



Australian Government

Australian Transaction Reports  
and Analysis Centre

## Public Legal Interpretation Series

# Public Legal Interpretation No. 12 of 2009 – Notices to reporting entities

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The views on the subject matter set out in this Public Legal Interpretation are the views of AUSTRAC at 29 September 2009.

You should ensure that this Public Legal Interpretation has not been superseded or withdrawn.

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## Objective

- 1 The purpose of this Public Legal Interpretation is to set out AUSTRAC's views on the provisions in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) and the *Financial Transaction Reports Act 1988* (FTR Act) under which the AUSTRAC Chief Executive Officer (CEO) may issue notices to reporting entities and/or cash dealers.

## Introduction

- 2 This Public Legal Interpretation (PLI) sets out AUSTRAC's views on its powers to serve notices on reporting entities under the AML/CTF Act:
  - section 49
  - subsection 50(2)
  - subsection 161(2)
  - subsection 162(2)
  - subsection 165(2)
  - subsection 167(2)
  - section 202
  - section 203
  - section 204
  - section 205
  - section 206
  - section 207.
- 3 This PLI covers AUSTRAC's powers to serve notices on cash dealers under the FTR Act:
  - subsection 16(4)
  - subsection 24(5)
  - section 27E.
- 4 This PLI does not cover the giving of infringement notices under Part 15, Division 3 of the AML/CTF Act.
- 5 This PLI does not cover powers of the AUSTRAC CEO to give notices to entities such as beneficiary or ordering institutions involved in electronic funds transfer instructions including under Part 5 of the AML/CTF Act. AUSTRAC has discussed some of these provisions in PLI 11, *International funds transfer instructions and electronic funds transfer instructions*.

## Interpretation

### Notices to reporting entities under the AML/CTF Act

- 6 AUSTRAC's powers to serve notices on reporting entities under the AML/CTF Act are discussed below:

#### *Section 49 of the AML/CTF Act*

- 7 Section 49 of the AML/CTF Act provides that the AUSTRAC CEO or one of the listed officials may, by written notice to a reporting entity, require the reporting entity to give further information, or to produce documents, to the AUSTRAC CEO regarding information given to AUSTRAC under sections 41 (suspicious matter reports), 43 (reports of threshold transactions) and 45 (reports of international funds transfer instructions) of the AML/CTF Act.
- 8 A section 49 notice may only be issued to a reporting entity that has made a report under sections 41, 43 or 45 of the AML/CTF Act. The notice may require the production of information<sup>1</sup> or documents.
- 9 Paragraphs 49(1)(h) and 49(1)(i) require that the notice must specify the further information required to be produced, and the manner and the period in which it is to be produced. Paragraph 49(1)(h) provides that 'further information' must be given where the reporting entity has that information, whereas paragraph 49(1)(i) provides that documents must be given which are relevant to information communicated under sections 41, 43 or 45 of the AML/CTF Act.
- 10 While paragraph 49(1)(i) is specifically tied to documents relevant to the reports under sections 41, 43 and 45, paragraph 49(1)(h) is not so limited.
- 11 AUSTRAC is accordingly of the view that provided a report under sections 41, 43 or 45 has been provided by the reporting entity, the persons in paragraphs 49(1)(a)-(g) could ask for any information which relates to matters raised in a report made under sections 41, 43 or 45. The reporting entity must provide the information, to the extent that it has it. Persons in paragraphs 49(1)(a)-(g) could however only ask for documents that are relevant to the matter which is the subject of the report provided under sections 41, 43 or 45 under the AML/CTF Act.
- 12 Failure to comply with a notice under subsection 49(1) is a civil penalty provision (subsection 49(3)).
- 13 Subsection 123(3) of the AML/CTF Act provides that a reporting entity that gives information or produces a document to a person under subsection 49(1) must not disclose to anyone else that the information has been given or the document has been produced, or any other information from which the person to whom the information is disclosed could reasonably be expected to infer that that information or document had been produced.
- 14 A reporting entity who breaches subsection 123(3) would have committed an offence under subsection 123(11) of the AML/CTF Act.
- 15 The penalty for this offence is imprisonment for 2 years or 120 penalty units or both. 'Penalty unit' is defined in section 4AA of the *Crimes Act 1914* as \$110.

