



Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2007

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Law and Bills Digest Section

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Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2007

Date introduced: 15 February 2007

House: House of Representatives

Portfolio: Justice and Customs

Commencement: Sections 1 to 3 commence on the day the Bill receives Royal Assent. Schedule 1, items 1 to 13, items 15 to 19 and items 21 to 58 and items 62 to 69 commence the day after the Bill receives Royal Assent. Schedule 1 item 14 commences on 12 December 2008. Schedule 1 item 20 commences on 12 December 2007. Schedule 1 items 59 to 61 take retrospective effect from 13 December 2006.

Purpose

The amendments made by the Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2007 (the Bill) are designed to ensure the effective operation of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* to combat money laundering and terrorist financing.

The Bill makes amendments to the following legislation:

- *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act);
- *Anti-Money Laundering and Counter-Terrorism Financing (Transitional Provisions and Consequential Amendments) Act 2006* (AML/CTF Consequentials Act);
- *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act);
- *Commonwealth Electoral Act 1918* (Electoral Act);
- *Financial Transaction Reports Act 1988* (FTR Act);
- *Inspector-General of Intelligence and Security Act 1986* (IGIS Act); and
- *Surveillance Devices Act 2004* (Surveillance Devices Act).

Background

The Bills Digest on the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 (the AML/CTF Bill) can be accessed [here](#).

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The Bills Digest on the Anti-Money Laundering and Counter-Terrorism Financing (Transitional Provisions and Consequential Amendments) Bill 2006 (the AML/CTF Consequentials Bill) can be accessed [here](#).

The AML/CTF Bill passed through the House of Representatives on 28 November 2006 with limited debate and passed through the Senate during the final sittings.

The Explanatory Memoranda for both the AML/CTF and AML/CTF Consequentials Bills was replaced and then a correction to the Explanatory Memorandum for the AML/CTF Bill was issued dealing with the strict liability provisions. A substantive set of corrections was also issued for the replacement Explanatory Memorandum to the AML/CTF Consequentials Bill.

The AML/CTF and AML/CTF Consequentials Bills received Royal Assent on 12 December 2006, and became Acts No. 169 and No. 170 of 2006.

Basis of policy commitment

When introducing the Bill to the House, the Attorney-General noted that the 2006 [report](#) of the Senate Standing Committee for the Scrutiny of Bills raised concerns about the application of absolute liability rather than strict liability to some elements of offences under sections 136, 137, 139, 140 and 141 of the AML/CTF Act.¹

During the debate of the (then) Bills in 2006, the Minister for Justice and Customs, Senator the Hon. Chris Ellison, undertook to amend these sections to replace the application of absolute liability with strict liability.² These amendments are made at **items 41 to 47** of the present Bill.

The 2006 Bills were also the subject of an inquiry by the Senate Standing Committee on Legal and Constitutional Affairs with the [report](#) tabled on 28 November 2006 which made fourteen recommendations. The government response to the recommendations came in the second reading speech in the Senate on 7 December 2006. The Minister agreed to review several issues raised by the Committee in the review of the legislation to be conducted under clause 251.³ That review is only required seven years after the commencement of the AML/CTF Act.

The Minister also undertook to continue to work with industry groups and other stakeholders to resolve certain technical issues in response to recommendation 7 and, if necessary, to address these technicalities in a further bill. The other recommendations of the Senate Committee were not accepted.

When tabling the present Bill, the Attorney-General advised that:

Further consultation was undertaken and no amendments were considered necessary to resolve issues raised by the committee. Affected industry sectors were advised of

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the government's view that the common law principles of agency apply throughout the Anti-Money Laundering and Counter-Terrorism Financing Act 2006.⁴

However, the consultations did raise the following issues, which are characterised by the Attorney-General as technical amendments:

1. Reporting entities will gain additional rights to seek review of decisions made by the AUSTRAC CEO under the Anti-Money Laundering and Counter-Terrorism Financing Act 2006. This includes a right to a merits review by the Administrative Appeals Tribunal of decisions by the AUSTRAC CEO to appoint an external auditor to carry out a risk management audit under section 161, and decisions by the AUSTRAC CEO to give a remedial direction under section 191.
2. In addition the Administrative Decisions (Judicial Review) Act 1977 will be amended to remove the general exemption given to decisions under the AML/CTF Act from review under the ADJR Act and replace it with an exemption limited to decisions by the AUSTRAC CEO to apply to the Federal Court for a civil penalty order under section 176 and to the granting of an exemption from, or declaring a modification to, a requirement of the act under section 248. This amendment will ensure greater accountability for decisions by the AUSTRAC CEO under the AML/CTF Act.
3. ASIS is to be made a designated agency thereby granting ASIS officials access to AUSTRAC information to ensure that financial intelligence is available to counter the financing of terrorism. This brings ASIS into line with ASIO which is also a designated agency.
4. Amendments to the secrecy and access provisions of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 are to ensure national security and intelligence agencies which are designated agencies can fulfil their functions under their enabling legislation.
5. Minor amendments to the Commonwealth Electoral Act 1918 will ensure that a person who has an arrangement with a reporting entity to verify customer identity under the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 will have access to the electoral roll equivalent to that which is currently provided for the purposes of the Financial Transaction Reports Act 1988.
6. Additional minor technical amendments are made to the Surveillance Devices Act 2004, the Inspector-General of Intelligence and Security Act 1986 and the Financial Transaction Reports Act 1988.⁵

Financial implications

The Bill makes technical amendments and appears revenue neutral.

