

Suppression of the Financing of Terrorism

- 6.1 This Chapter deals with the financing of terrorism offences contained in Division 103 of the Criminal Code and list and offence regime under *Charter of the United Nations Act 194*.
- 6.2 The *Suppression of the Financing of Terrorism Act 2002* (SFTA):
- created an offence of financing terrorism directed at persons who provide or collect funds with the intention that the monies be used to facilitate terrorist activities;
 - requires cash dealers to report suspicious transactions;
 - enables the Director of the Australian Transaction Reports and Analysis Centre (AUSTRAC) and the Commissioner of the AFP and Director-General of Security - ASIO to disclose financial transaction reports directly to foreign countries, foreign law enforcement and foreign intelligence agencies; and
 - amended the *Charter of the United Nations Act 1945* to increase the penalties for the offence of providing assets to or dealing in assets of those engaged in terrorist activities.
- 6.3 The SFTA implements Australia's international legal obligations under the International Convention on the Suppression of the Financing of Terrorism and United Nations Security Council resolutions 1267 and 1373. It also responded to the United Nations Financial Transaction Task Force (FATF) recommendations on terrorist financing.

Financing terrorism

- 6.4 Division 103 of the *Criminal Code* contains two financing of terrorism offences. It is an offence to:
- intentionally provide or collect funds where the person is reckless as to whether the funds will be used to facilitate or engage in a terrorist act;¹
 - intentionally makes funds available to another person (whether directly or indirectly); or collect funds for or on behalf of another person (directly or indirectly) where the person is reckless as to whether the other person will use the funds to facilitate or engage in a terrorist act.²
- 6.5 Both offences attract up to life imprisonment and apply whether or not:
- a terrorist act occurs;
 - the funds will not be used to facilitate or engage in a specific terrorist act; or
 - the funds will be used in relation to one or more terrorist acts.³

Fault element

- 6.6 Each offence applies the fault element of intention to the actual provision, collection, the making of funds available or collection of funds on behalf of another. The fault element that applies to the connection between the conduct to acts of terrorism is the lower threshold of 'recklessness'. Chapter 2 of the *Criminal Code* defines the fault elements of 'intention', 'knowledge', 'recklessness' and 'negligence'.⁴ Recklessness requires awareness of a substantial risk that the result will occur and, having regard to the circumstances known to the person, it is unjustifiable to take the risk.⁵ The question whether taking a risk is unjustifiable is one of fact.⁶

1 Paragraphs 103.1 (1)(a)(b) of the *Criminal Code*; the offence was repealed and substituted in the same terms by *Criminal Code Amendment (Terrorism) Act 2003*.

2 Subsection 103.2 (1) of the *Criminal Code*; the offence was inserted by the *Anti Terrorism Act (No.2) 2005* (Cth).

3 Paragraphs 103.1(2) (a)(b)(c) of the *Criminal Code*.

4 See Chapter 2 Division 5 – Fault Elements sections 5.1 – 5.6 of the *Criminal Code*.

5 Section 5.4(4) of the *Criminal Code*.

6 Section 5.4(3) of the *Criminal Code*.

6.7 UNSCR 1373 and Article 2 of the International Convention on the Suppression of the Financing of Terrorism require 'specific intent' or at least 'knowledge' that the funds are to be used in order to carry out terrorist acts. For example, UNSC 1373 1(b) obliges Member States to:

Criminalise wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts.

6.8 Under the *Criminal Code* 'knowledge' is a higher fault element than recklessness and appears to be more in keeping with the intention of UNSCR 1373.1(b). Knowledge is defined as:

A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.⁷

6.9 The Sheller Committee recommends that, for clarity and consistency of drafting that section 10.3(1) (a) be expressed clearly to require intention to provide or collect funds. While this is desirable, it addresses only the drafting issue and not the substantive question, which is the appropriate fault element to be applied.

6.10 The maximum penalty for each of the financing of terrorism offences is life imprisonment. This is the highest possible penalty available under the *Criminal Code* and means that financing terrorism offences are treated as seriously as if the person had carried out an act of terrorism themselves. For example, the maximum penalty of life imprisonment is available where 'a person engages in a terrorist act' or 'does any act in preparation for, or planning a terrorist act'.⁸

6.11 AGD has also previously argued that applying 'intention' to the conduct and 'recklessness' as to the connection with funding terrorism is consistent with the *Criminal Code*. However, we note that, personal terrorism offences in Division 101, which attract a lower maximum penalty, require the higher standard of 'knowledge' of the connection between the conduct and a terrorist purpose.⁹ It would not

7 Section 5.3 of the *Criminal Code*.

8 See sections 101.1 and 101.6 of the *Criminal Code*.

9 For example, a person who provides or receives training that is connected to the preparation, engagement or assistance must have knowledge of that connection to attract the penalty of 25 years (s.101.2). Similarly, the offence of possession of things connected

be inconsistent to raise the fault element in section 103.1 and 103.2 at least to 'knowledge' in respect of the second limb of the offence.

