



Australian Government

Australian Transaction Reports
and Analysis Centre

Public Legal Interpretation series

Public Legal Interpretation No. 6 of 2008 – Suspicious matter and suspect transaction reports

Disclaimer

The purpose of this Public Legal Interpretation is to provide an interpretation of issues arising out of the legislation administered by the Australian Transaction Reports and Analysis Centre (AUSTRAC). This Public Legal Interpretation is not exhaustive in its coverage of rights or obligations under law.

This Public Legal Interpretation is based on AUSTRAC's interpretation of the relevant legislation and has no legal status or effect.

This Public Legal Interpretation is a technical document and you may need to seek legal or other professional advice to fully appreciate the issues that it addresses.

The legal view provided may be affected by changes to legislation. AUSTRAC accepts no responsibility for the accuracy, completeness or currency of the material.

Users of this Public Legal Interpretation are encouraged to obtain independent professional advice on the relevant legislation and to exercise their own skill and care in relation to the users' legal position.

The Commonwealth accepts no liability for any loss suffered as a result of reliance on this publication.

Copyright notice

This Public Legal Interpretation is copyright. You may use and reproduce this material in an unaltered form only for your personal non-commercial use or non-commercial use within your organisation. Apart from any use permitted under the *Copyright Act 1968*, all other rights are reserved. Requests and enquiries concerning reproduction and rights should be addressed to the Commonwealth Copyright Administration, Attorney-General's Department, Robert Garran Offices, National Circuit, Barton, ACT 2600 or posted at <http://www.ag.gov.au/cca>.

Currency

The views on the subject matter set out in this Public Legal Interpretation are the views of AUSTRAC at 16 March 2010. This version of this Public Legal Interpretation replaces the version published on 26 September 2008. The original published Public Legal Interpretation has been amended to reflect the views in *Public Legal Interpretation No. 10 – agency and the AML/CTF Act*.

You should ensure that this Public Legal Interpretation has not been superseded or withdrawn.

Table of contents

Objective	3
Introduction.....	3
Interpretation	4
Related Information	17
Legislation Attachment.....	17
Further Information.....	18

Objective

- 1 The purpose of this Public Legal Interpretation is to set out AUSTRAC's views on the provisions of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) and the *Financial Transaction Reports Act 1988* (FTR Act) as they relate to:
 - the obligation to report suspicious matters within the meaning of section 41 of the AML/CTF Act
 - the obligation to report suspect transactions within the meaning of section 16 of the FTR Act
 - the general prohibition on use of these reports as evidence.

Introduction

- 2 Section 41 of the AML/CTF Act commenced on 12 December 2008.
- 3 The objects of the AML/CTF Act include fulfilling Australia's international obligations and addressing matters of concern in combating money laundering and the financing of terrorism.
- 4 Section 41 of the AML/CTF Act provides that reporting entities must make reports of suspicious matters to the AUSTRAC CEO in certain circumstances. Section 49 permits the AUSTRAC CEO and other specified persons to request additional information in relation to reports under section 41, 43 or 45. Section 123 generally prohibits a reporting entity from disclosing suspicious matter information about or relating to a person, except to the AUSTRAC CEO, staff of AUSTRAC and other specified exceptions.
- 5 Section 16 of the FTR Act provides that cash dealers (as defined in section 3 of that Act) must make reports of suspect transactions to the AUSTRAC Chief Executive Officer (CEO) in certain circumstances. The section also permits the AUSTRAC CEO and other specified persons to request additional information in relation to a report. Subsection 16(5A) prohibits a cash dealer from disclosing to any person that the information in a report has been communicated to the AUSTRAC CEO.
- 6 The *Freedom of Information Act 1982* (FOI Act) exempts documents concerning information communicated to AUSTRAC under section 41 or 49 of the AML/CTF Act and section 16 of the FTR Act.¹

Outline of Interpretation

- 7 This Public Legal Interpretation contains:
 - Section one:
 - Reports of 'suspicious matters' in section 41 of the AML/CTF Act.
 - Section two:
 - Reports of 'suspect transactions' in section 16 of the FTR Act.
 - Section three:
 - Disclosure to third parties of information contained in reports of suspect transactions and suspicious matters.

¹ Subsection 7(2) and Schedule 2, Part II of the FOI Act.

Interpretation

Section one – reports of ‘suspicious matters’ in section 41 of the AML/CTF Act

Provisions of section 41

- 8 Section 2 of the AML/CTF Act provides that Part 3, Divisions 1 to 4, commenced on 12 December 2008. Part 3 Division 2 includes section 41 of the AML/CTF Act.
- 9 Section 41 provides that the obligation to provide a report to the AUSTRAC CEO occurs when:
- the reporting entity commences or proposes to provide a designated service to a person² (the first person); or
 - the first person requests the reporting entity to provide a designated service and the service is of a kind ordinarily provided by the reporting entity;³ or
 - the first person inquires whether the reporting entity would be willing to provide a designated service to the person, and the service is of a kind ordinarily provided by the reporting entity;⁴

and any of the following conditions is satisfied at the relevant time or at a later time:

