). See also **item 50** which contains a transitional provision with respect to this obligation.

80. AUSTRAC, ‘Draft AML/CTF Rules relating to reporting obligations of registered remittance affiliates’, AUSTRAC website, viewed 4 May 2011, http://www.austrac.gov.au/files/draft_rules_re_report_obligs.pdf

81. Pursuant to existing section 175 of the AML/CTF Act, the Federal Court may order a person to pay a pecuniary penalty to the Commonwealth where it is satisfied that a person has contravened a civil penalty provision. Subsection 175(4) of the AML/CTF, provides that the maximum civil penalty that can be imposed by the Court for breaches of these provisions is 100 000 penalty units (currently \$11 million) for a body corporate and 20 000 penalty units (\$2.2 million) for a person other than a body corporate.

82. Attorney-General’s Department, ‘Enhanced AML/CTF regulation of the alternative remittance sector’, *Regulation Impact Statement*, op. cit., p. 39.

from adopting another program than the one made available to them by their network provider. This is a civil penalty provision.⁸³

Item 33 creates an exemption for network providers and their affiliates to the tipping off offence contained in existing section 123 of the AML/CTF Act. This amendment is necessary because, as explained in the RIS:

In practice, some PRNs have developed workarounds to support the compliance of their agents through developing common programs and other infrastructure. However, in some cases some arrangements may be in breach of the law, for instance where a PRN provides assistance and advice to remitters about suspicious matter reporting, the remitter may be in breach of the tipping off provisions of the AML/CTF Act.⁸⁴

The proposed new registration process

Item 31 repeals the existing registration process outlined in existing sections 75—79A and replaces it with **proposed new sections 75, and 75A—75S** which together, form the proposed new registration process.

Proposed new section 75 provides for the creation of a ‘remittance sector register’. In contrast to its predecessor, **proposed paragraph 75(4)(b)** enables publication of the register in whole or part or of specified information contained therein. According to the Explanatory Memorandum, ‘this will enable AUSTRAC to publish information which ensures that the remittance Register is easily accessible by interested members of the public’.⁸⁵

Proposed new section 75A specifies the information that must be entered on the register if the CEO decides to register a person. In addition to the name and registrable details⁸⁶ of the person, under the new register additional details must also be recorded such as: whether the person is registering as a network provider, an independent dealer, or an affiliate (and the name of their network provider); any conditions imposed on the registration; and when the registration takes effect. Reflective of industry practice, it should be noted that provision is made for a person to be registered in different capacities.

Proposed new section 75B provides that a person may apply in writing to the AUSTRAC CEO for registration as a network provider, independent dealer, or (in prescribed circumstances) an affiliate of a network provider. A person can only apply for registration as an affiliate of a network provider if they are already registered as an independent dealer or they are simultaneously applying to be

83. See footnote 70 for an explanation of the term ‘civil penalty’.

84. Attorney-General’s Department, ‘Enhanced AML/CTF regulation of the alternative remittance sector’, *Regulation Impact Statement*, op. cit., p. 22. See also **item 51** which contains a transitional provision with respect to this offence.

85. Explanatory Memorandum, op. cit., p. 97.

86. Chapter 27 of the AML/CTF Rules prescribe the ‘registrable details’ as defined in section 5. These can be viewed at: http://www.comlaw.gov.au/Details/F2011C00081/Html/Text#_Toc282089595

registered as both an independent dealer and an affiliate of a network provider. In either case, their network provider must consent to the making of their application. Thus, an affiliate can no longer be registered on their own. In this respect, the RIS relevantly notes that affiliates are ‘most often’ in a business relationship with at least one and sometimes more than one network provider.⁸⁷ A network provider *may* lodge an application for registration on behalf of their affiliate under **proposed subsection (2)** though this is not obligatory.