- 6.12 A requirement of 'knowledge', rather than 'recklessness', would improve the certainty about the intended scope and application of the offence. This would seem appropriate in light of the penalty of life imprisonment and the fact that the offences do not require proof of any connection to a specific act or acts of terrorism.¹⁰
- 6.13 The offence has potentially wide reach. For example, it is possible that if a person who donates to a charity may be alleged to be reckless as to whether their donations will facilitate acts of terrorism. During hearings, a number of witnesses raised concerns about donations to Tsunami relief efforts. The Australian media has reported that some members of an Indonesian medical relief organisation (which uses a Commonwealth Bank account to collect funds) have close links to extremist groups.¹¹ The question of terrorist financing has also been raised in the context of the Cole Inquiry.

Specificity of section 103.1 and 103.2

- 6.14 The Sheller Committee observed that section 103.1 is unclear as to whether the recipient of the funds is an individual or an organisation but the offence is broad enough to cover both. Further, that section 103.2, was introduced to confirm Australia's commitments to FATF's Special Recommendations on Terrorist Financing but does not identify that the recipient should be an individual terrorist. The Sheller Committee recommends that 103.2(1) (b) be amended to make clear the intended recipient of the funds is a 'terrorist' to bring the provision in line with the FATF's recommendation.¹²

with a terrorist act requires knowledge to attract the higher penalty of 15 years imprisonment (s.101.4). The offence of collecting or making documents likely to facilitate a terrorist act requires knowledge for the 15 years maximum penalty (101.5). Each of these offences is structured so that where the person is reckless as to the circumstances or the result lower maximum penalties applies to the same conduct.

- 10 Nor are sections 103.1 and 103.2 limited to proscribed terrorist organisations or individuals or entities listed under the *Charter of the United Nations Act 1945*.
- 11 Morgan Mellish, *CBA caught in terrorism funding alert*, Australian Financial Review, 27 September 2006, p. 1; AAP, *CommBank denies terrorism funding claims*, Sydney Morning Herald, 27 September 2006 see also, *Muslim Scholar Barred by US Denies Support for Terrorism*, New York Times, 26 September, 2006 concerning an Swiss born Oxford University academic denied a visa on the grounds that he has provided \$770 to the French based Committee for the Charity and Aid to the Palestinians in 2000.
- 12 Sheller Report, p.161.

- 6.15 The Government has rejected the proposal on the ground that it introduces a new concept and that, in any case, the offence only applies to a person (an individual) who will engage in a terrorist act (a terrorist), which would necessarily make that person an 'individual terrorist'.¹³ Given that the offence is not linked to the commission of any acts of terrorism and requires recklessness not intention (that the funds be used for a terrorist purpose), it is theoretically possible to apply the offence in the absence of any terrorist conduct.

Recommendation 21

The Committee recommends that:

- section 103.1 be amended by inserting 'intentionally' after 'the person' in paragraph (a) and removing the note;
- that recklessness be replaced with knowledge in paragraph (b).

The Committee recommends that paragraph 103.2(1)(b) be redrafted to make clear that the intended recipient of the funds be a terrorist.

Charter of the United Nations Act 1945

- 6.16 This section deals with amendments to that introduced new Part 4 to the *Charter of the United Nations Act 1945*, (COUNA) which provided offences directed at those who provide assets to, or deal in the assets of, persons and entities involved in terrorist activities and associated provision allowing for the Minister for Foreign Affairs to list persons and entities, for the purpose of those offences.
- 6.17 On 8 October 2001 the Government made the *Charter of the United Nations (Anti terrorism Measures) Regulations 2001* (the Regulations) to give effect to United Nations Security Council Resolution 1373 1 (c) and (d). The SFTA superseded the Regulations, brought the offences into the principal statute and imposed higher penalties.
- 6.18 AGD advised the Sheller Committee that 538 individuals and entities (plus their various aliases) have been listed under the COUNA. Eighty-nine of these individuals and entities have been listed by the Foreign Minister under section 15 as being associated with terrorism

13 AGD, *Submission 14*, p.10.

as provided in paragraph 1 (c) UNSCR 1373. The remainder, 492 are individuals or entities that have been listed by the United Nations 1267 Sanctions Committee as being affiliated with the Taliban or Al-Qa'ida.