- the reporting entity suspects on reasonable grounds that:
 - the first person is not the person who they claim to be,⁵ or that an agent of the first person is not the person the agent claims to be;⁶
 - the information concerning the provision or prospective provision of the designated service may be relevant to the investigation or prosecution of an evasion of a taxation law,⁷ or of a taxation law or a State or Territory,⁸ or of an offence against a law of the Commonwealth or of a State or Territory,⁹ or may be of assistance to enforcement of the *Proceeds of Crime Act 2002*,¹⁰ or of a law of a State or Territory that corresponds to the *Proceeds of Crime Act 2002*,¹¹
 - the provision or prospective provision of the service is preparatory to a financing of terrorism offence,¹² or that the information may be relevant to the investigation or prosecution of an offence of financing of terrorism;¹³
 - the provision or prospective provision of the service is preparatory to the commission of an offence of money laundering,¹⁴ or that the information may be relevant to the investigation or prosecution of a money laundering offence.¹⁵
- 10 If any of the conditions in paragraphs 41(1)(d) to (j) are met then a reporting obligation arises.

² Paragraph 41(1)(a).

³ Subparagraph 41(1)(b)(i) and (ii).

⁴ Subparagraph 41(1)(c)(i) and (ii).

⁵ Paragraph 41(1)(d).

⁶ Paragraph 41(1)(e).

⁷ Subparagraph 41(1)(f)(i).

⁸ Subparagraph 41(1)(f)(ii).

⁹ Subparagraph 41(1)(f)(iii).

¹⁰ Subparagraph 41(1)(f)(iv).

¹¹ Subparagraph 41(1)(f)(v).

¹² Paragraph 41(1)(g).

¹³ Paragraph 41(1)(h).

¹⁴ Paragraph 41(1)(i).

¹⁵ Paragraph 41(1)(j).

- 11 Paragraphs 41(1)(g) and 41(1)(h) state that the reporting entity's suspicion must relate to offences that correspond to paragraphs (a), (b) or (c) of the definition of 'financing of terrorism' (excluding paragraph (d) of the definition). 'Financing of terrorism' is defined in section 5 of the AML/CTF Act as follows:

financing of terrorism means conduct that amounts to:

- (a) an offence against section 102.6 or Division 103 of the *Criminal Code*; or
 - (b) an offence against section 20 or 21 of the *Charter of the United Nations Act 1945*; or
 - (c) an offence against a law of a State or Territory that corresponds to an offence referred to in paragraph (a) or (b); or
 - (d) an offence against a law of a foreign country or a part of a foreign country that corresponds to an offence referred to in paragraph (a) or (b).
- 12 Paragraphs 41(1)(i) and 41(1)(j) state that the reporting entity's suspicion must relate to offences that correspond to paragraphs (a) and (b) of the definition of 'money laundering' (excluding paragraph (c) of the definition). 'Money laundering' is defined in section 5 of the AML/CTF Act as follows:

money laundering means conduct that amounts to:

- (a) an offence against Division 400 of the *Criminal Code*; or
- (b) an offence against a law of a State or Territory that corresponds to an offence referred to in paragraph (a); or
- (c) an offence against a law of a foreign country or of a part of a foreign country that corresponds to an offence referred to in paragraph (a).

The first person

- 13 Subsection 41(1) creates a suspicious matter reporting obligation for a reporting entity in relation to the 'first person'. Paragraphs 41(1)(a) to (c) describe the 'first person' as the customer of the designated service or a person who makes inquiries about a designated service or requests the provision of a designated service.
- 14 The identity of the 'first person' is determined at 'the relevant time'. This is the time of the occurrence of the matters in paragraphs 41(1)(a) to (c).
- 15 In most cases the first person is the customer or agent of the customer of the relevant designated service.
- 16 The relevant designated service is taken broadly and includes an inquiry, a proposal, or a request, to provide or commence to provide the service.

Timing of report

- 17 The reporting entity may form a suspicion at 'a later time' than the time of the occurrence of the matters in paragraphs 41(1)(a) to (c); that is, the 'relevant time'. This means that the obligation arises whenever the suspicion on reasonable grounds is formed. This may occur at, or later than, the time of the inquiry, request, proposal, or commencement of provision of a designated service to the first person. This is confirmed by the Replacement Explanatory Memorandum (REM)¹⁶ which states at page 8:

¹⁶ The *Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 Replacement Explanatory Memorandum* circulated by authority of the Minister for Justice and Customs.

The time for reporting a suspicious transaction does not arise until the reporting entity forms the relevant suspicion.

- 18 Subsection 41(2) requires that the report must be made within certain periods of the reporting obligation having arisen.
- 19 For matters in paragraphs 41(1)(d), (e), (f), (i) or (j) that do not relate to the offences of 'financing of terrorism' as defined by paragraph (a), (b) or (c) of the definition in section 5, a report must be provided within 3 business days after the day on which the relevant suspicion was formed.
- 20 If an offence of 'financing of terrorism' is suspected, the report must be made within 24 hours after the time at which the relevant suspicion is formed.