Proposed subsections (3) and (4) provide that an application must also contain information required under the AML/CTF Rules.⁸⁸ The *Broad overview of the proposed AML/CTF Rules to support the exposure draft of the Bill* states that AUSTRAC proposes that applicants will be required to provide the following information (where relevant to their circumstances):

- basic personal information
- evidence of identity
- a national police certificate issued by an Australian police force within 6 months of the date of application
- information relevant to their suitability for registration (for example, whether they have been charged or convicted of a money laundering, terrorism, people smuggling, dishonesty or fraud offence)
- beneficial ownership information (in the case of corporate applicants)
- the name of the person (or persons) who has control and ownership of the corporation or, for public companies, details of the shareholders who have greater than 10 per cent of the issued share capital as well as application information.⁸⁹

On 27 April 2011 AUSTRAC released for public consultation draft AML/CTF Rules specifying information to be included in an application for registration pursuant to **proposed paragraph 75B(3)(b)**.⁹⁰

An application will be deemed to be refused by operation of law in circumstances specified in **proposed subsections (6) and (7)**.

The RIS identifies the lack of discretion in determining the suitability for registration as a key weakness in the existing regulatory regime. However, it also acknowledges that ‘the CEO still has

87. Attorney-General’s Department, ‘Enhanced AML/CTF regulation of the alternative remittance sector’, *Regulation Impact Statement*, op. cit., p. 11.

88. AUSTRAC *must* have regard to information required pursuant to **proposed subsection 75B(4)** when deciding whether to register a person.

89. Author unknown, *Broad overview of the proposed AML/CTF Rules to support the Exposure Draft of the Combating the Financing of People Smuggling and Other Measures Bill*, AGD website, pp. 2–3, viewed 20 March 2011, http://www.ag.gov.au/www/agd/agd.nsf/Page/Anti-money_laundrying

90. AUSTRAC, ‘Draft AML/CTF Rules specifying information to be included in an application for registration as a remittance network provider, a remittance affiliate of the registered remittance network provider or an independent remittance dealer’, AUSTRAC website, viewed 4 May 2011, http://www.austrac.gov.au/files/draft_rules_spec_regist_app_info.pdf

limited power to exercise discretion as to whether a person should be entered on the register even in circumstances where the CEO believes that the person should not be providing alternative remittance services, for example because they present a significant money laundering, terrorism financing or people smuggling risk'.⁹¹ **Proposed new section 75C** sets out the circumstances in which the CEO *must* approve an application for registration. Namely, if satisfied that it is appropriate to do so, having regard to whether registering the person would involve a significant money laundering, financing of terrorism or people smuggling risk and any other matters (if any) specified in the AML/CTF Rules.⁹² A non-exhaustive list of 'matters' that *may* be specified in the AML/CTF Rules is contained in subsection (3). Such matters might broadly include any offences for which an applicant has been 'charged or convicted', and the compliance or non-compliance of the applicant with *any* law.

The discussion paper issued by the Minister for Home Affairs identified the absence of a clear authority to refuse to register a remitter as a key weakness in the existing regulatory regime. Similarly, the Explanatory Memorandum notes that 'the inability of the AUSTRAC CEO to *refuse* the registration of a remittance dealer is a serious weakness in the existing Act'. **Proposed subsection 75C(4)** of the exposure draft of the Bill contained an express power to enable the CEO to refuse a registration. This provision was not retained in the current Bill. Rather, the CEO has discretion to refuse to register a person as evidenced by the definition of 'reviewable decision' in proposed section 5 which means a decision to refuse an application for registration (see also operation of **proposed section 75A**).⁹³

Proposed new section 75E provides the CEO with the power to impose conditions upon a registration. The Bill provides a non-exhaustive list of conditions that *may* be imposed. These may relate for instance, to the volume and destination of funds to be remitted. This is a significant amendment that will undeniably provide AUSTRAC with far greater powers to effectively regulate and scrutinise the flow of funds emanating from the sector.

Despite the fact that the Explanatory Memorandum notes that 'the inability of the AUSTRAC CEO to cancel the registration of a remittance dealer is a serious weakness in the existing Act', the CEO has had since 16 April 2010 the ability under the AML/CTF Rules to remove a person's name from the register if it was considered that having the person's name and registrable details on the Register would constitute an unacceptable money laundering or terrorism financing risk.⁹⁴ AUSTRAC has

91. Attorney-General's Department, 'Enhanced AML/CTF regulation of the alternative remittance sector', *Regulation Impact Statement*, op. cit., p. 21.