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<sup>1</sup> Paragraphs 49(1)(h) and 49(1)(i) of the AML/CTF Act.

*Subsection 50(2) of the AML/CTF Act*

- 16 Subsection 50(2) of the AML/CTF Act states that if the AUSTRAC CEO or the Commissioner of Taxation has required information from a reporting entity under section 49 relating to the identity of the holder / signatory of a credit card account or a debit card account, of a card issued outside Australia, the AUSTRAC CEO or the Commissioner of Taxation may issue a further written notice to the reporting entity.
- 17 The AUSTRAC CEO or the Commissioner of Taxation may by written notice to the reporting entity, direct the reporting entity to give the card issuer a request to obtain information about the identity of holders of foreign credit cards and foreign debit cards.
- 18 The reporting entity must comply within 10 business days after the day on which the direction is given (subsection 50(3)).
- 19 Subsections 50(4) and 50(5) state that if the reporting entity gives the card issuer a request under subsection 50(2) as directed by the AUSTRAC CEO or the Commissioner of Taxation, the reporting entity must within 20 business days after the subsection 50(2) direction, or a longer period if the written notice allows a longer period to be given, report about the card issuer's response or lack of response to the request.
- 20 Section 5 of the AML/CTF Act provides that business day means a day other than a Saturday, a Sunday or a public or bank holiday in the place concerned.

*Subsections 161(2) and 162(2) of the AML/CTF Act*

- 21 Sections 161 and 162 of the AML/CTF Act provide for the AUSTRAC CEO to issue a notice requiring a reporting entity to appoint an external auditor to examine:
  - the reporting entity's capacity and endeavours to identify, mitigate and manage the risks that the reporting entity may reasonably face that the reporting entity's provision of designated services at a permanent establishment in Australia might involve or facilitate money laundering or financing of terrorism (subsection 161(2));
  - the reporting entity's compliance with the AML/CTF Act, regulations or AML/CTF Rules,<sup>2</sup> or one or more specified aspects<sup>3</sup> of the reporting entity's compliance with the obligations contained therein (subsection 162(2)).
- 22 The power to issue a notice to appoint an external auditor under subsections 161(2) and 162(2) only applies if the conditions in subsections 161(1) and 162(1) are satisfied, that is, the AUSTRAC CEO has reasonable grounds to suspect:
  - that a reporting entity has not taken, or is not taking appropriate action to identify, mitigate and manage the risk that the reporting entity may reasonably face that the reporting entity's provision of designated services at a permanent establishment in Australia might involve or facilitate money laundering or financing of terrorism (subsection 161(1));
  - that a reporting entity has contravened or is contravening or is proposing to contravene the AML/CTF Act, the regulations or the AML/CTF Rules (subsection 162(1)).

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<sup>2</sup>Subparagraph 162(2)(b)(i) of the AML/CTF Act.

<sup>3</sup>Subparagraph 162(2)(b)(ii) of the AML/CTF Act.

*Reasonable grounds to suspect*

- 23 *Public Legal Interpretation No. 6– Suspect transactions and suspicious matter reports* (PLI 6) sets out AUSTRAC's views on the tests to be applied when determining when there are reasonable grounds for a person to form a suspicion. These arguments are repeated here.
- 24 'Reasonable grounds to suspect' indicates that the test is both objective and subjective. That is, a person 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.
- 25 The High Court in *Gypsy Jokers Motorcycle Club Inc. v Commissioner of Police*<sup>4</sup> 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.

- 26 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.
- 27 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*<sup>5</sup> 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 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 ...".

- 28 In brief reasons DM Campbell J said at 228:

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<sup>4</sup> (2008) 242 ALR 191.

<sup>5</sup> [2006] SASC 353.

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.

- 29 The other members of the Court agreed.<sup>6</sup>
- 30 AUSTRAC therefore concludes that a reasonable belief contains a subjective element and an objective element. The test AUSTRAC would in practice adopt would be whether a reasonable person would form the suspicion, (that is, whether a reasonable person would form the subjective element of the test).