Suspects on reasonable grounds

- 21 Section 41 of the AML/CTF Act provides that a suspicious matter reporting obligation arises if a reporting entity 'suspects on reasonable grounds' any of the matters specified in paragraphs 41(1)(d) to (j). The phrase 'suspects on reasonable grounds' indicates that the test is both subjective and objective. That is, the reporting entity must have a real suspicion of the relevant matters, and the suspicion must be based on matters or evidence that support the truth of the suspicion.
- 22 The High Court in *Gypsy Jokers Motorcycle Club Inc. v Commissioner of Police*¹⁷ considered a provision in the *Corruption and Crime Commission Act 2003* (WA) concerning review of a warrant. The legislation gives a right of review concerning whether the Commissioner of Police 'could have reasonably had' a certain belief, prior to issue of a warrant. The High Court stated:

Upon that review the Supreme Court is to be satisfied that facts exist which are sufficient to have induced that belief in a reasonable person. With respect to s76(1) of the Act, the belief in issue is that of the Commissioner of Police stipulated by s72(2), and its reasonableness is to be determined by the Supreme Court upon regard of any submissions and any other "information" which the Commissioner of Police took into consideration.

- 23 That is, if facts exist which could induce a belief in a reasonable person, then the Court determines the warrant to be validly issued. From this reasoning AUSTRAC concludes that a reasonable belief contains an objective element, and must be founded on facts available to the holder of the belief.
- 24 Courts have also held that a reasonable belief includes a genuine belief of certain matters which are later found to be mistaken. The Supreme Court of South Australia in *Police v Jeko Zaprionoz Grozev*¹⁸ stated:

But Mr Stratton-Smith has referred to a number of cases which suggest that a mistaken belief as to a matter of law can be relied upon as a basis for a reasonable belief that an offence has been committed. Or, putting it a little differently, the authorities can be seen as supporting the view that a reasonable belief can be formed that an offence has been committed, even though that belief might include or ultimately be founded on an error of law.

In *Veivers v Roberts* [1980] Qd R 226 a police officer arrested a man who was, I gather, protesting against the demolition of certain premises. The police officer arrested the man for the offence of being, without lawful excuse, in an "enclosed yard" under certain Queensland legislation. The Court held that the place in question was not an "enclosed yard" for the purposes of the legislation, and dismissed the charge of the offence in connection with which the man was arrested. There was a

¹⁷ (2008) 242 ALR 191

¹⁸ [2006] SASC 353

further charge of resisting the member of the police force in the execution of his duty. The issue was raised of whether the man could be convicted of resisting arrest on a charge in respect of which he had been acquitted. The power of arrest, under s 546 of the Criminal Code 1899 (Qld), was a power to arrest if the police officer "believes on reasonable grounds that the offence has been committed, and that any person has committed it ...".

In brief reasons DM Campbell J said at 228:

A constable may have reasonable grounds for believing that an offence has been committed although he is under a misapprehension as to the law. In this case the respondent was on private property. He was in an area which was fenced in. He was committing a trespass and the constable had reasonable grounds for believing that he found him offending against s 4(1)(viii)(a) of the Vagrants, Gaming and Other Offences Act.

The other members of the Court agreed.¹⁹

- 25 It is therefore the case that a reporting entity that suspects the relevant matters on reasonable grounds which are later found to be mistaken, has an obligation to report to AUSTRAC. Paragraph 235(1)(e) provides immunity from any action, suit or proceeding in relation to any matter done in good faith in compliance with the Act, regulations or the AML/CTF Rules.
- 26 Paragraph 41(3)(c) provides that the report must contain a statement of the grounds on which the reporting entity holds the relevant suspicion.

Differences in formulation of the test in section 41 than in section 16 of the FTR Act

- 27 Section 16 of the FTR Act sets out the obligation to report a suspect transaction. This is described below in section two of this PLI.
- 28 The following matters in section 41 of the AML/CTF Act are different from the relevant test in section 16 of the FTR Act:
 - Section 41 pertains to provision, prospective provision, or a request or inquiry concerning provision of a designated service. Only a reporting entity involved in the provision or proposed provision of, or a request or inquiry in relation to, a designated service must report to the AUSTRAC CEO.

Section 16 refers to a 'transaction' and requires that a cash dealer be a party to the transaction which is the subject of the report. 'Transaction' has the extended meaning of proposal or negotiations for a transaction.

However, it is likely that the terms of section 41 are broader with respect to a designated service. This is because of the reference to requests or inquiries and to prospective provision of a designated service. AUSTRAC's view is that these matters include offers to provide designated services. AUSTRAC refers to *Public Legal Interpretation No. 4 – What constitutes a reporting entity* (see 'Related information' below) at paragraph 10.

- Section 41 outlines a broader range of matters on which suspicion may be formed than section 16. Paragraphs 41(1)(d) and (e) refer to grounds of suspicion that the identity of the potential customer or agent of the customer is false.

This is not a specific ground in section 16. However, if a cash dealer suspected that a person concerned in a relevant transaction was not who the person claimed to be, this would most likely constitute reasonable grounds to suspect one of the relevant matters.

¹⁹ [2006] SASC 353 at 360.