92. On 27 April 2011 AUSTRAC released for public consultation draft AML/CTF Rules specifying matters to be considered by the AUSTRAC CEO in considering applications for registration pursuant to **proposed subsection 75C(2)**. See: http://www.austrac.gov.au/files/draft_rules_spec_ceo_apps2.pdf

93. It is not clear why this drafting formula has been adopted. For comparative purposes see: section 39D of the *Marriage Act 1961* or section 65 of the *Migration Act 1958*.

94. See Chapter 44 'Removing a Person's Name and Registrable Details from the Register of Providers of Designated Remittance Services' available at: http://www.comlaw.gov.au/Details/F2011C00081/Html/Text#_Toc282089612 made under section 229 of the AML/CTF Act for the purposes of paragraph 75(4)(b) of that Act. Explanatory Memorandum, op. cit., p. 100.

subsequently published copies of written notices it has issued with respect to the removal of two persons from the register.⁹⁵ The RIS acknowledges the existence of what it terms ‘an interim solution’ but explains that ‘it is desirable to ensure that this mechanism is clearly set out in the legislation and that review mechanisms are provided for decisions to refuse to register or cancel registration’.⁹⁶ Under the current AML/CTF Rules, removal may only occur if the CEO is of the opinion that the consequences of keeping a person’s name and registrable details on the register would constitute an unacceptable money laundering or terrorism financing risk. **Proposed section 75G** will expand the basis upon which registration *may* be cancelled—if continued registration involves or ‘may involve’ a significant money laundering, financing of terrorism or people smuggling risk, the person has breached a condition of their registration, or any other matter (if any) to be specified in the AML/CTF Rules. The *Broad overview of the proposed AML/CTF Rules to support the exposure draft of the Bill* states that the additional considerations that AUSTRAC proposes to be included in the rules are:

- whether the registered person has been charged or convicted in relation to a money laundering, financing of terrorism, people smuggling or fraud offence
- whether the registered person has ceased to provide a registrable remittance network service or registrable designated remittance service
- where the remittance provider has been or is in breach of the AML/CTF Act or FTR Act.⁹⁷

On 27 April 2011 AUSTRAC released for public consultation draft AML/CTF Rules specifying the matters which the CEO must have regard to when deciding if it is appropriate to cancel a person’s registration pursuant to **proposed paragraph 75G(1)(c)**.⁹⁸ It is noteworthy that the prescribed matters are broader than those initially proposed.

Proposed new section 75H provides that the AML/CTF Rules may make provision for the suspension of registrations by the CEO. This is an important amendment that will undeniably give AUSTRAC greater power to effectively control the flow of funds emanating from the sector. Though the Explanatory Memorandum notes that this mechanism will enable the CEO to immediately stop the flow of suspect remittances that may be used for example, for people smuggling ventures—the Bill does not prescribe any grounds precedent to the imposition of such a suspension such as, the CEO forming of a reasonable belief that the registrant will, or is likely to, remit funds for the purposes of money laundering, the financing of terrorism or other illegal activity. Rather, a broad list of non-exhaustive matters which the AML/CTF Rules may provide for are included in proposed subsection

95. AUSTRAC, ‘Removal from Register of Providers of Designated Remittance Services’, AUSTRAC website, viewed 11 April 2011, <http://www.austrac.gov.au/rrpds.html>

96. Attorney-General’s Department, ‘Enhanced AML/CTF regulation of the alternative remittance sector’, *Regulation Impact Statement*, op. cit., p. 20.

97. Author unknown, *Broad overview of the proposed AML/CTF Rules to support the Exposure Draft of the Combating the Financing of People Smuggling and Other Measures Bill*, op. cit., p. 4.

