Chapter 10

LEGAL EFFECTIVENESS AND LEGAL ISSUES

Introduction

10.1 This chapter examines the legal effectiveness of the provisions of the Act including matters of law which have emerged in the initial years of operation of the legislation, or which may emerge in the future. This includes the following:

- the precision of terms such as `account' and `transaction';
- the extent to which tellers should be required to give evidence in prosecution proceedings;
- the structuring offence in the FTR Act;
- the import/export of currency provisions; and
- the extent to which decisions under the Act should be subject to administrative review.

Definition of Account

10.2 Section 3 of the FTR Act defines "account" as follows:

> "account" means any facility or arrangement by which a cash dealer does any of the following:
>
> (a) accepts deposits of currency;
> (b) allows withdrawals of currency;
> (c) pays cheques or payment orders drawn on the cash dealer by, or collects cheques or payment orders on behalf of, a person other than the cash dealer;
>
> and includes any facility or arrangement for a safety deposit box or for any other form of safe deposit, but does not include an arrangement

for a loan that sets out the amounts and times of advances and repayments, being amounts and times from which the borrower and lender may not depart during the term of the loan"

10.3 The term is significant to the scheme of the Act in a number of ways. The identification requirements in relation to signatories to accounts in Part III of the Act operate when an account is opened, together with the provisions relating to the blocking of an account about which the information is not available. The offence in section 24 of the Act applies to a person who opens or operates an account with a cash dealer in a false name.

10.4 The definition has been amended twice since its enactment:

i) The *Crimes Legislation Amendment Act 1989* inserted words to clarify that a facility used by a cash dealer to collect payments for itself was not an account and to add a safe deposit box.

ii) The *Crimes Legislation Amendment Act 1992* made it clear that an arrangement for a loan under which amounts and times of advances and repayments are fixed was not included.

10.5 AUSTRAC has advised cash dealers that "the broad principles on which characterisation of accounts for the purpose of the FTR Act are based, significantly focus on the ability to withdraw or deposit cash and in the case of loans and credit facilities, on the degree of flexibility of payments".[1]

10.6 Advice has been given to AUSTRAC by Senior Counsel that a comprehensive meaning of the first two elements of the definition is not possible.[2] The NCA supports AUSTRAC's approach to the definition but considers that difficulties with interpretation may affect the application of the Act and therefore recommends a review of the definition. [3]

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1 Submission No. 13, p. 149.

2 See reference to NCA Report *Taken to the Cleaners: Money Laundering in Australia* in NCA Submission No. 27, p. 16.

3 Submission No. 27, p. 17.

10.7 A number of changes have been called for:

- that it should be extended to non-cash facilities,
- that it exclude Casino-hotel safe deposit facilities, and
- that the status of credit and debit facilities as accounts should be clarified.

10.8 Some financial institutions feel disadvantaged by the need to comply with the Act compared to those only offering non-cash facilities. The Attorney-General's Department has stated:

> The definition does not cover financial facilities under which deposits and withdrawals can only be made by cheque, not cash. Some financial institutions have proposed that the definition of 'account' be extended to cover such facilities on the ground that the present position places them at a disadvantage compared with cash dealers who offer only non-cash facilities.[4]

10.9 Also, such institutions would not be affected by the requirements to report significant cash transactions. The Attorney-General's Department disagrees on the basis that all financial institutions are free to offer non-cash facilities if they so desire. Also there is no need to extend the Act to facilities which can only be operated by cheque because there is no risk that illicit funds can enter the financial system untraced.

10.10 It is clear that an entity becomes a "cash dealer" within the meaning of the FTR Act even if only one of its activities is caught by the definition of "cash dealer" in section 3. The result of this is that the provisions of the Act apply to that entity in respect of all its activities.

> ... an entity which falls within the definition of "cash dealer" has the associated obligation in relation to all its activities. There is nothing in the Act to suggest otherwise and this interpretation is consistent with the underlying policy objective of including all entities (not just particular activities) thought sufficiently vulnerable to money-laundering.[5]

10.11 Because of this situation, casino-hotels claim a commercial disadvantage compared to other hotels by the need to identify customers

4 Submission No. 35, pp. 4-5.

5 See Attorney-General's Department Submission No. 35, p. 24.

who wish to open a safety deposit box in the hotel merely because the casino activities of that hotel make it a cash dealer within the meaning of the Act. On the other hand other commercial advantages are available to a hotel that runs a casino.