*What must a notice specify*

- 31 Subsections 161(3) and 162(3) provide that the notice must specify the matters to be covered by the audit, and the form of the audit report and the kinds of details to be contained in the report.
- 32 Subsection 161(4) provides that the matters that may be included in a notice issued under subsection 161(2) are either or both of the following:
- an assessment of the risks that the reporting entity may reasonably face that the reporting entity's provision of designated services at a permanent establishment in Australia might involve or facilitate money laundering or financing of terrorism ((paragraph 161(4)(a));
  - an assessment of what the reporting entity will need to do or continue to do to identify, mitigate and manage the risks that the reporting entity may reasonably face by providing designated services at a permanent establishment in Australia that might involve or facilitate money laundering or financing of terrorism ((paragraph 161(4)(b)).
- 33 Subsection 162(4) provides that the matters that may be included in a notice issued under subsection 162(2) are either or both of the following:
- an assessment of the reporting entity's existing capacity to comply with the AML/CTF Act, regulations, and AML/CTF Rules ((paragraph 162(4)(a));
  - an assessment of what the reporting entity will need to do to continue to comply with the AML/CTF Act, regulations, and AML/CTF Rules ((paragraph 162(4)(b)).
- 34 Subsections 161(7) and 162(7) of the AML/CTF Act state that failure to comply with a notice issued under subsections 161(2) and 162(2) is an offence. Failure to comply with a notice is also a civil penalty provision: subsections 161(8) and (9) and 162(8) and (9).
- 35 Section 164A of the AML/CTF Act provides that decisions made under section 161 are reviewable by the Administrative Appeals Tribunal. This is not the case for decisions under section 162 of the AML/CTF Act.

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<sup>6</sup> [2006] SASC 353 at 360.

*Subsection 165(2) of the AML/CTF Act*

- 36 Subsection 165(2) of the AML/CTF Act states that the AUSTRAC CEO may, by written notice to a reporting entity, require the reporting entity to carry out a money laundering and terrorism financing risk assessment and prepare a report setting out the results of the assessment.
- 37 Subsection 165(1) states that a notice under subsection 165(2) may only be issued if the AUSTRAC CEO is satisfied that:
- a reporting entity has not carried out a money laundering and terrorism financing risk assessment; or
  - a reporting entity has carried out a risk assessment that has ceased to be current; or
  - a reporting entity has carried out a risk assessment that is inadequate.
- 38 The reporting entity must give the AUSTRAC CEO a copy of the report within the period specified in the notice or within a longer period as allowed by the AUSTRAC CEO: subparagraphs 165(2)(c)(i) and (ii).
- 39 AUSTRAC is of the view that the AUSTRAC CEO may therefore provide an extension after the notice has been issued under subparagraph 165(2)(c)(ii).
- 40 Subsection 165(3) states that failure to provide the risk assessment and provide the written report is an offence.
- 41 Failure to comply with the requirements of the notice is also a civil penalty provision: subsections 165(4) and (5) of the AML/CTF Act.

*Subsection 167(2) of the AML/CTF Act*

- 42 Subsection 167(2) of the AML/CTF Act states that authorised officers may give a person who is or has been a reporting entity; or an officer, employee or agent of a reporting entity; or whose name is or has been entered on the Register of Provider of Designated Remittance Services, written notice requiring them to give the authorised officer within a specified period and by specified manner any such information or documents specified in the notice.
- 43 Subsection 167(1) states that this power may be exercised where an authorised officer believes on reasonable grounds that the:
- person is or has been a reporting entity; or
  - person is or has been an officer, employee or agent of a reporting entity; or
  - person's name is or has been entered on the Register of Providers of Designated Remittance Services; and
  - person has information or documents that are relevant to the operation of the AML/CTF Act, the regulations or the AML/CTF Rules.
- 44 Section 145 provides that the AUSTRAC CEO may appoint members of AUSTRAC staff or other persons whose services are made available to the AUSTRAC CEO under subsection 225(3) to be authorised officers.
- 45 Subsection 225(3) provides that persons who may be appointed authorised officers include officers and employees of Commonwealth authorities; Australian Federal Police members; State or Territory officers and employees; officers and employees of State or Territory authorities and State or Territory police force or police service members.

- 46 Failure to provide the information or documents is an offence under subsection 167(3). The penalty that applies is imprisonment for 6 months or 30 penalty units or both.
- 47 Subsection 167(4) provides that the notice must set out the effect of subsection 167(3) (a person commits an offence if they fail to comply with the notice), section 136 (giving false or misleading information) and section 137 (producing false or misleading documents).

