



Law Council
OF AUSTRALIA

Office of the President

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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

Dear Committee Secretary

Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017

1. The Law Council of Australia is grateful for the opportunity to provide further comments to the Senate Legal and Constitutional Affairs Committee (**the Committee**) regarding the Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017 (**the Bill**). Per the Committee's request, the Law Council provides these comments in response to answers by the Attorney-General's Department (**AGD**) to Questions on Notice (**QON**) arising from the public hearing of 20 September 2017 into the Bill.
2. The Law Council acknowledges the assistance of its Financial Services Committee (**FSC**) of the Business Law Section (**BLS**) and the Anti-Money Laundering Working Group in the preparation of these comments.

'In the course of carrying on a business'

3. In its submission to the Committee of 15 September 2017,¹ the Law Council raised concerns about the phrase 'in the course of carrying on a business', which appears in a number of items in the tables of designated services in section 6 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AML/CTF Act**).
4. The concern is that the phrase 'in the course of carrying on a business' is excessively broad and, on its plain words, capable of bringing into the scope of the AML/CTF Act entities that provide a particular designated service on a sporadic, occasional or incidental basis.
5. While the Explanatory Memorandum to the Bill states that regulatory relief will be given by qualifying the phrase, in our view the Bill contains no change which addresses the

¹ Law Council of Australia, Submission No 9 to Senate Legal and Constitutional Affairs Committee, *Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017 [Provisions]*, 15 September 2017, 1-2.

concern. Instead the Bill only proposes to add the same language to some places in section 6 of the AML/CTF Act where it had not previously been included.

6. The Law Council noted that there is an inconsistency between the plain words of the AML/CTF Act and its Replacement Explanatory Memorandum (**REM**), such that an intended narrower construction of the phrase 'in the course of carrying on a business' stated in the REM will not apply.
7. AGD's response referred to above confirms the Law Council's understanding on this point, noting that the AGD has said that the general statement of principle in the REM '... cannot override the ordinary meaning of the AML/CTF Act'.²
8. The REM, the *Report on the Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the **Report**) and the Explanatory Memorandum to the current Bill variously refer to a policy intention that the AML/CTF Act should capture businesses in relation to the provision of a particular designated service only where the business provides that particular designated service in the course of carrying on a core activity of the business, or where the business routinely provides the designated service.
9. The Report, for example, noted that some stakeholders '... asked for the phrase 'in the course of carrying on a business' to be recast so that it did not capture entities providing the relevant designated service on a sporadic basis'.³ In its discussion, the Report noted:

Businesses that may provide some designated services incidentally, rather than as part of their core business, should not generally be captured under AML/CTF regulations. This position is consistent with the Replacement Explanatory Memorandum for the AML/CTF Act which states that:

as a general proposition, designated services are limited to services provided to a customer on(sic) the course of carrying on the core activity of a business and to not capture activities which are peripheral to the core activity of the business... Some businesses may have more than one core activity and whether an activity is a core activity of the business will be determined by the circumstances of each case.

In view of this, the services currently included in tables 2 and 3 of section 6 of the AML/CTF Act should only apply to services provided by a reporting entity to a customer in the course of carrying on the reporting entity's core activity. The amendments will better target the AML/CTF regime at businesses that routinely provide services that pose a ML/TF risk, and reduce the regulatory burden for businesses that do not. This may reduce the number of reporting entities required to be enrolled with AUSTRAC.

10. The Report's final recommendation in relation to the phrase 'in the course of carrying on a business' was as follows:

² Attorney-General's Department, Answers to questions on notice 20 September 2017 to Senate Legal and Constitutional Affairs Committee, *Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017 [Provisions]*, 4 October 2017, 11.

³ Attorney-General's Department, *Report on the Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 and Associated Rules and Regulations* (April 2016) <<https://www.ag.gov.au/Consultations/Documents/StatutoryReviewAnti-MoneyLaunderingAndCounter-TerrorismFinancingActCth200/report-on-the-statutory-review-of-the-anti-money-laundering.pdf>>.

Recommendation 4.5

The use of the term 'in the course of carrying on a business' should be qualified for the activities currently within tables 2 and 3 of section 6 of the AML/CTF Act to ensure that only activities routinely or regularly provided by a reporting entity are captured under AML/CTF regulation.

11. The view taken by AUSTRAC, in its Public Legal Interpretation No. 4 of 2008, is that because the term 'business' is defined in the AML/CTF Act to include a venture or concern in trade in commerce, whether or not conducted on a regular, repetitive or continuous basis, [para 15] 'the reference to *core activities* of a business in the Replacement Explanatory Memorandum is to be given lesser consideration when determining what constitutes business in relation to the provision of financial services by an entity' [para 20]. The Public Legal Interpretation goes on to conclude [at para 22] that, from "the definition of 'business', there may be circumstances where activities which are not conducted on a regular, repetitive or continuous basis, are done for the carrying on of a business."
12. The response to the QON indicates that the AGD considers that the AUSTRAC Public Legal Interpretation is to be preferred, noting that the general statement of principle in the 2006 Replacement Explanatory Memorandum "...cannot override the ordinary meaning of the AML/CTF Act."
13. As the Law Council noted at paragraph 5 of its Submission on the current Bill, the inconsistency between the policy intent as stated in the REM (for example) and the ordinary meaning of the AML/CTF Act means that statements in the REM are unable to be used in construing the meaning of the provisions of the legislation, which contradict that policy intent.
14. This might mean, for example, that a law firm which is prepared to provide a loan to clients so that the clients can pay for a pre-trial survey, on a single occasion, would become subject to the full force of the AML/CTF Act as a lender, simply on the basis that - although the law firm's core activity is not regulated - the loan for a pre-trial survey was or will be in trade or commerce and that action is captured by the AML/CTF Act, even if that action is sporadic, occasional, incidental or peripheral to the core activity of the business.
15. In the Law Council's view, the Report expressed a clear intention that businesses that provide a particular designated service only on a sporadic, occasional or incidental basis should not be put to the significant expense of compliance with the AML/CTF Act. AGD's response to the QON, by comparison, clearly indicates that AGD has no desire for the regime in place to reflect the intention as indicated in the REM or the Report. The response states:

It would be inappropriate to impose similar specific limitations on all designated services due to the potential to inadvertently open a legislative loophole whereby a business could structure itself to provide basic financial services without triggering corresponding obligations under the AML/CTF Act.

16. In the Law Council's view, the 'legislative loophole' to which AGD refers is precisely the nuanced application which the REM and the Report support.
17. The Law Council supports laws which are prepared so as to be directed at the community that is sought to be regulated, and do not accidentally apply onerous laws

to a wide range of businesses which ought not to be regulated. The Law Council does not regard this exclusion as a “loophole” or oversight in the proposed legislation but as a deliberate legislative step to ensure that the legislation does not overreach and unnecessarily burden businesses

18. The key issue is that, strictly interpreted, the AML/CTF Act is capable of being applied to a far wider range of businesses providing a designated service than was originally intended (i.e. to businesses which provide a designated service business but not conducted on “a regular, repetitive or continuous basis”), subject to regulatory discretion. As a matter of principle and the proper operation of separation of powers, the Law Council does not favour an approach where onerous obligations have a technically broad application, so that a wide range of entities could be subjected to heavy penalties, but the executive selectively chooses not to enforce those penalties or require compliance.

Stored value cards

19. In its submission to the Committee of 15 September 2017,⁴ the Law Council raised concerns about the definition of a stored value card in the AML/CTF Act.
20. In responding to these concerns, AGD says that ‘... the new definition of stored value card in the Bill has been drafted in an inclusive, technologically-neutral manner’.⁵ In a broad sense, the Law Council agrees with this approach.
21. However, AGD has not addressed the key issue identified by the Law Council, being that the definition may create unnecessary commercial discrimination. When construed in relation to what is actually in the markets, the distinction will come down to cards issued by a financial institution, which will be incapable of being ‘stored value cards’, and cards not issued by a financial institution, which would usually be ‘stored value cards’. The Law Council still questions why it is appropriate that a card which does not permit ‘cash out’ but is issued by an Authorised Deposit-taking Institution (**ADI**), is treated as having a different risk than a card with the same properties issued by a non-ADI.

Objects clauses – reference to offences

22. During the course of giving evidence to the Committee the Law Council suggested that the legislation needs to provide definitions of what is meant by terms such as ‘offences’ and ‘serious criminal offences’. The concern we expressed is that reporting entities subject to the AML/CTF regime do not necessarily have a complete understanding of what a term such as *serious criminal offence*, for example, might mean and that clarity around the issue would go a long way to assist in implementation of the Bill.
23. The Bill proposes to insert additional clauses into section 3 of the AML/CTF Act to state that the domestic objects of the AML/CTF Act include:

- ‘... measures to detect, deter and disrupt ... other *serious financial crimes*’;

⁴ Law Council of Australia, Submission No 9 to Senate Legal and Constitutional Affairs Committee, *Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017 [Provisions]*, 15 September 2017, 2-3.

⁵ Attorney-General’s Department, Answers to questions on notice 20 September 2017 to Senate Legal and Constitutional Affairs Committee, *Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017 [Provisions]*, 4 October 2017, 11.

- ‘to provide relevant Australian government bodies and their international counterparts with information...to investigate and prosecute ... other *serious crimes*’;
- ‘to support cooperation and collaboration ... to detect, deter and disrupt ... other *serious crimes*’; and
- ‘to promote public confidence in the Australian financial system through ... controls and powers ... to detect, deter and disrupt ... other *serious crimes*’.⁶

24. The response to the QON states that the suspicious matter reporting obligations extend to:

*... a suspicion that the reporting entity possesses information that may be relevant to the investigation of, or prosecution of a person for, an offence against a law of the Commonwealth or of a State or Territory. For this reason, reporting entities should already be considering this range of crime types (including ‘serious crimes’) in carrying out their obligations under the AML/CTF Act.*⁷

25. The Law Council submits that there is the potential for confusion among reporting entities about the extent of their obligations under the AML/CTF Act if the domestically-focussed objects of the AML/CTF Act are only stated as being to address *serious financial crimes* and other *serious crimes*, as proposed by the Bill, given that suspicious matter reporting applies to, essentially, a suspicion relevant to any crime type.

I trust that this information is of assistance. If the Law Council can be of further assistance to the Committee, our contact officer is Mr Murray Hawkins, telephone 02 62463734 or murray.hawkins@lawcouncil.asn.au.

Yours sincerely



Fiona McLeod SC
President

⁶ Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017 (Cth) sch 1 item 1 (emphasis added).

⁷ Ibid, 10.