CHAPTER 7

ANTI-MONEY LAUNDERING AND TERRORISM FINANCING

Introduction

7.1 This chapter will outline the key provisions and issues raised in relation to the following aspects of the Bill:

- the proposed amendments to the *Financial Transaction Reports Act 1988* (the FTR Act) and other related legislation (Schedule 9); and
- the proposed amendments to expand existing terrorism financing offences (Schedule 3).

New anti-money laundering provisions

7.2 Schedule 9 of the Bill amends the FTR Act, and makes consequential amendments to the *Proceeds of Crime Act 2002*, and the *Surveillance Devices Act 2004,* in order 'to better implement the requirements of the Financial Transaction Task Force' (FATF).[1]

7.3 The FATF is an international organisation concerned with strengthening anti-money laundering (AML) provisions in the global financial system, including recommending legislative and enforcement measures for individual countries to implement. To this end, it developed a series of 40 AML recommendations in 1990, which have been revised twice since. In the aftermath of the terrorist attacks on 11 September 2001, FATF also adopted 9 special recommendations on combating the financing of terrorism (CFT). The amendments contained in Schedule 9 of the Bill address three of these FATF CFT special recommendations – Special Recommendation VI (remittance services), Special Recommendation VII (wire transfer funds services), and Special Recommendation IX (cash couriers).[2]

7.4 Australia's progress in meeting the various FATF recommendations was reported in a FATF country evaluation published in October 2005. Of the three special recommendations in question, Australia was rated as 'partially compliant' for special recommendations SR VI and SR IX, and 'non-compliant' with SR VII. Australia achieved a rating of 'largely compliant' to most of the other special recommendations.

7.5 Australia's principle anti-money laundering legislation - the FTR Act - was last updated in a significant way through the *Proceeds of Crime Act 2002* and, in relation to terrorism, through the *Suppression of the Financing of Terrorism Act 2002*.

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1 Explanatory Memorandum, p. 97.

2 Bills Digest, p. 49. The following paragraphs are drawn from pp. 49-51 of the Bills Digest.

However, following the revision of the FATF recommendations in 2003/04, the Australia Government committed itself to a further overhaul of the FTR Act and associated legislation. The Bills Digest reports that the consultative process has been lengthy, with industry groups raising concerns over compliance costs and competitive neutrality between different sectors.[3] The Government is likely to release an exposure draft anti-money laundering Bill later this year. That Bill is expected to cover a broad range of FATF recommendations.[4]

Outline of the key provisions

Cash dealers and remittance services

7.6 Item 11 of Schedule 9 inserts new Part IIIB – Register of Providers of Remittance Services – into the FTR Act.[5] Proposed section 24E provides that cash dealers (other than financial institutions and real estate agents) who provide remittance services must provide certain information to the Director of the Australian Transaction Reports and Analysis Centre (AUSTRAC). AUSTRAC is the Commonwealth agency with primary responsibility for day to day administration of the FTR Act.

7.7 A failure to provide the above information carries a maximum penalty of 2 years imprisonment, or in the case of a corporation, a fine of approximately $50,000.

7.8 The detail of the information the cash dealer must provide to AUSTRAC will be prescribed by regulations. The Explanatory Memorandum to the Bill notes this is likely to include Australian Business Numbers and various contact details. The information provided will be placed on a Register maintained by the Director.[6]

International funds transfer

7.9 Item 10 of Schedule 9 inserts new Division 3A into Part II of the FTR Act.[7]

7.10 In order to strengthen the existing reporting and recording-keeping obligations contained in Part II of the FTR Act, new Division 3A will require customer information to be included in instructions for international funds transfers into and out of Australia. In particular, proposed section 17FA provides that, when a cash dealer is given an instruction for a transfer of funds out of Australia, the dealer must ensure the instruction includes information about the ordering customer. In relation to funds transfers coming into Australia, clause 17FB in certain situations allows the

3 Bills Digest, p. 49.

4 Senator the Hon Chris Ellison, Minister for Justice and Customs, Australia Fighting Money Laundering and Terrorism Financing, media release, 17 October 2005.

5 The following paragraphs are drawn from the Bills Digest, pp 49-50.

6 See proposed section 24F of the Bill.

7 Bills Digest, p. 50.

AUSTRAC Director to direct a cash dealer to request the ordering customer to include customer information in all future incoming transfers.