*Part 15, Division 9 of the AML/CTF Act*

- 48 Subsection 202(1) states that the AUSTRAC CEO and persons authorised to give notices under that subsection may give a written notice to a person, if the matters set out in subsection 202(2) are satisfied. Persons authorised under subsection 202(1) to give notices are the AUSTRAC CEO, an authorised officer, the Commissioner or a Deputy Commissioner of the Australian Federal Police (AFP), a senior executive AFP employee, the Chief Executive Officer of the Australian Crime Commission (ACC), an examiner of the ACC, and an approved examiner under the *Proceeds of Crime Act 2002* (POC Act).
- 49 AUSTRAC's view is that 'authorised officer' in paragraph 202(1)(b) refers to an officer authorised by the AUSTRAC CEO under section 145 of the AML/CTF Act. This is consistent with the meaning of 'authorised officer' as defined in section 5 of the AML/CTF Act and includes the AUSTRAC CEO.
- 50 Subsection 202(2) states a written notice may be given to a person who the AUSTRAC CEO (or one of the persons authorised) believes on reasonable grounds to be a reporting entity, to provide information or documents, relevant to any of the following:
- (a) determining whether the person provides designated services at or through a permanent establishment of the person in Australia;
  - (b) ascertaining details relating to any permanent establishment of the person in Australia;
  - (c) ascertaining details relating to designated services provided by the person at or through a permanent establishment of the person in Australia.
- 51 AUSTRAC (or one of the persons authorised) may therefore serve a notice on a person it believes on reasonable grounds to be a reporting entity.
- 52 In *George v Rockett* (1970) 170 CLR 104, the seven judges of the High Court found in a joint judgment at 115 that:

In considering the sufficiency of a sworn complaint to show reasonable grounds for the suspicion and belief to which s679 refers, it is necessary to bear in mind that suspicion and belief are different states of mind...and the section prescribes distinct subject matters of suspicion on the one hand and belief on the other. The Justice must be satisfied that there are reasonable grounds for suspecting that 'there is in any house, vessel, vehicle, aircraft, or place - anything' and that there are reasonable grounds for believing that the thing 'will...afford evidence as to the commission of any offence...'

...Suspicion as Lord Devlin said in *Hussien v Chong Fook Kam* (1970) AC 942 at 948, in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove.' The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown...

...Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture...

- 53 The test AUSTRAC therefore adopts when determining whether it has reasonable grounds to believe a person is a reporting entity, is that there are affirmative reasons for it to consider that the person is a reporting entity.

- 54 AUSTRAC notes that the document or information required for production must be relevant to one of the matters in paragraph 50.
- 55 A reporting entity may create documents which concern broader aspects of its operations of peripheral relevance only to the designated services that it provides. For example, profit and loss statements, and employee and personnel records. Further, a reporting entity may have commercial in confidence, or other, obligations in relation to its product / disclosure documents which are not part of its designated service records.
- 56 AUSTRAC may request such documents if they are relevant to details of a designated service, a permanent establishment of the person in Australia, and in determining whether a person provides designated services in Australia. AUSTRAC considers that if the documents/information are relevant to establishing any of the matters referred to at paragraph 50 they should be produced in response to the notice. AUSTRAC considers that production of such documents in response to the notice will override any obligations of commercial in confidence which may also exist in relation to relevant documents. Recipients of a section 202 notice may however refuse to provide documents or information on the basis that it is subject to legal professional privilege (LPP).<sup>7</sup>
- 57 Subsection 202(3) states that the AUSTRAC CEO or other authorised officer may not issue a notice unless the person reasonably believes that the notice is required:
- (a) to determine whether to take any action under the AML/CTF Act; or
  - (b) in relation to proceedings under the AML/CTF Act.
- 58 The grounds on which a section 202 notice can be issued are therefore limited. The person issuing the notice must firstly, have a 'reasonable belief' that the notice is required, and secondly, there must be action or proceedings contemplated under the AML/CTF Act.
- 59 AUSTRAC's view is that 'action' under the AML/CTF Act would include enforcement of a civil penalty provision for example by giving a remedial direction under section 191, or seeking an enforceable undertaking under section 197 of the AML/CTF Act.
- 60 The term 'proceedings' was considered by the High Court in *Latter -v- The Council of the Shire of Muswellbrook* [1936] HCA 70; (1936) 56 CLR 422. Three justices of the High Court held that 'proceedings' under an enactment are the required procedural steps taken in applying for a determination of rights or entitlement to relief. While two of the justices held that this could include steps leading up to the determination, they did not find that administrative measures such as filing an intention to bring proceedings formed part of those proceedings.
- 61 AUSTRAC is therefore of the view that 'proceedings' refers to any court or tribunal action including for enforcement of civil penalty provisions or enforceable undertakings, contemplated under the AML/CTF Act.