- Section 41 refers to prosecution under laws of a State or Territory. Section 16 permits consideration of prosecution or investigation of offences against laws of a Territory and does not refer to laws of a State.
 - Section 41 requires that a reporting entity must report if the entity 'suspects on reasonable grounds'. This is essentially the same subjective and objective test as in section 16: 'reasonable grounds to suspect'.
 - Grounds in subparagraphs 41(1)(f) (i)–(v) are similar to subparagraphs 16(1)(b)(i)–(iv) and subparagraphs 16(1A)(b)(i)–(ii) (with the proviso that the AML/CTF Act refers to laws of States as well as laws of Territories). That is, if an offence against a law is suspected, a reporting obligation arises under both the FTR Act and the AML/CTF Act.
 - Paragraphs 41(1)(g) and (h) are similar to the matters in subsection 16(1A) and pertain to financing of terrorism. There is no relevant equivalent to paragraphs 41(1)(i) and (j) in section 16 of the FTR Act with respect to offences of money laundering.
- 29 Reporting entities must comply with the suspicious matter reporting obligations under section 41. Unlike the test in section 16 of the FTR Act, there is no requirement that the reporting entity be a 'party' to a 'transaction'.
- 30 The overall result is that section 41 may require that some matters be reported which were not required to be reported under section 16. For example, reasonable suspicion of an offence against laws of a State must be reported under section 41.
- 31 Section 49 of the AML/CTF Act provides that the AUSTRAC CEO and other specified officials may request additional information in relation to section 41 suspicious matter reports, by written notice to the reporting entity. This is similar to subsection 16(4) of the FTR Act. Section three of this PLI refers to the admissibility of such reports.

Civil penalty

- 32 Subsection 41(4) provides that the obligation to report in subsection 41(2) is a civil penalty provision. This means that the AUSTRAC CEO may take enforcement action if a reporting entity does not comply.
- 33 Such action includes that the AUSTRAC CEO may apply for a civil penalty order in the Federal Court under Part 15, Division 2 of the AML/CTF Act.

AML/CTF Rules

- 34 Subsection 41(5) provides:

The AML/CTF Rules may specify matters that are to be taken into account in determining whether there are reasonable grounds for a reporting entity to form a suspicion of the kind mentioned in paragraph (1)(d), (e), (f), (g), (h), (i) or (j).

- 35 To date no such Rules have been made.

Agency and the obligation to report

- 36 As stated above at paragraph 21 the reporting entity must report if the reporting entity 'suspects on reasonable grounds' the relevant matters in subsection 41(1). This indicates that the test is both objective and subjective.
- 37 The subjective element of the test is that the reporting entity must have a real suspicion of the relevant matters. It is therefore the reporting entity which is required to:
- form the relevant suspicion of a suspicious matter (paragraphs 41(1)(d)-(j) of the AML/CTF Act); and

- communicate the information to the AUSTRAC CEO (subsection 41(2) of the AML/CTF Act); and
 - not disclose information from which inference can be made that information has been communicated to the AUSTRAC CEO (paragraph 123(2)(d) of the AML/CTF Act).
- 38 AUSTRAC's view is that the common law principles of agency can apply to this reporting obligation. If an agent of a reporting entity is involved in providing the designated service on behalf of a reporting entity, the agent may form a suspicion.
- 39 It would then follow that the suspicion of the agent could be imputed to the principal, who has the obligation to submit the report.
- 40 Correspondingly, the agent may fulfil the principal's reporting obligation under section 41 without breaching the tipping off provisions in section 123.
- 41 The application of the common law principles of agency in this way to sections 41 and 123 of the AML/CTF Act will depend on the particular circumstances.
- 42 An agent has a fiduciary duty to communicate all material facts concerning the exercise of the agency to the principal. This includes information concerning the matters in section 41. A reporting entity that receives such a report from an agent must report to the AUSTRAC CEO if the reporting entity suspects the relevant matters on reasonable grounds, including those contained in the report. An agent may also report such matters to AUSTRAC on behalf of the principal under the principles of agency. The obligation to provide the report to AUSTRAC, and any penalty for breach of this obligation, would however remain with the principal under the AML/CTF Act.
- 43 To ensure that it is able to comply with its obligations under the AML/CTF Act, the reporting entity (principal) should put in place adequate AML/CTF programs. Such programs should provide for the principal's employees and its agents to recognise and report suspicious matters, either to the reporting entity, or to AUSTRAC under principles of agency on behalf of the reporting entity. Further, reporting entities that use agents should ensure that agents are contractually bound to report suspicions to the reporting entity.
- 44 AUSTRAC notes that the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)* (AML/CTF Rules 2007) includes Chapter 15²⁰ relating to requirements to obtain information about customers for ongoing customer due diligence purposes. Reporting entities undertaking ongoing customer due diligence may form suspicions on reasonable grounds where the information is provided by an agent or agents of the reporting entity. In this instance the reporting entity should have programs and contractual arrangements in place to ensure that agents pass on this information.