7.11 The customer information required includes the customer's name, residential or business address, account number or identification code. Additional information such as the customer's date and place of birth may be required in respect of funds transfers coming into Australia.[8]

7.12 A failure to comply with the above requirements carries a maximum penalty of 2 years imprisonment, or in the case of corporation, a fine of approximately $50,000.[9]

Cash couriers - bearer negotiable instruments taken in and out of Australia

7.13 Schedule 9 of the Bill also inserts into the FTR Act new reporting requirements in respect of 'bearer negotiable instruments'. These amendments address the FATF's comments in its country evaluation report for Australia that:

> … [while] Australia has a comprehensive system for reporting cross-border movements of currency above AUD 10,000 to AUSTRAC … there is no corresponding system for declaration/disclosure of bearer negotiable instruments.[10]

7.14 For the purposes of the Bill, 'bearer negotiable instruments' are defined to include bills of exchange, cheques, money orders, postal orders, travellers' cheques, and promissory notes. That is, the types of instrument whereby the holder, or some other person, can exchange for cash or a deposit of equivalent value in a bank account.[11]

7.15 Item 18 of Schedule 9 inserts proposed section 33AA into Part V of the FTR Act. It provides that a person that is leaving or arriving in Australia must, if requested by an officer, declare any bearer negotiable instruments they have with them and the amount payable under each instrument. They must also produce each instrument to the officer, if requested. If a person fails to declare or produce a bearer negotiable instrument as required, they commit an offence with a maximum penalty of imprisonment for one year. If an officer has asked a person to declare any bearer negotiable instrument, and they have 'reasonable grounds to suspect that the person has made a false or misleading declaration' in response, they may search their baggage or person. Officers may seize any bearer negotiable instruments in respect of which a false declaration has been made.[12]

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8 See subsection 17FA(3) and subsection 17FB(6) of the Bill.

9 Bills Digest, p. 50.

10 FATF, *Third Mutual Evaluation Report on Money Laundering and Combating of the Financing of Terrorism – Australia*, 14 October 2005 at p.18, cited in Bills Digest, p. 50.

11 See Item 1 of Schedule 9.

12 Bills Digest, p. 50.

7.16 If a bearer negotiable instrument is produced in a voluntary declaration by the person, or found through search, an officer may ask the person to prepare a report on the instrument. The report must include the very detailed information listed in proposed Schedule 3AA.[13]

7.17 The Explanatory Memorandum notes that there is no monetary limit on the face value of a bearer negotiable instrument that triggers the above reporting requirements. It explains that:

> In practice a person will only be required to produce a bearer negotiable instrument when asked by an officer. It is not proposed that the currency declaration system that applies to all persons travelling into or out of Australia be extended to bearer negotiable instruments. This 'disclosure when asked' system will enable more targeted use of customs and police resources.[14]

Commencement of the above provisions

7.18 The Bill provides that the proposed amendments concerning international fund transfer instructions and registration of remittance service providers shall commence on Proclamation, or if any of the relevant provisions do not commence within the period of 6 months beginning on the day the Act receives Royal Assent, they shall commence on the expiry of 6 months and one day from the date of Royal Assent.[15] According to the Explanatory Memorandum:

> The reason for the potential delay of 6 months for the commencement of these provisions is to allow for industry to develop processes to meet the inclusion of customer information requirements with international funds transfer instructions and for AUSTRAC to implement appropriate systems to raise public awareness of the new register requirements and to manage this information.[16]

7.19 The Bill provides that the amendments concerning negotiable bearer instruments generally commence on Proclamation, or if any of the relevant provisions do not commence within the period of 12 months beginning on the day the Act receives Royal Assent, they commence on the expiry of 12 months and one day from the date of Royal Assent.[17] According to the Explanatory Memorandum:

> The reason for the potential delay of 12 months for the commencement of these provisions is to allow for a public education campaign to raise

13 See Item 21 of Schedule 9 of the Bill; Bills Digest, p. 50.

14 p 99.

15 See clause 2 of the Bill.

16 p. 4.

