

14 October 2024

Committee Secretary
Senate Legal and Constitutional
Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
By email



ABN 79613955950

Level 2
696 Bourke Street
Melbourne VIC 3000
(by appointment only)

govlaw.com.au

Re: Legal and Constitutional Affairs References Committee inquiry into the Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024 ('AML/CTF Amendment Bill')

Dear Sir/Madam,
Thank you for the opportunity to make a submission to the inquiry into the AML/CTF Amendment Bill.

The AML/CTF Bill is a welcome step forward by including the 'tranche two' entities in the fight against money laundering (when progressed *with* beneficial ownership legal reforms to enhance the information available to regulated businesses to be able to determine the true owner or controller for legal entities such as trusts and companies and for land titles).

However, getting the detail of the new AML/CTF regulation right is essential for the Australian economy. AUSTRAC's reporting entity population is estimated to increase from approximately 17,000 by approximately 90,000 Australian businesses, according to the Regulatory Impact Analysis report.



The **new compulsory examination power** for AUSTRAC was not included in the industry consultation process and has an even **wider potential impact** to employees, contractors and *any person* who “has information or a document that is relevant to compliance” with the AML/CTF legislation (proposed new section 172A).

Further industry consultation requested on new examination power

For these reasons, it is submitted that a **new round of industry consultation** be opened by the AGD specifically on this new power for all affected industry sectors. Some initial legal and policy issues with the proposed new compulsory examination power are outlined below.

Policy issues

- How will the right to legal representation by a person called to a compulsory examination be protected in practice, given the cost of living crisis, if their employer does not cover this cost? It is submitted a provision be added that the regulator cover the reasonable costs where the examinee can provide evidence they are not able to access legal representation.
- What mechanism is available for the person required to sign the record of the examination transcript (including their answers) to be able to request correction where it does not accurately record what was said? A penalty of up to three months imprisonment can apply for not signing. The person can also be required to take an oath or make an affirmation. It is submitted a provision be added to facilitate this process.
- Should additional protections be added where the person required to attend the compulsory examination must reschedule due to a family illness or other emergency? Failure to attend an examination can result in a penalty of up to two years imprisonment. It is submitted a provision be added for ‘reasonable excuse’ as applies under the *Australian Securities and Investments Commission Act 2001* (section 63).
- Should additional workplace protections for the staff member required to give evidence be included to protect against disadvantage or discrimination at work, particularly where the evidence leads to large fines / civil penalties for the employer? It is submitted a such provision be added.
- Will employers be required to compensate full time and casual staff or contractors for their time in attending the examination?
- AUSTRAC regulates business to guard against money laundering and terrorism financing *by their customers*, so regulated entities are one step removed from the primary wrongdoing. Does the compulsory examination power make as much sense for a ‘meta’ regulator like AUSTRAC compared to a regulator which *directly* regulates against misconduct by the businesses that are regulated?

Legal issues

Consistent with the concerns raised by the Senate Standing Committee for the Scrutiny of Bills, relating to the limits the proposed new power makes to the right against self-incrimination and on amending the penalties associated with strict liability, we note the following by way of an initial review:

- The draft provisions include a strict liability offence where a solicitor can be fined for continuing to represent their client, if directed not to by the examiner. Without amendment to qualify the examiner's discretion (e.g, where 'reasonably necessary' for the purposes of the examination) this provision appears inconsistent with the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* which impose a duty on lawyers to act in the best interests of a client in any matter in which the solicitor represents the client (section 4.1.1).
- It is submitted the drafting of the provision dealing with self-incrimination be reviewed to ensure the protection is not limited to where the person called to the examination pro-actively asserts the right "before making an oral statement in answer to a question, or signing a record" (section 172K(2)(a)). The drafting appears to rely on where the person "claims" the information may be self-incriminating (section 172K(2)). The 'and' should be replaced with 'or' to ensure rights are protected, even for citizens who do not raise the right as part of the examination. This is also an **equity issue** as citizens who can't afford legal advice may not be aware of the need to make a particular statement for their rights to be protected.
- It is submitted that where best practice has developed in balancing individual rights with the compulsory examination power of another regulator in the Federal Court, this should be incorporated in any new versions of the provision in the statute. For example, the Federal Court in *Collard v ASIC* [2008] FCA 1681 (Perram J) considered the authorities and applied a "reasonable grounds and in good faith" test to ASIC's decision to seek to prevent a lawyer from representing more than one client for a compulsory examination. Leaving important rights protections to case law is also an **access to justice and equity issue** as citizens who can't afford legal advice may not be able to locate the relevant cases, whereas the statute can easily be found online and the section will be quoted in the regulator's letter. This would also lower the regulatory burden for business.

Please feel free to contact me to discuss.

Yours sincerely,

Andrew Fernbach
Lawyer, GOVLAW