98. AUSTRAC, ‘Draft AML/CTF Rules specifying matters to be considered by the AUSTRAC CEO when deciding to cancel a registration’, AUSTRAC website, viewed 4 May 2011, http://www.austrac.gov.au/files/draft_rules_spec_ceo_cancel.pdf

(2). The *Broad overview of the proposed AML/CTF Rules to support the exposure draft of the Bill* states that AUSTRAC is proposing to allow suspension if:

- they have been charged, found guilty or convicted in relation to a money laundering, financing of terrorism, people smuggling, dishonesty or fraud offence and the AUSTRAC CEO has not yet completed the cancellation of the registration or the removal of the person's name from the register
- they have breached a registration condition
- the registered person has not complied with the provisions of the AML/CTF Act
- the AUSTRAC CEO is no longer satisfied that the information contained in the registration application is true and correct.⁹⁹

On 27 April 2011 AUSTRAC released for public consultation draft AML/CTF Rules specifying the grounds for suspension pursuant to **proposed subsection 75H(1)**.¹⁰⁰ It is noteworthy that the prescribed grounds are broader than those initially proposed.

Proposed section 75K deals with the removal of entries from the remittance sector register. Most significantly, proposed subsection (3) provides that if a network provider is removed from the register then each entry relating to their affiliate must similarly be removed. It is for the AUSTRAC CEO to notify each affiliate of the network provider 'as soon as reasonably practicable' that their network provider has been removed from the register (proposed subsection (6)). The operation of this provision is a direct consequence of linking the registration of an affiliate to their network provider.

Proposed section 75L provides that the AML/CTF Rules that may be made with respect to the remittance sector (under Part 6 of the AML/CTF Act) may set out different rules to apply to the three different entities. This is significant because though it entrenches an additional layer of flexibility—it in turn could be said to create a lack of uniformity of practice and thus create greater uncertainty for parts of the sector, particularly those that are already struggling to understand and comply with existing regulatory requirements.

Proposed section 75M creates an obligation on independent dealers, network providers and affiliates of network providers (that applied for registration on their own behalf) to inform AUSTRAC of any changes in circumstances that could materially affect their registration or other matters specified in the AML/CTF Rules. Notification must be via the approved form and in a specified time period (14 days following the change in circumstances). If a network provider registered an affiliate, the affiliate has an obligation to inform their network provider of a change in circumstances within 14 days. The network provider must in turn inform AUSTRAC of same within seven days of receipt of

99. Author unknown, *Broad overview of the proposed AML/CTF Rules to support the Exposure Draft of the Combating the Financing of People Smuggling and Other Measures Bill*, op. cit., p. 4.

100. AUSTRAC, 'Draft AML/CTF Rules on suspension of registration from Remittance Sector Register', AUSTRAC website, viewed 4 May 2011, http://www.austrac.gov.au/files/draft_rules_susp_regist.pdf

information. The substantive requirements set out in subsections (1)—(3) (not the prescribed time periods) are civil penalty provisions.¹⁰¹

Items 53—57 provide for the transition to the new registration scheme. In essence, providers of remittance network services will have 12 months from the ‘registration commencement day’ (the day on which item 1 of Schedule 1 commences) to apply for registration as a network provider under the new register. Similarly, independent dealers and affiliates will have six and 12 months respectively to register.

Review of decisions

Item 11 inserts a definition of ‘reviewable decision’ into section 5 of the AML/CTF Act to include a decision:

- to refuse an application for registration (including deemed refusal)
- to cancel a registration
- to impose conditions on a registration

Proposed new section 75Q provides that *before* the CEO makes a ‘reviewable decision’, a written notice must be issued stating (amongst other things) the reasons for the proposed decision and that a submission can be made in relation to the proposed decision. Such a submission must be made within 28 days ‘of the giving of the notice’. A notice need not be issued if the CEO is satisfied that it is ‘inappropriate to do so because of the urgency of the circumstances’. An example provided in the Explanatory Memorandum is where the CEO is aware that a serious criminal offence is about to occur.¹⁰²