17 Clause 2 of the Bill.

> awareness about the implications of the amendments and to enable the AUSTRAC to put in place appropriate training and system upgrades.[18]

Issues

7.20 Key concerns raised in respect of the Schedule 9 of the Bill include the following:

- a lack of consultation with industry on the detail of the provisions;
- the Bill's interaction with the pending AML review and legislation and the potential cost to industry of having to amend their processes and systems to comply with the Bill and then the AML legislation;
- industry's need for more time in which to make the necessary changes in order to be compliant with the Bill; and
- privacy concerns over the required transfer of customer information.

Lack of consultation with industry

7.21 The Department argued that the amendments in Schedule 9 of the Bill should not take industry by surprise. It advised the committee that:

> … Industry has been closely consulted on AML/CTF reform, and the FATF Forty Recommendations and Special Recommendations on Terrorist Financing since the Government announced its intention to implement the FATF Recommendations in December 2003. Consultation has taken a number of forms, including the release of industry-specific discussion papers, several meetings of a Ministerial Advisory Group and Systems Working Group, and ongoing discussion between industry representatives and the Department. More recently a number of round-table forums were held with the financial sector, co-chaired by the Minister for Justice and Customs and the ABA [Australian Banker Association], resulting in agreement on many specific issues, including funds transfers. The proposed amendments on funds transfers are consistent with the agreements reached on this issue.[19]

7.22 The Department did acknowledge that the banking and finance industry has not been consulted on the exact provisions of the Bill.[20] As the Australian Bankers Association stated:

> It is certainly the case that we have been involved in extensive consultation with the government and we continue that in relation to the AML bill. The point at issue here, however, is the detail of some very specific provisions. That is quite a different matter to talking about principles in relation to FATF recommendations.[21]

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18 EM, p. 4

19 *Submission 290A*, Attachment B, p. 29.

20 *Submission 290A*, Attachment B, p. 29.

21 Mr Tony Burke, *Committee Hansard*, 17 November 2005, p. 15

The Bill's interaction with the pending AML review and legislation

7.23 In this regard, a key concern of the Australian Bankers Association was possible overlap with the pending AML Bill. As the Department explained:

> Similar provisions to those contained in Schedule 9 of the AT Bill will be in the AML/CTF exposure Bill, as the FTR Act will eventually be replaced by the new AML/CTF legislation.[22]

7.24 The Department confirmed that the exposure Bill will also impose additional related obligations necessary to ensure greater compliance with relevant FATF Special Recommendations.[23]

7.25 Industry representatives were therefore concerned that financial institutions were potentially faced with two different pieces of legislation and compliance obligations, which may involve the same internal systems and processes, but with different requirements and dates of effect. The Australian Bankers Association was particularly concerned to avoid:

> … an outcome where banks, and many other financial institutions, would be required, in a relatively short time frame, to undertake two major sets of changes to the same computer systems and business processes: one to meet the ATB's requirements, and the other to meet the requirements of the new anti money laundering laws, the specific requirements of which are not yet known.[24]

7.26 These concerns were shared by the Association of Superannuation Funds of Australia.[25]

Cost to industry

7.27 At issue here was the potential cost to industry. The Department's view was that Schedule 9 of the Bill would have relatively little cost impact on industry and any assessment of cost could safely be left to the consultation on the AML exposure Bill. In its view, consultation at that time 'will enable an assessment of the overall costs to industry of AML/CTF reform to occur'.[26] The Department also advised the committee that consideration of measures to alleviate or offset industry's implementation costs could be also be left to consultation on the exposure Bill.[27] The Department also noted that the amendments in Schedule 9 had been designed to have a minimal impact on

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22 *Submission 290A,* Attachment A, p. 30.

23 *Submission 290A,* Attachment B, p. 28.

24 Mr David Bell, *Committee Hansard*, 17 November 2005, p. 14.

25 *Submission 64*, p. 1.

26 *Submission 290A,* Attachment B, p. 29.