10.12 The Committee was not persuaded by the evidence that an exemption should be allowed.

10.13 Metway bank's submission advocates the exclusion of 'fixed interest fixed term loan accounts' from the definition.[6] It is possible that such accounts would already be excluded by the approach to the definition taken by AUSTRAC, together with the 1992 amendment discussed above. There was little evidence available to support this proposal.

Meaning of Transaction

10.14 The Act does not currently define the term "transaction". This was noted by the Committee in 1988[7] but it was not pressed in light of adequate definition of "cash transaction" and reliance was placed on its ordinary meaning. The lack of such a definition has, however, raised some questions in relation to the reporting of suspect transactions.

10.15 AUSTRAC was advised that it would include, in this context, preliminary negotiation, going beyond merely answering an inquiry, not leading to a contractual arrangement or dealing,[8] involving positive activity on the part of the negotiating party.[9]

10.16 There has been some debate about this interpretation and Hewett and Kalyk, in their book *Understanding the Cash Transaction*

6 Submission No. 10, p. 2.

7 See paragraph 2.10 of Report on the Cash Transaction Reports Bill 1987, by the Senate Standing Committee on Legal and Constitutional Affairs

8 Attorney-General's Department, Submission No. 35, p. 24.

9 NCA Submission No. 27, p. 15.

Reports Act (CCH, Australia 1990) have argued that negotiations which do not conclude in a dealing will not always constitute a transaction.[10]

10.17 In its money laundering report, the NCA has concluded that AUSTRAC's approach is correct, pointing out that it has the investigative advantage of bringing a wider range of activity within the ambit of the Act. In their submission to this Committee they have recommended that consideration be given to a definition of 'transaction' to make it certain on the face of the Act.[11] The Attorney-General's Department supports this view. The Department points out that in some situations suspicion may actually arise only from the fact that the person did not complete the transaction and this may come about upon learning of a requirement of the Act.

Recommendation 15: The Committee recommends that a definition of 'transaction' be inserted in the Act to make clear that an uncompleted transaction is caught by the reporting requirements of the Act.

Tellers as Witnesses

10.18 Cash dealers' submissions to the inquiry have called for consideration of ways to avoid the need for tellers who originate a suspect transaction report to be called as witnesses in subsequent prosecution proceedings.[12] The Australian Bankers Association voiced concern about the potential for bank staff to be subject to retribution by customers. The issue as it has been experienced so far in the context of the FTR Act was put in evidence as follows by Mr Riches of the Commonwealth Bank [13]:

> All the guidelines and assurances from AUSTRAC, the Australian Federal Police and the Director of Public Prosecutions concerning the involvement and protection of witnesses in prosecutions are of no ultimate protection as the legislation, by its terms, clearly contemplates and may require the

10 Referred to in NCA Submission No. 27, p. 15.

11 Submission No. 27, p. 15.

12 CUSCAL Submission No. 34, p. 6, ABA Submission No. 26, pp. 2, 8.

13 Evidence, p. 74.

> involvement of the bank and its staff. The bank considers the reliance on agreements and assurances, the terms of which sit oddly with the legislative provisions and often lead to ambiguity and uncertainty, to be most unsatisfactory. The reality is that in almost every case, where subpoenaed by the prosecution or defence, the bank officer will become involved.

10.19 Cash dealers contend that staff should only be required to give evidence in exceptional circumstances. They do not appear to be comfortable with assurances from law enforcement agencies that staff will only be called as a last resort. Mr Aub Chapman of Westpac[14] suggested that reports as such ought not to be the basis on which charges should be laid but rather treated as intelligence only, pointing to normal bank documents as a better basis for charges.

10.20 Cash dealers are concerned that if tellers continue to be subpoenaed to give evidence about a suspect transaction report they have made, they will be discouraged from forming any suspicion at all on which they would be required to make a report. This might lead to a breakdown of the reporting requirements and erode the level of intelligence AUSTRAC provides to law enforcement.