'Tipping off'

- 45 Section 123 of the AML/CTF Act is similar to subsection 16(5A) of the FTR Act. Subsection 123(1) provides that where a suspicious matter reporting obligation has arisen and the reporting entity has communicated information to the AUSTRAC CEO, a reporting entity must not disclose the making of the report or the forming of the suspicion to any person other than the AUSTRAC CEO or a member of staff of AUSTRAC.
- 46 Subsection 123(2) extends beyond the matters in subsection 16(5A) of the FTR Act which requires both that a suspicion has been formed, and that the relevant information has been communicated to the AUSTRAC CEO.
- 47 Subsection 123(2) applies to either case, that is:
- the forming of the suspicion;²¹ or

²⁰ Chapter 15 of the AML/CTF Rules 2007 came into force on 12 December 2008.

²¹ Subparagraph 123(2)(b)(i).

- the communication of that suspicion to the AUSTRAC CEO.²²

In all relevant cases the prohibition does not apply to disclosure to the AUSTRAC CEO or a member of the staff of AUSTRAC.

48 In either case, a reporting entity must not disclose:

- that the suspicion has been formed;²³ or
- that the information has been communicated;²⁴ or

any information from which a person could be reasonably expected to infer:

- that the suspicion has been formed;²⁵ or
- that the information has been communicated.²⁶

49 Subsection 123(2) does not prevent an agent from disclosing a suspicion to the principal, or to AUSTRAC, in appropriate circumstances where principles of agency are relied on for reporting purposes.

50 Similarly, if a reporting entity provides information or documents to a person under section 49, the reporting entity must not disclose that the information or documents have been given, or any information from which it could be inferred that the information or documents have been given (refer to subsection 123(3)).

51 Questions have arisen in relation to the obligations of finance brokers. The same test applies under the AML/CTF Act for finance brokers as for any reporting entity. AUSTRAC has published information on the obligations of finance brokers under the AML/CTF Act, including how the tipping off provisions affect such entities. This information is available on the AUSTRAC website at: http://www.austrac.gov.au/finance_brokers.html.

52 In relation to finance brokers who are providing designated services and are thus reporting entities under the AML/CTF Act, it is AUSTRAC's view that, consistently with AUSTRAC's view on the application of principles of agency generally to the reporting of suspicious matters, the offence of 'tipping off' is limited to disclosure to anyone other than AUSTRAC that a suspicious matter report has been submitted or that the broker has formed the applicable suspicion under subsection 41(1) of the AML/CTF Act.

53 For finance brokers and other reporting entities, the mere act of asking a customer for additional information about their identity or the source or destination of their funds, for example, would not constitute 'disclosing information' under section 123 of the AML/CTF Act.

54 Subsection 123(2) does not apply in specified circumstances:

- disclosure by reporting entities who are legal practitioners or qualified accountants where the disclosure is made for the purposes of dissuading a customer from engaging in conduct that would constitute an offence of evasion of a law of taxation or against the law of the Commonwealth or of a State or Territory (subsection 123(4)); or
- disclosure to a legal practitioner for the purpose of obtaining legal advice (subsection 123(5)), provided that the legal practitioner does not disclose the information to another person (subsection 123(5A)); or

²² Subparagraph 123(2)(b)(ii).

²³ Subparagraph 123(2)(c)(i).

²⁴ Subsection 123(1) and paragraph 123(2)(d).

²⁵ Subparagraph 123(2)(c)(ii).

²⁶ Paragraph 123(2)(d).

- disclosure of information about the operation of Part 4 of the *Charter of the United Nations Act 1945* (subsection 123(6)); for example, disclosure of information is allowed in order to fulfil the obligations to freeze the assets of proscribed persons or entities designated under United Nations Security Council Financial sanctions regimes and outlined in the Consolidated List maintained by the Department of Foreign Affairs and Trade;
- disclosure between members of designated business groups in certain circumstances, including that the members have a joint anti-money laundering and counter-terrorism financing program, and that the disclosures are within the group for the purposes of informing group members about risks involved in dealing with a customer of a reporting entity in the group (subsection 123(7)); or
- disclosure by a reporting entity that is an authorised deposit-taking institution (ADI) to an owner-managed branch of the ADI (subsection 123(8)); or
- if disclosure is in compliance with laws of the Commonwealth or a State or Territory or is to an Australian government body responsible for law enforcement (subsection 123(9)).

55 Section 123 is not a civil penalty provision. Subsection 123(11) provides that breach of subsections 123(2), (3), (5A) and (8A) is an offence punishable by imprisonment of 2 years or 120 penalty units, or both. Subsection 235(1) provides an immunity from any action, suit or proceeding in relation to compliance with the obligations of the AML/CTF Act if done in good faith (if subsection 235(2) does not apply).

Foreign parent companies and section 123 'tipping off'

56 Many international banks have foreign subsidiaries in Australia. The foreign subsidiaries are separate legal entities to the parent, and may not be acting as the parent's agent in Australia. The companies together form a corporate group. Principles of agency may or may not apply between the companies forming the corporate group. Where principles of agency do not apply, AUSTRAC notes that there is provision for the corporate group to report as a designated business group if the conditions in subsection 123(7) are met.