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Main provisions

Schedule 1

Amendments to Administrative Decisions (Judicial Review) Act 1977

Item 1 amends **paragraph (qa)** of Schedule 1 of the ADJR Act to restrict the decisions under the AML/CTF Act that are exempt from review to those made under sections 176 and 248 of that Act. This item removes the general exemption currently applying to decisions under the AML/CTF Act.

Item 65 provides that the amendment in **item 1** applies retrospectively. The Explanatory Memorandum states that the provision is retrospective:

in order to ensure that all decisions other than those made under sections 176 and 248 of the AML/CTF Act will be subject to merits review since the commencement of the AML/CTF Act. The retrospectivity is justified because the provision is beneficial and includes a transitional provision allowing extra time for applications for judicial review.⁶

The explanations for retrospectivity in the Explanatory Memorandum are confusing as the ADJR Act deals with judicial review of decisions, while the AAT deals with merits review.

Amendments to Anti-Money Laundering and Counter-Terrorism Financing Act 2006

ASIS

Items 3 to 6 deal with adding the Australian Secret Intelligence Service (ASIS) to the AML/CTF regime. **Item 6** inserts **new paragraph (ga)** into the definition of *designated agency* in section 5 and thereby makes ASIS a designated agency for the purposes of the AML/CTF Act. As officials of a designated agency, ASIS officials will be able to obtain access to AUSTRAC information.

AUSTRAC CEO

Item 19 inserts **new section 79A** into the AML/CTF Act to allow the AUSTRAC CEO to provide a certificate stating that a person's registrable details were not on the 'Register of Providers of Designated Remittance Services'. The certificate will be prima facie evidence of the matters in the certificate. This is to ensure that the AUSTRAC CEO will not be required to attend court to give evidence of what appears on the Register in a prosecution for a specified offence or for proceedings for a civil penalty order. A defendant will be able to challenge the contents and validity of the certificate by bringing evidence to the contrary. This power does not limit the operation of section 155 of the *Evidence Act 1995* in relation to the AML/CTF Act.

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Item 52 adds a **new subsection 228(5)** which will require the Minister to table a direction to the AUSTRAC CEO made under section 228 in each House of the Parliament within 15 sitting days after giving the direction.

'Tipping off' offences

Items 21 to 23 deal with new 'tipping off' offences. Note the discussion of tipping off in the 2006 [Bills Digest](#) at pages 12-14.

Item 21 inserts a **new subsection 123(5A)** that will prohibit a person to whom information has been disclosed under subsection 123(5) from disclosing the information to another person. Subsection 123(5) allows an exemption from the subsection 123(2) tipping off prohibition for reporting entities that make a disclosure to a legal practitioner for the purpose of obtaining legal advice.

Item 22 inserts a **new subsection 123(8A)** that will prohibit a person to whom information has been disclosed under subsection 123(8) from disclosing the information to another person. Subsection 123(8) allows an authorised deposit-taking institution (ADI) to disclose the matters, which would otherwise be subject to the prohibition in subsection 123(2), to an owner-managed branch of an ADI.

Item 23 amends subsection 123(11) to create offences for contravening the prohibitions mentioned in items 21 and 22 above. The maximum penalties are the same for other subsection 123(11) offences – 120 penalty units or 2 years imprisonment.

Permitted disclosures of AUSTRAC information

Items 24 and 25 amend section 128 so that AUSTRAC information can be disclosed by an official of a designated agency for the purposes of court or tribunal proceedings or proposed or possible court or tribunal proceedings, or for the purposes of obtaining legal advice. *AUSTRAC information* is defined in section 5 of the AML/CTF Act.

Item 26 inserts **new subsection 128(12A)** into the AML/CTF Act. Subsection 128(12A) provides that in addition to the situations in which an ASIS official may disclose AUSTRAC information under the general provisions in section 128, an ASIS official may disclose AUSTRAC information in the following circumstances:

- to an Inspector-General of Intelligence and Security (IGIS) official for the purposes of the IGIS official performing his or her duties in relation to ASIS or an ASIS official
- to the ASIS Minister where the disclosure is for the purposes of, or in connection with, the ASIS Minister's performance of his or her responsibilities in relation to ASIS, and
- to a Minister who under section 9A of the *Intelligence Services Act 2001* is empowered to issue an authorisation in relation to ASIS, if the disclosure is for the purposes of, or in connection with, the exercise of that power.