10.21 The Attorney-General's Department, the NCA and the DPP do not favour a complete exclusion of the option to call the teller whether by legislative provision or otherwise. In a letter from the Commonwealth Director of Public Prosecutions to AUSTRAC on this issue[15] Mr Rozenes has pointed to recognition in the "Prosecution Policy of the Commonwealth"[16] that criminal charges should not automatically be laid in every case where an offence can be proved. This depends on the level of criminality involved.

10.22 He has clearly stated that whenever possible the DPP would prosecute without calling the teller but in some cases there may be no alternative. The letter then sets out the steps available to protect the security and identity of the witness in the event that his or her evidence is regarded as essential. The question of how and when these steps will be

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14 Evidence, p. 80.

15 AUSTRAC Submission No. 13, Appendix 5

16 Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth*, 2nd ed, (1990).

accepted by the court depends on the court and the State or Territory in which the proceedings are conducted.

10.23 It may be possible to make legislative provision in the FTR Act for protection of the identity of the teller who initiates a suspect transaction report to override the relevant State/Territory law. The Committee was referred to the example of the *Telecommunications (Interception) Act 1979* which in section 61 makes provision for evidence about the facts relating to the execution of an interception warrant to be given in the form of a conclusive certificate by the Managing Director of the relevant carrier. This restricts the need to call the person, usually the employee of a carrier, who actually carried out the interception. Mr Reaburn of the Attorney-General's Department said in evidence:

> This is designed so that, as a matter of normal practice, any court examination of evidence resulting from a telephone interception, as it were, starts from an assumption based on the certificate that the interception was properly carried out - properly in the technical sense...[17]

10.24 The danger in making such a provision, however, could be the cutting off what might be a crucial option for a prosecutor or defence lawyer.

10.25 The Privacy Commissioner commented in the course of giving evidence on his concerns with suspect transaction reporting that it is not possible to give a guarantee that the teller who initiates the report will not be caught up in criminal proceedings. It is very difficult therefore to address their wish not to be identified as they are in truth the source of information which is adverse to another.[18]

10.26 AUSTRAC has attempted to address the discomfort of cash dealers about this issue by agreements with law enforcement agencies and cash dealers on guidelines for investigating suspect transactions. A tabled draft clearly states that the DPP will only make reference to a suspect transaction report and the teller who made the report if there is no practical

17 Evidence, p. 164.

18 Evidence, Mr O'Connor, p. 186.

alternative.[19] It goes on to say that, if possible, such evidence will be introduced through an officer of the cash dealer rather than the officer who files the report.

10.27 Such agreements unfortunately do nothing to restrict the power of defence counsel to call the bank teller as a witness. Some defence counsel may even use such a mechanism to discourage tellers from making reports.

10.28 The Committee has concluded that with the approach of the DPP in place and a legislative protection of the identity of the teller, counter officers would be sufficiently protected to allow them to freely exercise their obligations under the Act. This would supplement the protection already provided against civil suit for filing a report given by subsection 16(5) of the Act.

Recommendation 16: The Committee recommends that the best way to deal with the protection of the identity of tellers as witnesses is:

- agreements between AUSTRAC and law enforcement agencies be drawn up along the lines of the draft agreement with the AFP referred to at para 10.26;
- the essence of such agreements be taken into account by the DPP;
- State law enforcement agencies and prosecuting authorities should be encouraged to take the same approach;
- at the same time legislative protection for the identity of the officer who initiates a suspect report should be provided in the FTR Act, but without excluding the possibility of calling the relevant officer in those few cases where it may prove to be necessary.

19 Operational Guidelines for Investigating Suspect Transactions - Draft Agreement Between AFP, AUSTRAC, Cash Dealer Groups and Bank Employee Unions. Document tabled by Mr Coad 8 June 1993.

10.29 In formulating the appropriate protection it will be necessary to be mindful of what might be a contradiction in the arguments of the cash dealers on this issue.

- On the one hand they have called for evidence that suspect transaction reports are producing direct results for law enforcement rather than mere corroborative evidence of intelligence obtained from other sources.

- On the other hand, in the context of counter staff as witnesses, cash dealers may be asking that the suspect reports themselves be excluded from a prosecution case.