- 6.19 It was reported that there has been only one case in which assets have been frozen. On 27 August 2002, three bank accounts held by the International Sikh Youth Federation (ISYF) totalling \$2,196.99 were frozen. The ISYF had been listed by the Minister for Foreign Affairs under the earlier *United Nations (Anti- terrorism Measures) Regulations 2001*. It was also reported that the AFP receive about five inquiries per week from financial institutions who think they have found a match with the Consolidated List.¹⁴

Criminal offences

- 6.20 Unless authorised under section 22, it is an offence punishable by five years imprisonment for a person:

- who holds a freezable account to use or deal or allow the asset to be dealt with¹⁵; or
- to directly or indirectly make an asset available to a proscribed person or entity.¹⁶

- 6.21 These offences give effect to Australia's international obligations, however, there were a number of criticisms including:

- no knowledge is required on the part of the offender that the asset is listed or is an asset of a proscribed organisation, and
- there is no requirement that the asset dealt with or given to a proscribed person or entity is connected to a terrorist activity;
- the offences are ones of strict liability.

- 6.22 The Sheller Committee accepted the offences are necessary to implement United Nations Security Council 1373. However, consistent with the view of strict liability generally, the Sheller Committee recommended that strict liability should not apply.

14 AGD, *SLR Submission 14*, p.26.

15 Section 20 of the COUNA.

16 The Taliban, Usama bin Laden, a member of Al-Qai'da, or a person or entity names in the list of the Committee established under paragraph 6 of the UNSCR 1267; section 21 COUNA and COUNA Regulation 6A.

Proscription mechanisms

- 6.23 The listing of a person, entity or assets is separate to the proscription of an organisation as a terrorist organisation under Division 102 of the *Criminal Code*. The listing of person, entities and assets for the purpose of the COUNA may occur in two ways: listing by the Minister under section 15 or by regulation made by the Governor-General under section 18. Assets may only be listed by the Minister.
- 6.24 Listing by the Minister is intended to implement UNSCR 1373. The Minister must list a person or entity¹⁷ and may list an asset, or class of asset¹⁸ if satisfied of prescribed matters, which may be set out in regulations and must be related to:
- a decision of the Security Council has made under Chapter VII of the Charter of the United Nations; and
 - article 25 requires Australia to carry out, and
 - relates to terrorism and dealings with assets.¹⁹
- 6.25 Regulation 6²⁰ prescribes that:
- the Minister must list a person or entity if the Minister is satisfied that the person or the entity falls within the definition of paragraph 1 (c) UNSC 1373 for the purpose of subsection 15(1); and
 - may list an asset, or class of asset, if the Minister is satisfied that the asset of class or asset is owned or controlled by a person or entity mentioned in paragraph 1 (c) of UNSCR 1373.
- 6.26 Listings by regulation for the purpose of section 18 include the Taliban, Usama bin Laden, members of the Al Qai' da organisation and a person or entity named on the listed by the United Nations Sanctions Committee as it exists from time to time.²¹

17 Subsection 15 (1) of the COUNA.

18 Subsection 15 (3) of the COUNA.

19 Subsection 15(5) of the COUNA.

20 *Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002*.

21 Resolution 1267 established the Al-Qai' da and Taliban Sanctions Committee (which consists of all members of the UNSC). UNSCR 1267 paragraph 4(b), UNSCR 1333 paragraph 8 (c); and UNSCR 1390 paragraph 2 require States to freeze the assets of persons mentioned in regulation 6A, and of entities directly or indirectly controlled by them. The Sanctions Committee has a mandate to list individuals and organisations, which is updated and reviewed based on information provided by Member States or regional or international organisation. See Security Council Committee established pursuant to Resolution 1267 (1999) Concerning Al-Qa'ida and the Taliban and Associated Individuals and Entities, *Guidelines of the Committee for the Conduct of its Work*, adopted on