Proposed new section 75R provides that ‘as soon as practicable’ *after* a ‘reviewable decision’ is made (other than a deemed refusal decision), the CEO must issue a written notice stating (amongst other things) the decision that has been made, the reasons for it and that internal review of the decision may be sought within 30 days (or such period as determined by the CEO). However, failure to comply with this requirement does not invalidate a decision. The internal review mechanism proposed in the Bill simply requires a more senior AUSTRAC officer (to the person who made the original decision) to review the decision. A new decision will be made affirming, varying or revoking the original decision and substituting such other decision as the more senior officer thinks appropriate. Such a review mechanism will undoubtedly be effective in promoting good primary decision-making and reducing the number of adverse decisions that will proceed to be reviewed independently by the Administrative Appeals Tribunal (AAT), as discussed below.

Item 2 defines an ‘AAT reviewable decision’ as a decision made under subsection 75R(6), (in other words, an internally reviewed decision) and a reviewable decision made personally by the CEO.

Proposed section 75S provides that the CEO must ‘as soon as practicable’ after an AAT reviewable

101. See footnote 70 for an explanation of the term ‘civil penalty’.

102. Explanatory Memorandum, op. cit., p. 104.

decision is made issue a written notice setting out (amongst other things) the decision that's been made, the reasons for it, and that the decision can be independently reviewed by the AAT. However, failure to comply with the requirement to issue such a notice will not invalidate the AAT reviewable decision that has been made. It is not clear whether this amendment will have significant resource implications for the AAT. At present the AAT's jurisdiction under the AML/CTF Act is limited to reviewing the following decisions of the AUSTRAC CEO:

to issue a written notice under s 161(2) requiring a reporting entity to appoint an external auditor to carry out an external audit of certain matters and give a copy of the audit report to the AUSTRAC CEO; to allow, or refuse to allow, under s161(2)(d) a longer period within which to give the AUSTRAC CEO the audit report; to direct a reporting entity under s 191(2) directing to take specified action towards ensuring that the reporting entity does not contravene a civil penalty provision under the Act, or is unlikely to contravene such provision, in the future.¹⁰³

Enforcement

One of the key failures of the existing regulatory regime identified by the Government in the RIS was that existing enforcement options are inflexible, and often do not allow for a proportionate response. Thus, it said the absence of effective enforcement tools have led to lower compliance levels in the sector.¹⁰⁴ The main enforcement options in the AML/CTF Act are pecuniary and criminal penalties, and enforceable undertakings.¹⁰⁵ In addition, existing Division 3 of Part 15 of the AML/CTF Act currently provides for the issuance of infringement notices for unreported cross-border movements of physical currency and bearer negotiable instruments.

Civil penalties are a financial penalty, determined by the Federal Court and do not involve criminal liability. In determining the amount of pecuniary penalty the Court must have regard to all relevant matters including the nature and extent of the contravention, any loss or damage suffered as a result of the contravention, and so forth.¹⁰⁶ **Infringement notices** issued under the AML/CTF Act are also a financial penalty but if the penalty amount (to be determined by AUSTRAC) is not paid, then criminal proceedings may be brought against the person or a civil penalty may be imposed under existing section 175.¹⁰⁷

Items 36—47 propose to expand the existing infringement notice scheme to apply to three key areas. Namely:

103. AAT, 'Administrative Appeals Tribunal Jurisdiction List as at 31 December 2009', AAT website, p. 26, viewed 15 April 2011, <http://www.aat.gov.au/docs/Jurisdiction%20List%2031%20December%202009.pdf>

104. Explanatory Memorandum, op. cit., p. 7.

105. The AUSTRAC CEO can seek to enforce an undertaking by applying to the Federal Court for an order under existing subsection 198(2).

106. See existing subsection 175(3) of the AML/CTF Act.

107. Under section 229 of the AML/CTF Act, the CEO may make AML/CTF Rules. The AML/CTF Rules are disallowable legislative instruments under the *Legislative Instruments Act 2003*.

- **proposed subsections 74(1), (1A), and (1B)** which prohibits unregistered persons from providing certain remittance services
- **proposed subsections 74 (1C)** which prohibits a registered person from breaching a condition of their registration
- **proposed subsection 75M(1)** which requires a registered person to notify AUSTRAC of a change in circumstances (and other matters) that could materially affect their registration.