10.30 If evidence of the making of a suspect report is not to be available for testing in subsequent prosecutions there may be a tendency on the part of law enforcement to seek out other evidence to support the case. Thus the benefits of AUSTRAC data will be diminished and additional delay and costs will be incurred which might otherwise have been avoided.

10.31 Another related issue is whether objective criteria for forming a suspicion [20] might increase the likelihood of tellers being called as witnesses. There is some fear that such criteria, particularly if specified in the legislation, may increase the incidence of calling tellers as witnesses in prosecution proceedings.

- It may become necessary to have them give evidence in person in order for the parties to ascertain whether the provisions of the legislation have been complied with.

- It would presumably be necessary to do this in order to evaluate the admissibility of the evidence.

- This might be the case whether evidence is required with regard to the report itself or some other evidence which has been identified as a result of the report.

At this stage no conclusion on this aspect is possible.

20 Discussed in more detail chapter 4 in the context of suspect transaction reporting.

Structuring

10.32 Section 31 makes it an offence for a person to conduct 2 or more transactions in such a way that it would be reasonable to conclude that the sole or dominant purpose was to ensure, or attempt to ensure that the transaction would not give rise to a significant cash transaction report under s.7 or a currency transfer report under s.15. The offence is punishable by a maximum of 5 years imprisonment and/or $10,000.

10.33 A number of difficulties with this section have been brought to the attention of the Committee.

i) The Law Council of Australia suggests[21] that the offence is couched in such terms that a cash dealer who facilitated a transaction for a customer which came within the relevant description could be committing an offence as they may be regarded as party to the transaction through the service they have provided. It proposes that section 31 be amended to make it clear that cash dealers are exempt except when actively participating in the transaction.

ii) The Law Council also claims a cash dealer who observes conduct which arouses a suspicion that the conduct may be leading to a structuring situation may, if they allow their services to be used for the transaction, be aiding and abetting the commission of an offence against section 31. A legislative amendment to make it clear that the cash dealer is not required to refuse to provide services to a customer in these circumstances was proposed.

10.34 It is quite clearly not the intention of section 31 to catch the legitimate activity of cash dealers in either of these circumstances, although a literal interpretation of the provisions could support the Law Council's conclusion. The Committee's view is that prosecutorial discretion would adequately deal with both of these issues and that there is no need to amend the section as proposed.

iii) Another aspect of section 31 raised for the Committee is that of the appropriate mental element for an offence to be established. The

21 Submission No. 44, p. 4.

VCCL's submission [22] recommends the amendment of section 31 so that it only applies when there is an intention on the part of the alleged offender to evade the provisions of the Act. It is argued that the present formulation creates a strict liability offence and that this represents a departure from currently accepted criminal law principles. This was expanded upon during the course of evidence.[23]

10.35 Establishing intent for the offence apparently relies upon an objective test based upon what another person would reasonably conclude from the behaviour of the defendant. The VCCL argues that the actual intent of the person making the transactions is not relevant.

10.36 The Attorney-General's Department submission[24] recommends the inclusion of mental elements in all the offences in the FTR Act where there is presently none specified.

10.37 The issue with section 31, as raised by VCCL, is that there is a clear statement as to the mental element but the question is whether that is an appropriate one. A person commits an offence against the section if it would be reasonable for someone else to conclude from the 'manner and form in which the transactions were conducted' that they were so conducted with the intention to evade the reporting requirements of the Act.

10.38 This formulation doubtless was intended to make it easier to establish the commission of the offence than would be the case if it was necessary to prove that the person actually had the required intention. However, a strict liability offence can infringe unacceptably upon the personal rights and liberties of individuals. The present formulation of section 31 creates a strict liability offence because it is not necessary to prove the guilty mind of the defendant.

22 Victorian Council of Civil Liberties Submission No. 12, p. 39.

23 Mr Pearce, Evidence, pp. 202-203.

24 Submission No. 35, pp. 26 and 44.

Recommendation 17: The Committee considers that there should not be strict liability under section 31. It should be required that the prosecution establish that the defendant conducted the relevant transactions with the intent of evading the reporting requirements of the FTR Act.