Section two – reports of 'suspect transactions' in section 16 of the FTR Act

Cash dealer reporting obligations after 12 March 2010

57 A cash dealer that is not a reporting entity must continue to report under the FTR Act.

Section 16 of the FTR Act

58 Section 16 of the FTR Act sets out the obligation of a cash dealer to make reports to the AUSTRAC CEO of suspect transactions relevant to, or which may be of assistance in:

- an investigation of evasion of a taxation law; or
- an investigation of, or prosecution of a person for, an offence against a law of the Commonwealth or of a Territory; or
- enforcement of the proceeds of crime legislation (subsection 16(1)); or
- financing of terrorism (subsection 16(1A)).

Party to a transaction

59 Section 16 is applicable to a cash dealer who is 'a party to a transaction'. 'Transaction' is defined in section 3 of the FTR Act as having 'a meaning affected by subsection 3(7)'. Subsection 3(7) states:

Division 2 of Part II applies in relation to a proposal for a transaction, or negotiations for a transaction, in the same way as it applies to a completed transaction.

60 Division 2 of Part II of the FTR Act includes section 16. Therefore 'transaction' has the extended meaning set out in subsection 3(7). A cash dealer who is a party to a transaction, including proposals and negotiations for the transaction, and who forms the relevant suspicion, must make a report as set out in section 16, regardless of whether or not the transaction was completed.

61 'Transaction' has been judicially considered in the following comments of a Canadian Court in *R v Canavan and Busby* [1970] 3 OR 353 at 356, ONT CA per Schroder JA:

"transaction" is a word of a quite comprehensive import, which, so far as I am aware, has never been a subject of any exact legal definition. The word has been interpreted as the justice of each case demanded rather than by any abstract definition. In its ordinary sense it is understood to mean the doing or performing of some matter of business between two or more persons. "Transaction" in its broadest sense expresses the concept of driving, doing or acting as denoted by the Latin word *trans agere* from which it is derived. A "transaction" may and frequently does include a series of occurrences extending over a length of time. Thus, the word "transaction" is normally used to denote some bilateral activity, even though it can also be used to denote an activity in which only a single person is engaged (See *Greenberg v Inland Revenue Commissioner* [1971] 3 All Er 136 at 149, HL, per Lord Reid).

62 'Transaction' can refer to a dealing or a series of dealings between two or more parties, often in the course of business, that affects the rights of the parties: *Gordon v VCT* [1965] 113 CLR 604; *Palmer v CMR State Taxation (WA)* (1976) 136 CLR.

63 To be a party to a transaction, the party must be aware of the transaction. Knowledge of an agent of a cash dealer can be, in AUSTRAC's view, imputed to the cash dealer (see paragraph 39).

Grounds of suspicion

64 If a cash dealer has 'reasonable grounds to suspect that information that the cash dealer has concerning the transaction' may be relevant to one of the matters specified in subsections 16(1) or 16(1A), the cash dealer must provide a report of the transaction to the AUSTRAC CEO as soon as practicable after forming the relevant suspicion.

65 Subsections 16(1) and 16(1A) set out the grounds on which a cash dealer must report to the AUSTRAC CEO:

- information may be relevant to an investigation of an evasion or attempted evasion of a taxation law²⁷
- information may be relevant to an investigation or prosecution of an offence against a law of the Commonwealth or of a Territory²⁸
- information may be of assistance in the enforcement of the *Proceeds of Crime Act 1987* or the *Proceeds of Crime Act 2002*²⁹
- the transaction is preparatory to the commission of a financing of terrorism offence or information may be relevant to the investigation or prosecution of a financing of terrorism offence.³⁰ A 'financing of terrorism offence' is defined as an offence under section 102.6 or Division 103 of the *Criminal Code*, or section 20 or 21 of the *Charter of the United Nations Act 1945*.³¹

²⁷ Subparagraph 16(1)(b)(i).

²⁸ Subparagraph 16(1)(b)(ii).

²⁹ Subparagraphs 16(1)(b)(iii) and (iv).

³⁰ Subparagraphs 16(1A)(b)(i) and (ii).

³¹ Subsection 16(6).

Subjective and objective test

- 66 Similarly to the test in section 41 of the AML/CTF Act, the cash dealer must report if the cash dealer 'has reasonable grounds to suspect' the relevant matters in paragraphs 16(1)(b) and (1A)(b) of the FTR Act. This indicates that the test is both objective and subjective.
- 67 AUSTRAC relies on the discussion at paragraphs 21 to 25 as also outlining the subjective and objective test to be applied under section 16 of the FTR Act.
- 68 That is, the cash dealer must have a real suspicion of the relevant matters, and the suspicion must be based on matters or evidence that support the truth of the suspicion.
- 69 Paragraph 16(2)(c) provides that the report must contain a statement of the grounds on which the reporting entity holds the relevant suspicion.
- 70 Paragraph 16(5)(d) provides immunity from any action, suit or proceeding for mistakenly reporting matters.