27 *Submission 290A,* Attachment B, p. 34.

business pending that further consultation, but were going to have been implemented at some stage as they are FATF requirements. [28]

7.28 Industry representatives had a less sanguine view. They argued that Schedule 9 of the Bill – particularly the amendments concerning international funds transfers - would involve 'very significant change' to industry practice and processes. Mr Bourke of the Australian Bankers Association stated:

> … what is sought of us now by these provisions is not currently provided and … to provide this information in the specific form requested will require changes to core systems and to multiple core systems, because these payments are processed across a range of applications. It is also the case that the larger institutions process payments on behalf of smaller institutions and those smaller institutions will need to provide the same information, with possibly, relative to the size of their institutions, a greater impact.[29]

7.29 These sentiments were echoed by Mr Bell, also of the Australian Bankers Association:

> There must be a cost. If you change computer systems there is a cost. If you change computer systems twice, because of overlap or underlap of legislation, there will be more cost involved. What that cost is we do not know. It is not insignificant.[30]

Additional time required to ensure compliance

7.30 Industry representatives argued that there was a need for more time and further consultation. They had originally argued for an implementation period of 3 years for the proposed AML/CTF legislation, part of which is now covered by the Bill. As explained above, the Bill provides that Schedule 9 will come into force within six months (for international fund transfer instructions and registration of remittance service providers) and 12 months (for negotiable bearer instruments) of the Bill receiving Royal Assent. Industry had expressed concern at having to ensure all relevant systems and processes are compliant by the earlier date than expected.[31]

7.31 In support of the argument for more time, industry representatives also raised a number of specific concerns with the detail and drafting of the Bill.[32]

7.32 In light of the above, the Australian Bankers Association put the following recommendation to the committee:

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28 *Submission 290A,* Attachment B, p. 33. *Submission 290A,* Attachment A, p. 29.

29 *Committee Hansard*, 17 November 2005, p. 15.

30 *Committee Hansard*, 17 November 2005, p. 16.

31 Australian Bankers Association, *Submission 26*, Attachment, p. 2.

32 Australian Bankers Association*, Submission 26*, Attachment. See also Australian Bankers Association, *Submission 26B*

> The simplest solution, which would involve minimal changes to the Bill, would be to increase the implementation time by changing the date of commencement of proposed new sections 17FA and 17FB to 'a date to be proclaimed'. The date to be proclaimed should be the same as the date of commencement of related provisions in the new anti money laundering laws currently being drafted. Proposed sections 17FA and 17FB of the bill should also be repealed in 2006, on the date of royal assent for the new anti-money laundering laws, and replaced by provisions in the anti money laundering legislation. The consultation period for the anti money laundering laws would allow industry to work with governments to overcome the problems in the current drafting of this bill.[33]

7.33 In response, the Department stressed that there was a need to act now to prevent the Australian financial system being used for terrorist financing purposes. It pointed out that, in contrast, there is likely to be a considerable period before the new AML legislation will come into force. Although this new legislation was likely to be introduced into Parliament in mid-2006, a considerable transition period would still be required to allow industry implementation of the new requirements.[34]

7.34 The Department also argued that action was required now to prevent the Australian financial system from being used to finance terrorism and to ensure that Australian financial institutions are not barred from sending funds transfers to Europe and the US.[35] The Department noted that:

> US AML/CTF legislation already requires the inclusion of customer information with funds transfers and most EU [European Union] countries will have similar provisions by January 2007. For Australian financial institutions to be able to send funds transfer instructions to corresponding banks in these countries they will soon have to include customer information, regardless of what Australian law provides.[36]

7.35 The Department maintained that the measures proposed by Schedule 9 were ones that could be effectively implemented by industry and the Government relatively quickly. It considered a six month period from Royal Assent for those amendments that, in its view, will affect industry (i.e., those amendments dealing with international funds transfer instructions and the register of providers of remittance services) was sufficient time for industry to prepare for those provisions to come into force.[37]

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33 Mr David Bell, *Committee Hansard*, 17 November 2005, p. 14.

34 *Submission 290A,* Attachment A, p. 30.

35 *Submission 290A,* Attachment A, p. 30.

36 *Submission 290A,* Attachment A, p. 29

37 *Submission 290A,* Attachment B, p. 27.

Privacy Concerns

7.36 The Australian Bankers Association, the Office of the Privacy Commissioner (OPC) and the Australian Privacy Foundation (APF) raised privacy concerns over the amendments proposed by Schedule 9 of the Bill. As mentioned above, the amendments will require:

- certain cash dealers to provide prescribed personal information to AUSTRAC;
- identifying personal information to be included in international funds instructions; and
- persons carrying 'bearer negotiable instruments' – such as travellers cheques - to prepare detailed reports to AUSTRAC containing personal information about the courier or the person on whose behalf the instruments are being carried.