Proposed section 186A(2) provides that the penalty to be specified in an infringement notice for a breach of one of these provisions will be 60 penalty units (\$6600) for bodies corporate or 12 penalty units for others (\$1320) unless the AML/CTF Rules specify otherwise pursuant to proposed subsection (3).¹⁰⁸ The Explanatory Memorandum notes that the Rules may specify higher pecuniary penalty amounts in circumstances where the lower default amounts would not be a sufficient deterrent to comply with the provision, or to take into account instances where there have been a number of alleged contraventions, or where a reporting entity has previously been given an infringement notice in relation to an alleged contravention.¹⁰⁹ However, the number of penalty units to be specified cannot exceed 120 penalty units (\$13 200) for a body corporate and 24 penalty units (\$2640) for others.

Schedule 2—Amendments relating to designated agencies

Items 5 and 6 add five new agencies to the definition of ‘designated agency’ in existing section 5 of the AML/CTF Act. The new agencies that will gain access to AUSTRAC information under Division 4 of Part 11 of the AML/CTF Act include the Department of Foreign Affairs and Trade (DFAT), Office of National Assessments (ONA) and three select defence intelligence agencies—the Defence Imagery and Geospatial Organisation (DIGO), Defence Intelligence Organisation (DIO) and the Defence Signals Directorate (DSD). As previously mentioned, the Senate Legal and Constitutional Affairs Legislation Committee recommended that as a matter of priority, AUSTRAC establish appropriate MOUs for the sharing of its intelligence with these agencies.

Item 14 inserts **proposed new subsection 128(13B)** which prescribes when AUSTRAC information can be passed on by a defence intelligence official. Broadly speaking, such information may be disclosed (in prescribed circumstances) to IGIS, to the Defence Minister, to the Minister responsible for administering the *Telecommunications (Interception and Access) Act 1979*. An official of DIGO or DSD may also disclose AUSTRAC information (in prescribed circumstances) to a Minister who is empowered under section 9A of the *Intelligence Services Act 2001* to issue an authorisation to DIGO or DSD.

Proposed new subsection 128(13C) prescribes when AUSTRAC information can be passed on by ONA officials. An official of ONA may disclose AUSTRAC information to an official of the Inspector General of Intelligence and Security (IGIS), to the Minister responsible for administering the

108. Section 4AA of the *Crimes Act 1914* defines ‘penalty unit’ to mean \$110.

109. Explanatory Memorandum, op. cit., p. 106.

Telecommunications (Interception and Access) Act 1979, and to the Prime Minister (in prescribed circumstances).

Item 16 inserts **proposed new sections 133B and 133C** into the AML/CTF Act. These provisions prescribe the circumstances in which the Director of a defence intelligence agency and the Director-General of ONA respectively, may communicate AUSTRAC information to a foreign intelligence agency. **Items 12 and 13** insert exceptions to this effect into existing section 127 of the ACT/CTF which makes it an offence for an official of a designated agency to disclose AUSTRAC information. Sections 133B and 133C mirror existing sections 133 and 133A of the AML/CTF Act which give such a power to ASIO and ASIS.¹¹⁰

Schedule 3—Verification of identity

Item 6 inserts **proposed new Division 5A** into the AML/CTF Act. **Proposed new subsection 35A(1)** provides that for the purposes of verifying the identity of a person for the purposes of the AML/CTF Act, a reporting entity may disclose a person's name, address and date of birth to a credit reporting agency to see whether the details provided matches (in whole or part) information held by the credit reporting agency.¹¹¹ Proposed subsection (2) makes such a request conditional upon numerous factors, including obtaining the express consent of the individual concerned. In addition, **proposed paragraph (2)(c)** provides that an alternative means of verifying their identity must have been made available. **Proposed section 35B** prescribes what information a credit reporting agency can disclose to a reporting entity when it receives a verification request. In essence, its assessment is restricted to confirming whether their information matches (in whole or part) the personal information provided to it (name, address and date of birth). If a credit reporting agency is unable to verify the person's identity, the reporting agency must provide the person with a written notice to this effect and offer them an alternative means of verifying their identity.¹¹²