Other matters

- 71 The cash dealer must make the report 'as soon as practicable after forming that suspicion'; that is, the suspicions referred to in subsections 16(1) and 16(1A). 'As soon as practicable' is not defined. AUSTRAC's view is that what is reasonably practicable will depend on the circumstances of a case. A relevant factor is the seriousness of a suspected offence. For example if there is suspicion on reasonable grounds that a terrorism-related offence has been committed, a shorter time period, generally within 24 hours, would be practicable for reporting purposes.
- 72 A report made under subsection 16(1) or 16(1A) must be in the approved form and must contain reportable details of the transaction set out in Schedule 4 of the FTR Act.³²
- 73 Subsection 16(4) provides that the AUSTRAC CEO, or relevant authority, or an investigating officer, may request additional information in a written request specifying the additional information to be provided.
- 74 'Relevant authority'³³ means the Commissioner of the Australian Federal Police, the Integrity Commissioner, the Chief Executive Officer of the Australian Crime Commission, the Commissioner of Taxation, or the Chief Executive Officer of Customs.
- 75 'Investigating officer'³⁴ means a taxation officer, an Australian Federal Police member, a customs officer, a staff member of the Australian Commission for Law Enforcement Integrity, or an examiner or member of the staff of the Australian Crime Commission.

Cash dealer must not disclose report or information

- 76 A cash dealer who makes a report must not disclose to anyone that the cash dealer has formed the suspicion, or that the transaction has been reported to the AUSTRAC CEO:

or any other information from which the person to whom the information is disclosed could reasonably be expected to infer that the suspicion had been formed or that the first-mentioned information has been communicated.³⁵
- 77 To disclose the forming of the suspicion or the providing of the report is an offence punishable by imprisonment of not more than 2 years (subsection 16(5B)).

³² Subsection 16(2)

³³ Subsection 16(6).

³⁴ Subsection 16(6).

³⁵ Subsection 16(5A).

- 78 Section three of this PLI outlines the admissibility or otherwise of a report made under section 16.

Section three – disclosure to third parties

Disclosure under FOI and Privacy Act

Freedom of Information

- 79 Subsection 7(2) of the FOI Act states:

The persons, bodies and Departments specified in Part II of Schedule 2 are exempt from the operation of this Act in relation to the documents referred to in that Schedule in relation to them.

- 80 Schedule 2, Part II of the FOI Act includes the following:

Australian Transaction Reports and Analysis Centre, in relation to documents concerning information communicated to it under section 16 of the *Financial Transaction Reports Act 1988* or section 41 or 49 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*

- 81 By operation of subsection 7(2) of the FOI Act, any AUSTRAC documents which concern information communicated under section 16 of the FTR Act or sections 41 or 49 of the AML/CTF Act, are therefore exempt from the operation of the FOI Act. This means that AUSTRAC is not required to produce such documents to an applicant.

Privacy

- 82 AUSTRAC is not exempt from the *Privacy Act 1988* (Privacy Act) and must comply with the information privacy principles (IPPs) with regard to collection, storage, and dissemination of personal information.

- 83 AUSTRAC considers that section 16 of the FTR Act and sections 41 and 49 of the AML/CTF Act authorise collection of information for a purpose 'that is a lawful purpose directly related to a function or activity' of AUSTRAC within the meaning of IPP 1, IPP 2 and IPP 3.

- 84 IPP 6 'Access to records containing personal information' states:

Where a record-keeper has possession or control of a record that contains personal information, the individual concerned shall be entitled to have access to that record, except to the extent that the record-keeper is required or authorised to refuse to provide the individual with access to that record under the applicable provisions of any law of the Commonwealth that provides for access by persons to documents. (emphasis added)

- 85 AUSTRAC relies on the highlighted words as referring to the FOI Act exemptions described at paragraphs 82 to 84. The FOI Act exemptions authorise AUSTRAC 'to refuse to provide the individual with access to that record'.

- 86 This means that an individual is not entitled to have access to a record containing that individual's personal information, if the document is FOI exempt.

Disclosure of personal information to other parties

- 87 IPP 11 'Limits on disclosure of personal information' relevantly states:

Limits on disclosure of personal information

1. A record-keeper who has possession or control of a record that contains personal information shall not disclose the information to a person, body or agency (other than the individual concerned) unless:
 - (a) the individual concerned is reasonably likely to have been aware, or made aware under Principle 2, that information of that kind is usually passed to that person, body or agency;
 - (b) the individual concerned has consented to the disclosure;
 - (c) the record-keeper believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or of another person;
 - (d) the disclosure is required or authorised by or under law; or
 - (e) the disclosure is reasonably necessary for the enforcement of the criminal law or of a law imposing a pecuniary penalty, or for the protection of the public revenue. (emphasis added).

88 AUSTRAC refers to *Public Legal Interpretation No. 5 – Access to and disclosure of ‘AUSTRAC information’* (see ‘Related information’ below). PLI No. 5 describes how Part 11 of the AML/CTF Act authorises AUSTRAC to provide AUSTRAC information to designated agencies and other bodies. AUSTRAC information includes material obtained under section 16 of the FTR Act and sections 41 and 49 of the AML/CTF Act.

89 AUSTRAC relies on Part 11 of the AML/CTF Act as ‘authorising by or under law’ the disclosure, to designated agencies and the other bodies referred to in PLI No. 5, of AUSTRAC information which may contain personal information.