7.37 The Australian Bankers Association also expressed concern that sending personal information overseas may expose customers to the risk of identity fraud.[38]

7.38 The OPC expressed concern that the amendments in Schedule 9 will impose reporting obligations on a large number of financial entities, some of which may be exempt from statutory privacy obligations governing the private sector or state and territory agencies:

> The implications of this uneven coverage of the private sector and, possibly many public agencies, is that large amounts of often sensitive financial and other personal data handled by these entities will not be protected by any privacy legislation – national, state or territory. This situation is compounded by the current obligations in Part IV of the FTR Act for financial institutions to retain data, such as customer generated financial transaction documents, for a minimum of seven years.[39]

7.39 The OPC noted that a lack of effective privacy protection could result in an unintended loss of community and business confidence in the proposed regime:

> The effective implementation of legislative measures to counter money laundering and the financing of terrorist activities will depend in large part on the willing cooperation of the business community in providing critical financial data to law enforcement agencies. This in turn will be underpinned by the understanding and confidence on the part of the community as to what happens to their financial data.[40]

38 *Submission 26*, Attachment, p. 5.

39 *Submission 276*, p. 12.

40 *Submission 276*, pp 12-13.

7.40 In support of this argument, the OPC pointed to research demonstrating notable community reluctance to deal with business in situations where concerns existed over the protection of their personal information.[41]

7.41 The OPC therefore recommended that, in view of the privacy issues involved, the amendments should be delayed pending further careful consultation and assessment as part of the planned consultation process for the proposed AML Bill. It also stressed the need to conduct a Privacy Impact Assessment in respect of the proposed amendments in Schedule 9.[42]

7.42 The above concerns and recommendation were echoed by the Australian Privacy Foundation. It characterised the amendments proposed by Schedule 9 as:

> … another example of 'a power grab by stealth' – introduction of provisions with much wider reach, which deserve much wider debate by the many interested parties, as part of supposedly purpose specific anti-terrorism legislation. The appropriate place for these provisions are in the proposed anti money-laundering legislation, which have quite properly been the subject of recent consultation at least with industry (albeit with limited opportunity for wider community input).[43]

7.43 The Department advised the committee that detailed discussion on privacy issues and the means to best address these will take place during the consultation period following release of the AML exposure draft Bill.[44] However, it maintained that the amendments should not be delayed and the current practices and requirements included the disclosure of customer information (such as account numbers). It reiterated that:

> … the inclusion of customer information with wire transfers is a requirement of FATF under Special Recommendation VII on Terrorist Financing. Financial institutions from most EU countries are expected to be required to include this type of information in wire transfers by January 2007, and these institutions will be expecting institutions with which they have correspondent banking relationships to also comply. Financial institutions from the US are already required to include customer information with wire transfers.[45]

The committee's view

7.44 The committee acknowledges the concerns raised by submissions in respect of Schedule 9 of the Bill. However, the committee also appreciates the need for prompt

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41 *Submission 276*, p.12.

42 *Submission 276*, pp 12 and 15.

43 *Submission 165*, p. 6.

44 *Submission 290A,* Attachment B, p. 34.

45 *Submission 290A,* Attachment B, p. 34.

action to progress counter-terrorist financing measures. The committee also accepts that, as stated by the Department, the concerns outlined above may be able to be accommodated within the implementation time period currently provided for the Bill's commencement provisions. Yet, it is apparent that some flexibility in this area may be required. This can be achieved by providing the amendments will commence on 'a date to be proclaimed' as opposed to a fixed date.

Recommendation 50

7.45 The committee recommends that clause 2 of the Bill be amended to provide that Schedule 9 of the Bill shall commence on 'a date to be proclaimed'.