Proposed section 35D provides that credit reporting agencies must not include personal information that relates to a verification request or assessment on a person's credit information file. **Proposed sections 35E and 35F** cover the retention of verification information by credit reporting agencies and reporting entities respectively while **proposed section 35G** obligates both to take reasonable steps to ensure that an individual can obtain access to such information. **Proposed sections 35H, 35J and 35K** create offences for unauthorised access to verification information, obtaining access to such information by false pretences, and unauthorised use or disclosure of such information. Each of these offences attracts a maximum penalty of 300 penalty units (\$33,000). **Proposed new section 35L** effectively provides that a person affected by a breach of a requirement of Division 5A may also lodge a complaint with the Australian Information Commissioner.

110. Explanatory Memorandum, op. cit., p. 111.

111. **Items 7—10** clarify that a reporting entity may authorise an agent to undertake customer identification and verification procedures: Explanatory Memorandum, op. cit., p. 115.

112. See **proposed section 35C**.

Though the Senate Legal and Constitutional Affairs Legislation Committee noted broad support for the privacy safeguards in the Bill and the effectiveness of the Privacy Impact Assessment process in engaging relevant stakeholders, it also noted that privacy issues, in the context of the regulatory requirements of the AML/CTF Act may be an area of policy requiring further scrutiny in the future.¹¹³ It subsequently recommended that the Attorney-General's Department review relevant options with a view to introducing an appropriate oversight mechanism to monitor the handling of credit information for the electronic verification of identity pursuant to the Bill. This is consistent with the recommendation for an oversight mechanism put forth by the Office of Australian Information Commissioner (OAIC) in its submission to the inquiry.¹¹⁴

Schedule 4—Amendment of the Financial Transaction Reports Act

Item 1 inserts **proposed new section 41A** into the *Financial Transaction Reports Act 1988* (FTR Act) which enables the AUSTRAC CEO to exempt a person from one or more of the provisions of that Act. This amendment reflects a similar provision contained in existing section 248 of the AML/CTF Act. According to the Explanatory Memorandum, the absence of such a provision in the FTR Act 'can result in unnecessary regulatory and administrative burden'.¹¹⁵

Concluding comments

This Bill represents a significant reform of the remittance sector regulatory regime. Such reform reflects a realisation that parts of the sector are vulnerable to the risk of being used for criminal purposes. The exact extent of this risk is not readily known or easily quantifiable. This vulnerability arguably stems primarily from neglect and weaknesses in the existing regulatory regime which (amongst other things) has led to limited or non-compliance and inadequate enforcement. Pre-existing (sometimes cultural) sensitivities within parts of the sector have also, and may continue, to inhibited compliance.¹¹⁶ Thus, the extent to which an enhanced regulatory regime will overcome such vulnerabilities and reduce the risk of the remittance sector being used for illegal activity is not entirely clear.

The reforms proposed in this Bill will greatly impact upon network providers—who will become subject to AML/CTF obligations in the Act and who will, to varying extents, take greater responsibility for the compliance of their affiliates. Shifting the regulatory focus in this way will undoubtedly provide Government with greater awareness and the ability to regulate these

113. Senate Legal and Constitutional Affairs Legislation Committee, op. cit., p. 17.

114. OAIC, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Combating the Financing of People Smuggling and Other Measures Bill 2011*, viewed 4 April 2011, http://www.aph.gov.au/Senate/committee/legcon_ctte/financing_people_smuggling/submissions.htm

115. Explanatory Memorandum, op. cit., p. 117.

116. For further information see D Rees, 'Money laundering and terrorism financing risks posed by alternative remittance in Australia', op. cit.

operators more effectively. However, the increased costs and regulatory burden associated with these reforms may also have an adverse impact upon the sustainability of independent businesses, the number of network providers in the market, and potentially, the compliance incentive for illegitimate operators.

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