Disclosure of section 41 and 49 and section 16 information to courts or tribunals

AML/CTF Act

- 90 The AML/CTF Act contains multiple provisions concerning the prohibition on giving evidence of information provided under section 41 and section 49, and evidence of the making of a report.
- 91 Subsection 123(10) provides that a reporting entity is not to be required to disclose to a court or tribunal information mentioned in subsection 123(1), (2) or (3), unless it is necessary for the purposes of the AML/CTF Act or the FTR Act. The relevant information includes where a suspicious matter reporting obligation has arisen.
- 92 Subsection 124(1) is in similar terms to subsection 16(5D) of the FTR Act. The effect of subsection 124(1) is that:
 - reports or copies of reports under section 41
 - information based on reports produced under section 41
 - additional information provided on request under section 49
 - evidence as to the contents or the giving or making of any of the aboveare not admissible in any proceedings.
- 93 Subsection 124(2) provides that evidence of the above matters may be given in criminal proceedings for an offence against section 123 (tipping off), section 136 (false or misleading information) or section 137 (producing false or misleading documents). Further, evidence may be given in proceedings for a civil penalty order under section 175.

FTR Act

94 The position under the FTR Act is similar. Subsection 16(5D) of the FTR Act states:

In any legal proceeding other than a prosecution for an offence against subsection 29(1) or 30(1):

(a) none of the following is admissible in evidence:

- (i) a report prepared..... under subsection (1) or (1A);
- (ii) a copy of such a report;
- (iii) a document purporting to set out information contained in such a report;
- (iv) a document given... under subsection (4) [additional information]; and

(b) evidence is not admissible as to:

- (i) whether or not a report was prepared... ;
- (ii) whether or not a copy ...was given to... the AUSTRAC CEO ... ;
- (iii) whether or not particular information was contained in a report... ;
- (iv) whether or not particular information was given under subsection (4)...

95 The effect of subsection (5D) is that:

- reports or copies of reports under section 16
- information based on reports
- additional information provided on request
- evidence as to the contents or the giving or making of any of the above

are not admissible in any proceedings, other than proceedings in relation to the making or giving of the information under subsection 29(1) 'false or misleading information' or 30(1) 'incomplete information'.

AUSTRAC information obtained by the ATO and other agencies

96 PLI No. 5, published on 15 August 2008, covers the provision of AUSTRAC information to other agencies.

Related information

Legislative instruments

The *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)*³⁶ (AML/CTF Rules) can be found at:
<http://www.comlaw.gov.au/comlaw/management.nsf/lookupindexpagesbyid/IP200730563?OpenDocument>

AUSTRAC publications

Public Legal Interpretation No. 4 of 2008 – What constitutes a reporting entity provides AUSTRAC's views on provision of a designated service by a reporting entity. This public legal interpretation can be accessed via AUSTRAC's website at: <http://www.austrac.gov.au/pli.html>.

The *AUSTRAC Regulatory Guide* contains guidance on obligations under the AML/CTF Act and the FTR Act. Chapter 7 contains information regarding suspect transaction report obligations. It is available on the AUSTRAC website at: http://www.austrac.gov.au/regulatory_guide.html

AUSTRAC has published information on the obligations of finance brokers under the AML/CTF Act, including how the tipping off provisions affect such entities. This information is available on the AUSTRAC website at: http://www.austrac.gov.au/finance_brokers.html

The AUSTRAC typologies paper on money laundering and terrorism financing indicators is available on the AUSTRAC website at http://www.austrac.gov.au/typologies_paper.html

The AUSTRAC e-learning 'Introduction to AML/CTF' course module 'AML/CTF Reporting Obligations' contains some information on suspect transactions and is available on the AUSTRAC website at <http://www.austrac.gov.au/courses.html>

AUSTRAC has published relevant information circulars, numbers 1, 31, 38, 39, 40, 42-61, and 63-65.58.

These information circulars are available on the AUSTRAC website at:
http://www.austrac.gov.au/information_circular.html

Other

The Department of Foreign Affairs and Trade website contains information regarding Australia's Implementation of United Nations Security Council Financial Sanctions, including the Consolidated List, at: http://www.dfat.gov.au/icat/UNSC_financial_sanctions.html

The Financial Transaction Reports Amendment (Transitional Arrangements) Bill 2008 is available on the Parliament of Australia website at:
http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r3068_first/toc_pdf/08177b01.pdf;fileType=application/pdf#search=%22billsCurBef%22

Legislation attachment

The *Financial Transaction Reports Act 1988* is available in consolidated form at:
<http://www.comlaw.gov.au/comlaw/management.nsf/lookupindexpagesbyid/IP200403474?OpenDocument>

The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* is available in consolidated form at:
www.comlaw.gov.au/comlaw/management.nsf/lookupindexpagesbyid/IP200627290?OpenDocument

³⁶ Legislative Instrument Compilation F2008C00235

Further information

AUSTRAC officers are able to assist reporting entities, their staff and the public in providing general information relating to the AML/CTF Act. Enquiries can be directed to the AUSTRAC Help Desk via:

- email to help_desk@austrac.gov.au
- telephone 02 9950 0827 or 1300 021 037 (a local call within Australia).

16 March 2010 © Commonwealth of Australia