Financing terrorism

7.46 Schedule 3 of the Bill amends the Criminal Code and FTR Act in order to 'strengthen existing terrorism financing offences'. According to the Explanatory Memorandum:

> The amendments strengthen the existing terrorist financing offences and confirm Australia's commitment to the principles behind the Financial Action Task Force on Money Laundering's (FATF's) Special Recommendations on Terrorist Financing, the International Convention for the Suppression of the Financing of Terrorism and United Nations Security Council Resolution 1373. In particular, the proposed amendments better implement FATF's Special Recommendation II, which was developed with the objective of ensuring that countries have the legal capacity to prosecute and apply criminal sanctions to a person who finances terrorism.[46]

7.47 FATF, in its country evaluation report on Australia, recommended that 'Australia should specifically criminalise the collection or provision of funds for an individual terrorist, as well as the collection of funds for a terrorist organisation'.[47] FATF did so as it considered that Australia's existing terrorist financing offences did not sufficiently cover the requirements of Special Recommendation II.

Existing terrorism financing offences

7.48 Existing subsections 102.6(1) and (2) of the Criminal Code makes it an offence to receive funds from, or make funds available to, a terrorist organisation, whether directly or indirectly. Subsection 102.6(1) deals with the situation where the offender knows the organisation is a terrorist organisation. This offence carries the maximum penalty of 25 years imprisonment. Subsection 102.6(2) deals with the

46 p. 12.

47 FATF, *Third Mutual Evaluation Report on Money Laundering and Combating of the Financing of Terrorism – Australia*, 14 October 2005, para 2.2.2.

situation where the offender is reckless as to whether the organisation is a terrorist organisation, and imposes a maximum penalty of 15 years imprisonment.[48]

7.49 Existing subsection 103.1(1) of the Criminal Code makes it an offence for a person to provide or collect funds, and be reckless as to whether those funds will be used to facilitate or engage in a terrorist act. The offence is committed even if the terrorist act does not occur (subsection 103.1(2)). The maximum penalty for the offence is life imprisonment.[49]

7.50 'Knowledge' and 'recklessness' are defined in sections 5.3 and 5.4 respectively of the Criminal Code. A person has knowledge of a circumstance (in this case that an organisation is a terrorist organisation) if they are aware that the circumstance exists or will exist in the ordinary course of events. A person is reckless with respect to a circumstance if they are aware of a substantial risk that the circumstance exists or will exist, and having regard to the circumstances known to them, it is unjustifiable to take the risk.[50]

7.51 'Terrorist organisation' is defined in section 102.1 of the Criminal Code. 'Funds' are broadly defined in section 100.1 of the Code, and cover property and assets of every kind.

Outline of the Bill's key provisions

7.52 Item 1 of Schedule 3 of the Bill will amend subsections 102.6(1) and (2) to criminalise the collection of funds for, or on behalf of, a terrorist organisation, whether directly or indirectly. The new offence is committed where the person knows the organisation to be a terrorist organisation (102.6(1)(a)) or is reckless as to whether it is a terrorist organisation (102.6(2)(a)). The maximum penalties for the offences under subsections 102.6(1) and (2) will not change.[51]

7.53 Item 3 of Schedule 3 inserts proposed subsection 103.2(1) to criminalise similar conduct as that covered by existing section 103.1, but where the funds are made available to, or collected for, or on behalf of, another person. The offence will occur if the person providing, or collecting, the funds is reckless as to whether that other person will use the funds to facilitate or engage in a terrorist act.

7.54 The Explanatory Memorandum explains in relation to Item 3:

> As recklessness [*defined above*] is a relatively high standard fault element, the proposed offence will not apply to a person who provides or collects

48 This overview of existing offences and the amendments is drawn from pp 11-12 of the Bills Digest.

49 Bills Digest, p. 12.

50 Bills Digest, p. 11.

51 The following paragraphs are draw from pp 12-13 of the Bills Digest.

> funds believing those funds will be used for an innocuous purpose, irrespective of whether the funds are in fact used for a terrorist act.[52]

7.55 Proposed subsection 103.2(2) provides that the offence is committed under proposed subsection 103.2(1) even if:

- a terrorist act does not occur;
- the funds will not be used to facilitate or engage in a specific terrorist act; or
- the funds will be used to facilitate or engage a number of terrorist acts, instead of just the one act.

7.56 The offence in proposed subsection 103.2(1) carries a maximum penalty of life imprisonment.

7.57 Proposed subsection 103.3 provides that the offences under Division 103 (which includes existing subsection 103.1(1) and proposed subsection 103.2(1)) have extended geographical jurisdiction – Category D. This means that an offence under one of these provisions is committed whether or not the conduct constituting the alleged offence, or the result of that conduct, occurs in Australia.