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Item 27 amends subsection 128(13) by adding **new paragraph 128(13)(d)** which allows an ASIO official to disclose AUSTRAC information to a Minister who, under section 9A of the *Intelligence Services Act 2001*, is empowered to issue an authorisation in relation to ASIS, if the disclosure is for the purposes of, or in connection with, the exercise of that power.

Items 32 to 39 make amendments to section 128 to ensure AUSTRAC information can be disclosed in certain circumstances to allow the IGIS to carry out their functions in relation to ASIS.

Strict Liability

Items 41 to 47 amend the following offences to change absolute liability to strict liability.

- **Item 42** Section 137 – Producing false or misleading documents
- **Item 43** Section 139 – Providing a designated service using a false customer name
- **Item 44** Section 139 – Providing a designated service using customer anonymity
- **Item 45** Section 140 – Receiving a designated service using a false customer name
- **Item 46** Section 140 – Receiving a designated service using customer anonymity
- **Item 47** Section 141 – Customer commonly known by two or more different names-disclosure to reporting entity

The Scrutiny of Bills Committee holds the view that any use of strict or absolute liability should be properly justified. The Committee expects that the justification for the imposition of such offences should be clearly set out in the explanatory memorandum in each case. The Government issued a ‘Correction to the Replacement Explanatory Memorandum’ on 1 November 2006 for the 2006 AML/CTF Bill which contained the justifications for the strict and absolute liability offences.

For each offence in this Bill, therefore, the Explanatory Memorandum states that strict liability is provided because the offences involve a knowledge of law issue. ‘Knowledge of law’ is one of the justifications for strict liability indicated in the Report 6/2002 of the Senate Standing Committee for the Scrutiny of Bills: [*Application of Absolute and Strict Liability Offences in Commonwealth Legislation*](#).

The defence of mistake of fact will be available in relation to the physical element of the offences.

AAT

Item 49 inserts **new section 164A** at the end of Division 7 of Part 13 of the AML/CTF Act. This new section permits a reporting entity to apply to the Administrative Appeals Tribunal for review of a decision by the AUSTRAC CEO requiring the reporting entity to

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appoint an external auditor to carry out an external risk management audit under section 161.

Item 50 inserts **new section 191A** at the end of Division 5 of Part 15 of the AML/CTF Act. This new section permits a reporting entity to apply to the Administrative Appeals Tribunal for review of decisions by the AUSTRAC CEO to issue a remedial direction to the reporting entity under section 191.

Item 67 provides that **new section 164A** (inserted by **item 49**) will apply retrospectively. Section 164A is to have retrospective effect so as to allow a reporting entity to challenge the merits of a decision made between 13 December 2006 when the AML/CTF Act commenced and the commencement of item 49.

Item 68 provides that **new section 191A** (inserted by **item 50**) will apply retrospectively. The rationale for this is similar to that for **item 67**.

Amendment to the Commonwealth Electoral Act 1918

Item 54 amends the *Commonwealth Electoral Act 1918* by inserting a **new item 7** within the table in 90B(4) of the Electoral Act. This table specifies to whom the Electoral Commission may give information regarding the Electoral Roll. The new item applies to a prescribed person or organisation that is under an arrangement with a reporting entity or the agent of a reporting entity. If they provide information for the purpose of facilitating the carrying out of the applicable customer identification procedures under the AML/CTF Act, they can then have access to the Electoral Roll.

Item 56 inserts a **new subsection 91A(2E)** into of the Electoral Act. This provision is consequential upon item 54. For information provided under item 7 of the table in subsection 90B(4), facilitating the carrying out of an applicable customer identification procedure under the AML/CTF Act 2006 is a permitted purpose.

Amendment to the Inspector-General of Intelligence and Security Act 1986

Item 62 repeals existing subsection 22(3) and substitutes **new subsection (3)** to provide that if the Inspector-General has prepared a report upon completion of an inquiry under the IGIS Act which includes information acquired by the Commissioner of Taxation under the provisions of a tax law, the IGIS must prepare an alternate of the report which does not disclose the tax information. There is no longer the requirement that the Inspector-General must prepare another version of the report that does not disclose any AUSTRAC information.

Note that the Tax Laws Amendment (2007 Measures No. 1) Bill 2007 introduced on 15 February 2007 amends the secrecy and disclosure provisions in the *Taxation Administration Act 1953* to allow the Commissioner of Taxation to make disclosures of

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taxpayer information to Project Wickenby taskforce officers and to officers in other taskforces that may be prescribed in the regulations. Project Wickenby is a multi-agency taskforce addressing alleged tax avoidance and evasion involving the use of offshore entities, which may also entail other features such as large-scale money-laundering, fraud, or breaches of the law relating to the regulation of financial markets or corporations.

Endnotes

1. Alerts Digest 13 of 2006, pp.7–8.
2. Senator Chris Ellison, Senate *Debates*, 7 December 2006, p. 139.
3. *ibid.*
4. Philip Ruddock, House of Representatives, *Debates*, 15 February 2007, p. 1.
5. *ibid.*
6. Explanatory Memorandum, p. 16.

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