Import/Export Provisions

10.39 Section 15 of the FTR Act requires a person to report the transfer into or out of Australia of currency of $5,000 or more. It includes currency which is carried personally or consigned by ship or posted. The following issues were raised about section 15:

i) The Australian Customs Service (Customs) has primary responsibility for enforcing the reporting requirements in relation to the movement of cash into and out of Australia pursuant to section 15. Its submission points to the variation between incoming and outgoing amounts of cash and the number of declarants, saying this may indicate insufficient obligation placed on people to make declarations. [25]

ii) The NCA has noted that the majority of reports to AUSTRAC under section 15 relate to people carrying money into or out of Australia and leave aside shipping or mailing of currency.

iii) AUSTRAC and Customs have worked together to ensure the accuracy of records relating to such movements, in light of the money laundering implications of inaccurate records. [26]

iv) Customs recommends that cash sent by post or consignment should be deemed exported once it is irrevocably committed to export to close a loophole in the import\export requirements. The Committee accepts that such an amendment would bring the effect of the provision on mailed or consigned currency into line with its effect on the physical carriage of currency in subsections 15(7B), (7C) and (8A).

25 Australian Customs Service, Submission No. 15, pp 1 and 3.

26 National Crime Authority Submission No. 27, p. 12.

v) Customs suggests that it should be up to the offender to prove that currency did not come from an illicit source. This would allegedly bring the provision into line with the money laundering provisions of the *Proceeds of Crime Act 1987*. Customs also suggests that a person wishing to send money overseas should be required to identify himself or herself, consistent with the account opening provisions of the Act.

10.40 Such amendments may make the offences easier to prove and allow for seizure of the relevant funds in more circumstances than is now possible. However, there are certain threats to the rights and liberties of individuals in taking these kinds of measures and there was insufficient evidence before the Committee to conclude that the risks are balanced by the needs of law enforcement.

10.41 The Committee is wary of extending s.15 in this way without the opportunity of weighing up evidence as to the additional administrative burden which might be involved. Should there prove to be evidence of increased activity in these areas, further consideration may need to be given to the proposals.

vi) Threshold

10.42 The Attorney-General's Department has proposed that the threshold for reporting import and export of currency should be raised from $5,000 to $10,000. This would bring section 15 into line with significant cash transaction reporting. The Department points out that the original threshold related to the now repealed Banking (Foreign Exchange) Regulations, which section 15 replaced.

10.43 It appears that almost all cases involving prosecutions under section 15 have involved amounts of more than $10,000. It is not expected therefore that such a change would undermine the integrity of the provision.

vii) Alternative formulation

10.44 The DPP has proposed that the offence in section 15 be re-formulated to make it an offence to import or export without permission.[27] This would arguably make things easier at the barrier for the Customs

27 See Attorney-General's Department Submission No. 35, p. 9.

officer, discovering undisclosed currency, to seize that currency. Such a formulation is not supported by the Attorney-General's Department as it is contrary to the policy of minimum regulation of money movement and would require substantial bureaucratic support.

Recommendation 18: The Committee recommends that section 15 be amended:

- to increase the reporting threshold for import or export of currency to $10,000, and
- to define the point at which currency transferred by post or consignment should be deemed to have been exported.

Gold Bullion

10.45 Both the AFP and the NCA have expressed concern about movements of gold bullion out of the country[28]. Gold is a commodity of high value and great transferability. This is currently not reportable under any of the import/export related provisions of the FTR Act.

10.46 AUSTRAC informed the Committee that:

- bullion dealers in Australia now appear to be converting $1 million to $1.5 million in cash per week into gold bullion;
- structuring of transactions to avoid the cash reporting requirement appears rife;
- failure to report transactions of $10 000 cash or more is common; and

28 See AFP Submission No. 25, p. 5 and NCA Submission No. 27, para 5.9.

- the gold frequently appears to be taken out of Australia to Vietnam and Thailand.[29]

10.47 Whilst bullion dealers are cash dealers within the FTR Act [30] it is possible for customers to conduct transactions with them in such a way as to not be reportable. Further, customers may avoid the need to prove identity under the Act.[31]

10.48 AUSTRAC has been able to overcome the non-reporting aspect but there still remains some deficiency in the requirements for bullion dealers to identify their customers. The NCA has recommended that bullion dealers be required to identify their customers.[32]

10.49 Including bullion in the import/export provisions in section 15 would go some way towards closing what appears to be a serious loophole in the legislation's attempt to prevent, or at least trace, the movement of funds into and out of Australia.