7.58 Item 4 of Schedule 3 amends the definition of 'financing of terrorism offence' in subsection 16(6) of the FTR Act to include the new terrorist financing offence added by Item 3. Subsection 16(1A) of the FTR Act requires a cash dealer to report to AUSTRAC any transaction the dealer is involved in and has reasonable grounds to suspect is either:

- preparatory to the commission of a financing of terrorism offence; or
- relevant to the investigation or prosecution of a financing of terrorism offence.

Issues

7.59 Concerns were raised with the committee that the new offence of financing a terrorist (in new section 103.2) would allow a person to be imprisoned for life if the person *indirectly* makes funds available to another person, or *indirectly* collects funds for another, and the person is *reckless* as to whether the other person will use the funds for terrorism. That is, the person need not intend that the funds be used for terrorism, nor must they have knowledge that the funds will be used for the purpose. Also of concern was the fact that the offence is committed even if a terrorist act does not occur or the funds will not be used for a specific terrorist act.[53]

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52 p. 12.

53 See, for example, Law Council, *Submission 140*, pp 19-21 and New South Wales Council for Civil Liberties, *Submission 161*, pp 1-3.

7.60 The committee received a large number of submissions from a wide cross section of the community which argued that the above extends criminal liability too far and would make it impossible for any person to know the scope of their legal liabilities with any certainty.[54] For example, the Gilbert and Tobin Centre of Public Law submitted that:

> Terrorists obtain financing from a range of sources, including legitimate institutions (such as money laundering through banks), and employ a variety of deceptive means to secure funding. This offence would require every Australian to vigilantly consider where their money might end up before donating to a charity, investing in stocks, depositing money with a bank, or even giving money as birthday present.[55]

7.61 The key concern was that innocent, well meaning people will be caught. The Law Council noted, for example, that the proposed offence would encroach on everyday activities undertaken by many ordinary Australians:

> The proposed measure has the capacity to catch all financial transactions and everyday activities including purchasing items, paying bills, banking transactions and charitable and other collections, many of which typically do not warrant, require or allow an enquiry as to the purpose of the funds. … There is [also] no minimum amount required to commit the offence, so that the purchase of a $5 raffle ticket could be sufficient.[56]

7.62 The Australian Privacy Foundation advised the committee that:

> Individuals and organisations acting in good faith cannot be expected to know enough about these potential links to make a judgement. Criminal offences should only apply to financial contributions made in the full knowledge that they will be used to fund criminal activity. Otherwise, two things will happen - a vast number of individuals will inadvertently expose themselves to criminal prosecution, and some people will be deterred from contributing to legitimate social and political movements which criticise current government policies or even those that don't. Both are undesirable.[57]

7.63 Submitters pointed to the current controversy surrounding the Australian Wheat Board to demonstrate the uncertainties over the scope of the offence provision and its reliance on recklessness. As the Law Council noted:

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54 See for example: Australian Privacy Foundation, *Submission 165*, p. 23; Law Council, *Submission 140*, pp 19-21; Federation of Ethic Community Councils of Australia, *Submission 167,* pp 12-13; Quaker Peace and Justice NSW Committee, *Submission 183* p. 2; Queensland Council for Civil Liberties, *Submission 223,* p. 11; National Australian Bank, *Submission 209,* p. 1; PIAC, *Submission 81*, p. 29; and New South Wales Council for Civil Liberties, *Submission 161*, pp 1-3.

55 Gilbert and Tobin Centre for Public Law, *Submission 80*, p. 7.

56 Law Council, *Submission 140*, pp 19-21.

57 Australian Privacy Foundation, *Submission 165*, p. 23.

> The recent report on the Australian Wheat Board "knowingly" providing funds to the Saddam Hussein Government via a Jordanian trucking company provides an interesting example if the facts were slightly different. For example, what if the funds had flowed through to a terrorist organisation, would the Board's conduct amount to the reckless financing of terrorism?[58]

7.64 Submitters also expressed concern that the amendments would discourage donations to charitable organisations and create feelings of ill-will and suspicion within the community.[59] It was put to the committee that:

> … the Bill's provisions are likely to exacerbate community, and possibly racial, tensions as members of the public who propose to donate funds to seemingly needy groups or causes decide which recipients should be questioned, and to what extent, about how they propose to use the donated funds.[60]