Notification of listing to the financial services sector

- 6.27 It is the responsibility of banks and financial institutions to ensure they comply with any requirements to freeze the assets of their clients. However, the Department of Foreign Affairs (DFAT) has a duty to maintain a consolidated list of all persons, entities and all assets or classes of asset currently listed in an electronic version and publicly available on the internet.²² DFAT may give notice of decisions of the Minister under section 15 to list a person or entity, or an asset or class of assets to any person who is engaged in the business of holding, dealing in, or facilitating dealing in assets before the listing is published in the *Gazette*.
- 6.28 From the moment a person or entity is listed in the *Gazette* an obligation to freeze the assets of that individual or entity under Australian law is automatically activated.²³ There is no separate provision for notification in relation to listing by regulation but, in practice, the Consolidated List is updated when the Sanctions Committee amends its own list and, therefore, is incorporated into the notification system.
- 6.29 DFAT has established a computerised search facility, using software developed for the purpose, and an electronic notifications system: see http://www.dfat.gov.au/icat/freezing_terrorist_assets.html#8. The system enables the financial sector and other professional dealers in assets to receive information in advance of official listing.
- 6.30 However, it is unclear how widely the financial sector is aware of their obligations and how widely the notification system is used. Australia said in its 2003 report to the United Nations Sanctions Committee, that the system will 'enable banks and other large asset

7 November 2002, as amended on 10 April 2003 and revised on 21 December 2005; see also UNSCR 1390 paragraph 2.

22 Regulation 8 of the Regulations.

23 Australia has reported that no designated individual had been identified in Australia; Australia has not sought to submit additional names to the Sanction Committee for listing and none of the designated or listed individuals had brought a lawsuit or engaged in legal proceedings against Australian authorities for inclusion in the list; see *Note Verbale dated 15 April 2003 from the Permanent Mission of Australia to the United Nations addressed to the Chairman of the Committee, Security Council Committee (established under UNSCR 1267 1999), S/AC.37/2003/(1455)/13*, p.3; Australia has reported that no designated individual had been identified in Australia; Information about the UN Sanctions Committee list is available at:

<http://www.un.org/Docs/sc/committees/1267/1267ListEng.htm>

holders to perform searches of their holdings, which can take longer than twenty-four hours, in advance of formal dissemination.²⁴

Review and delisting

6.31 The Sanctions Committee Guidelines provide that individuals, entities and groups may petition the government of residence or citizenship to request a review of the case.²⁵ The European Court of Justice (First Instance) has confirmed that individuals and entities in the European Community (EC) have a right of petition to the Sanctions Committee through their national government.²⁶ The Court also found that EC Members are bound to observe the fundamental rights of the person. In particular:

- to ensure, so far as possible, the person concerned is in a position to argue their point effectively before competent national authorities;
- may not refuse to initiate the review procedure solely because the person could not provide precise and relevant information, owing to their having been unable to ascertain the precise reasons for which they were included in the list in question, on account of the confidential nature of those reasons; and
- are bound to act promptly in order to ensure that such persons' cases are presented without delay and fairly and impartially to the Sanctions Committee, if that appears to be justified in the light of the relevant information supplied;

6.32 The Court also found that, in addition, the persons concerned may bring an action for judicial review before the national courts against any wrongful refusal by the competent national authority to submit their cases to the Sanctions Committee for re-examination.

24 *Note Verbale dated 15 April 2003 from the Permanent Mission of Australia to the United Nations addressed to the Chairman of the Committee, Security Council Committee (established under UNSCR 1267 1999), S/AC.37/2003/(1455)/13, p.7.*

25 The Guidelines provide that national level consideration with bilateral and subsequently multilateral consideration of the request for delisting.

26 On 19 October 2001 Mr Chafiq Ayadi, a Tunisian national resident in Dublin, Ireland and on 20 November 2003, Fraja Hassan, a Libyan national held in Brixton Prison, UK were added to the European Community List. They appealed to the ECJ seeking review of their inclusion on the List; see *Chafiq Ayadi v Council of the EU Case T -253/02*; *Faraj Hassan v Council of the EU and Commission of the EC, Case T-49/04*.