10.50 The Committee notes the evidence that the transfer of bullion, and other precious commodities, into and out of Australia is not presently reportable under the FTR Act. There was insufficient evidence before the Committee to enable it to make a recommendation on this point. The Committee suggests that the Attorney-General seek advice on the need for legislative amendment to deal with this issue.

Recommendation 19: The Committee recommends that the FTR Act be amended to require the identification of customers in transactions for the sale and purchase of bullion through bullion dealers.

29 Submission No. 13 (AUSTRAC) p. 121.

30 See section 3, FTR Act

31 See Evidence, Mr Coad and Mr Sherman, pp. 37-39.

32 NCA Submission No. 27, p. 12.

Administrative Review and FOI

10.51 Section 42 of the FTR Act expressly excludes appeals under the *Administrative Decisions (Judicial Review) Act 1977* (AD(JR) Act) against almost all decisions made under the FTR Act and there is no provision for appeals to the Administrative Appeals Tribunal. The Attorney-General's Department opposes any expansion of administrative review of decisions under the FTR Act.[33] The Department's view is that review could prejudice criminal investigations. It also pointed out that whilst some decisions under the Act are subject to limited review, for example, decisions under subsection 19(2) and 19(3) concerning forfeiture of property, other decisions where appeal is not available do not affect personal rights.

10.52 This lack of appeal rights has been criticised in the past by both the Democrats and the Opposition.[34] The Administrative Review Council has consistently pressed for the application of administrative review to decisions under the FTR Act.[35] Alternatively, the Council contends that if the FTR Act is to remain exempt from judicial review, that exemption should be provided in the AD(JR) Act rather than the FTR Act.

10.53 The Committee supports the views of the ARC.

> The Council considers that the ambit of the AD(JR) Act should parallel the constitutionally-prescribed jurisdiction of the High Court to undertake review of the actions of officers of the Commonwealth. ... In summary, all of the decisions under the FTR Act would be subject to the High Court's original jurisdiction under sections 75(iii) and (v) of the Constitution and the Federal Court's jurisdiction under section 39B of the Judiciary Act 1903. In these circumstances, no practical advantage is likely to be gained by excluding AD(JR) Act review since aggrieved persons will be able to invoke other judicial review procedures.[36]

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33 See Attorney-General's Department Submission No. 35, p. 17.

34 Parliamentary Debates, Senate, 25 May 1988, pp. 2948-2949 and 19 February 1991 at p. 811.

35 Administrative Review Council, Submission No. 42.

36 Administrative Review Council Submission No. 42, p. 2.

Recommendation 20: The Committee recommends that section 42 of the FTR Act be amended so that administrative decisions made under the Act are reviewable under the AD(JR) Act. The advice of the Administrative Review Coucil should be sought as to whether certain decisions should be included in Schedule 2 of the AD(JR) Act so that reasons for decisions may not be required.

Freedom of Information

10.54 Section 38 of the *Freedom of Information Act 1982* (FOI Act) exempts documents or information protected by secrecy provisions to which section 38 is expressly applied. AUSTRAC has received advice that documents containing FTR information are not currently exempted by section 38. This section provides for the exemption from disclosure pursuant to a Freedom of Information request, of documents to which secrecy provisions apply, provided section 38 expressly applies. As section 38 is presently drafted it does not specifically exempt FTR information.

10.55 For reasons of protecting the integrity of information relating to law enforcement investigations and to the privacy of the individuals to whom FTR information relates, such documents should not be available under the FOI Act. The Attorney-General's Department has recommended that the FTR Act be amended to provide specifically that section 38 of the FOI Act applies to FTR information.[37]

Recommendation 21: The Committee recommends that FTR information be specifically exempted from FOI under section 38 of the FOI Act by appropriate amendment to the FTR Act.

37 Attorney-General's Department Submission No. 35, p. 29.