7.65 Witnesses and submitters also argued that a penalty of life imprisonment was unreasonable and not proportionate for an offence which is unknowingly committed by a person.[61]

7.66 The Law Council also opposed the use of a fault element of 'recklessness'. It argued that, where a person convicted of this offence faces the real possibility of losing their liberty and serving a lengthy prison term, intention and knowledge should be the standard of fault required.[62]

7.67 In light of the above, it was put to the committee that the new financing terrorism provisions should be subject to the same review as existing terrorism laws. The Law Council of Australia noted, for example, the current financing terrorism provisions in the Criminal Code, and therefore the proposed provisions in Schedule 3 of the Bill, are excluded from review required under the *Security Legislation Amendment (Terrorism) Act 2002* (Cth).[63]

The Department's response

7.68 The Committee put the above concerns to the Attorney-General's Department.

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58 Law Council, *Submission 140, p.* Mr David Bernie, New South Wales Council of Civil Liberties, *Committee Hansard,* 17 November 2005, p. 40.

59 Law Council, *Submission 140*, pp 19-21, Islamic Welfare Council of Victoria, *Submission 150*, Dr Waleed Kadous, AMCRAM, *Committee Hansard*, 17 November 2005, p. 23. Dr Ameer Ali, Federation of Islamic Councils of Australia, *Committee Hansard,* p. 23.

60 Law Council, *Submission 140*, p. 19.

61 Law Council, *Submission 140*, p. 21, Dr Waleed Kadous, AMCRAM, *Committee Hansard*, 17 November, p. 23.

62 Law Council, *Submission 140*, p. 20.

63 Law Council, *Submission 140*, p. 21.

7.69 The Department argued that many of the concerns raised were misconstrued. It stressed that the Criminal Code provides that a person is reckless with respect to a result if they are *aware* of a *substantial* risk that the result will occur, and *having regard to the circumstances known to them* it is unjustifiable to take that risk. As the Department explained:

> This means that a person would have to be aware of a substantial risk that the funds will be used by the receiver of the funds to facilitate or engage in a terrorist act, and being aware of that risk continued to provide funds or collect funds (whether directly or indirectly) for that person. The fact that the funds may be made available to the person indirectly or are indirectly collected for that person is irrelevant, unless the person engages in such conduct with the requisite state of mind. For the ordinary person who, for example, gives funds to a person believing that person is legitimately collecting money for charity or who collects funds believing that they are doing that for a legitimate charity, they will not commit an offence, irrespective of where those funds are eventually used.[64]

That is, the proposed offence will not apply to a person who provides or collects funds believing those funds will be used for an innocuous purpose, or even if they believe there is a small risk of the funds being used for terrorist purposes.[65]

7.70 The Department also advised the committee that:

> The maximum penalty of life imprisonment is considered appropriate to the gravity of the act of financing a terrorist offence. The maximum penalty is the same as that for the existing offence in section 103.1 of the Criminal Code of financing terrorism, which has been in the Criminal Code since the original terrorism offences were inserted in 2002. This offence covers essentially the same conduct and also carries a fault element of recklessness.[66]

The committee's view

7.71 The committee acknowledges the significant level of concern in respect of Schedule 3 of the Bill. However, after careful consideration and after having regard to the Department's response, the committee does not consider that these concerns warrant rejection or amendment of the Schedule. The committee also notes the onus of proof on the prosecution in criminal matters is beyond reasonable doubt. The Commonwealth Director of Public Prosecutions would have to be satisfied that a case was worth pursuing, having regard to the Prosecution Policy of the Commonwealth and related guidelines governing the exercise of the prosecutorial discretion.

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64 *Submission 290A,* Attachment A, p. 27

65 *Submission 290A,* Attachment A, p. 25.

66 *Submission 290A,* Attachment A, p. 25.

7.72 The committee does, however, accept the point that the new financing terrorism provisions ought to be subject to the same review requirements as apply to other federal terrorism provisions.

Recommendation 51

7.73 The committee recommends that the Bill be amended to provide that Schedule 3 of the Bill shall be subject to a public and independent five year review.

Recommendation 52

7.74 Subject to the above recommendations, the committee recommends that the Senate pass the Bill.

Senator Marise Payne

Chair