Right to review under Australian law

- 6.33 It has been argued that the administrative listing processes pursuant to UNSCR 1267 and 1373 lack democratic and juridical control. Listings by regulation may be subject to disallowance by the Parliament but, unlike the listing of terrorist organisations under section 102.2 of the *Criminal Code*, listing under COUNA is not subject to scrutiny through a parliamentary committee. There is no suggestion that there are systemic or egregious mistakes in the Consolidated List, rather that provision for review would guard against a listing, which cannot be objectively justified, is based on incorrect or out of date information or mistaken on some other basis.
- 6.34 The importance of procedural safeguards was argued on the basis that, while the Sanctions Committee list is restricted, the effect of UNSCR 1373 combined with broad definitions of terrorism in domestic law significantly extends the reach of COUNA provisions and the criminal offences, which are triggered by a listing. It was said that the lack of procedural safeguards should be addressed in order to ensure that right of access to the court is preserved. The same issues have been raised in the comparable jurisdictions, and, especially within the European Community.²⁷
- 6.35 The Sheller Committee accepted evidence that hearings prior to listing would defeat the objective of listing assets. This Committee agrees with that position. However, it is conceivable that, in the future, an Australian or a person within Australia or an asset, which affects the interests of an Australian person or company may be subject to listing. A person suspected of involvement in terrorism, is clearly open to listing for the purpose of freezing his or her assets. There are potentially significant consequences including, for example, the ability to remain in the country, to access employment, conduct a business, the need to meet financial and domestic needs of a family, which may arise from such circumstances.
- 6.36 Under the current law, a person or entity may apply to the Minister to have the listing of a person, entity or asset under section 15 revoked.²⁸ The provision for first instance internal review by the Minister was

27 For example, Professors Bill Bowring and Douwe Korff, *Terrorist Designation with Regard to European and International Law: The case of the PMOI*, November 2004.

28 Sections 15, 16 and 17 of the COUNA; the application must be in writing and set out the circumstances to justify the application. There is no obligation to consider the application if one has previously been made within 12 months of the current listing

introduced by the SFTA amendments. However, there is no provision for external merit review and judicial review is limited.

- 6.37 It has been said that in the UK the Proscription of Organisations Appeals Commission (POAC) provides external merit review of the equivalent decision to list in the UK. However, the POAC jurisdiction appears to be limited to review of proscription for the purpose of the *Terrorism Act 2000* and does not orders to freeze terrorist assets, which are dealt with by separate legislation.²⁹ Nevertheless, the principle is a valid one and warrants consideration. The UK Government has also recently announced that it will create a special advocate system, to facilitate the use of closed source evidence in appeals and reviews of decisions to freeze assets and report quarterly to the Parliament on the operation of the UK's asset freezing regime.³⁰
- 6.38 Nor is there separate provision for internal review if the listing has occurred by regulation. There may be a lacuna in the law in this respect, however, it does not seem appropriate to us that where a person or entity is listed by the United Nations Sanctions Committee it would be subject to separate review by an administrative tribunal. The matter is one for the United Nations Sanctions Committee and not a domestic tribunal. Nevertheless, as noted above, the guidelines of the Sanctions Committee and the existing European jurisprudence indicates that a person or entity listed regulation under section 18, should also have the opportunity to seek review of the UN Sanctions Committee listing through the national government.
- 6.39 Further, in principle, the decision of the Minister that he is 'satisfied' that prescribed matters have been met is subject to judicial review under the *Administrative Decision Judicial Review Act 1975* (ADJR). The ADJR allows for review of 'decisions of an administrative character' on grounds such as denial of natural justice, failure to take into account relevant considerations, taking into account irrelevant considerations, improper purpose and error of law. It is arguable that a court will only be able to inquire as to whether the opinion could be considered as having been 'formed by a reasonable man who correctly understands the meaning of the law under which he acts'.³¹

29 Part 2 and Schedule 3 of the *Anti-Terrorism, Crime and Security Act 2001* (UK); *The Al-Qa'ida and Taliban (United Nations Measures) Order 2002*.

30 Ministerial Statement of Mr Ed Ball, Economic Secretary to the Treasury, Terrorist Finance, 10 October 2006 available at: <http://www.publications.parliament.uk/pa/cm200506/cmhansrd/cm061010/wmstext/61010m0001.htm#061010148000123>

31 *R v Connell; Ex parte The Hetton Bellbird Collieries* (1944) 69 CLR 407 per Latham CJ at 430.

On this view, unless the discretion is framed in terms of 'on reasonable grounds' that a court would be unable to assess the decision by reference to any objective criteria.³² There appears to be an inconsistency between COUNA and section 102.2 of the *Criminal Code* in this regard.

Recommendation 22

The Committee recommends that:

- **external merit review of a decision to list a person, entity or asset under section 15 of the COUNA should be made available in the Administrative Appeal Tribunal;**
- **section 15 and regulation 6 be amended so that the Minister must be satisfied on reasonable grounds that the person, entity, asset or class of assets falls within the scope of UNSCR 1373;**
- **COUNA should be amended to provide that a person or entity listed by regulation is entitled to seek review as a step in the process of review by the Sanctions Committee.**

³² Tapley M, *Suppression of the Financing of Terrorism Bill 2002*, Bills Digest No.127 2001-2002, Department of the Parliamentary Library, May 2002, p.13.