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<sup>7</sup> Section 242 of the AML/CTF Act provides that the AML/CTF Act does not affect the law relating to LPP.

### *Service of a notice*

62 Section 202 provides that an authorised person may 'give' a notice. Subsection 28A(1) of the *Acts Interpretation Act 1901* (Acts Interpretation Act) provides that where the word 'give' is used to describe service of documents, the documents may be served in the following way:

- on a natural person - by delivering it to the person personally or leaving it at or sending it by pre-paid post to the address of the place of residence or person last known to the person serving the document (paragraph 28A(1)(a));
- on a body corporate – by leaving it at or sending it by pre-paid post to the head office, registered office or principal office of the body corporate (paragraph 28A(1)(b)).

63 Service on a body corporate would therefore be at the head office or the principal office of the body corporate. Similarly, where a notice is to be served on members of a designated business group (DBG), the notice is to be sent to the Nominated Contact Officer of the DBG, if the members of the DBG have agreed that the nominated contact officer is to accept service on their behalf.<sup>8</sup>

64 Under subsection 29(1) of the Acts Interpretation Act service by post is deemed to have been effected at the time at which the letter would have been served in the ordinary course of post.

65 AUSTRAC considers that formal service does not include service by facsimile or electronic transmission.

### *Contents of a notice*

66 Section 203 of the AML/CTF Act sets out the required contents of notices to reporting entities which are issued under section 202. The person who gives the notice (that is, the AUSTRAC CEO or one of the other officers referred to) must state the basis on which the person believes that the notice is required. That is, the notice must state that the notice is required in order to assist the AUSTRAC CEO or one of the other officers referred to, to determine whether to take any action under the Act or in relation to proceedings under the Act. AUSTRAC in appropriate circumstances may choose to rely on both limbs of paragraph 203(a).

67 Other matters to be included in the notice are set at paragraphs 203(b)–(g) and include:

- the name of the person to whom the notice is addressed;
- the kind of information or documents required to be produced;
- the form and manner in which the information or documents are to be produced;
- the notice must state that the information or documents must be produced within 14 days after the notice is given;
- the notice must state the effect of section 204 which sets out the consequences for breach of a notice;

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<sup>8</sup> Designated business group is defined at section 5 of the AML/CTF Act and Chapter 2 of the AML/CTF Rules.

- if the notice states that information about the notice must not be given, the notice must state the effect of section 207 which sets out the consequences of disclosing the existence or nature of a notice where the notice has specified that this must not be disclosed.
- 68 AUSTRAC considers that the reference in paragraph 203(e) to 14 days does not refer to the concept of 'business day' as defined in section 5 of the AML/CTF Act. As set out above, 'business day' is defined in section 5 as 'a day other than a Saturday, a Sunday or a public or bank holiday in the place concerned'.
- 69 Subsection 36(2) of the Acts Interpretation Act provides that where the last day of any period prescribed or allowed by an Act for the doing of anything falls on a Saturday, on a Sunday or on a day which is a public holiday or a bank holiday in the place in which the thing is to be or may be done, the thing may be done on the first day following which is not a Saturday, a Sunday or a public holiday or bank holiday in that place.
- 70 In practise it is likely that the giving of the notice will occur on a business day such that the day on which the information or documents will be due 14 days later is also a business day. AUSTRAC considers that the Acts Interpretation Act applies, such that where a response to a notice is due on a Saturday, Sunday or a day which is a public holiday or a bank holiday, the information or documents will be due to be returned on the first business day after the Saturday, Sunday, public holiday or bank holiday.
- 71 The AML/CTF Act does not provide for an extension of time to respond to the notice be given. Paragraph 203(e) states that the notice must state that the information or documents must be produced within 14 days after the notice is given. AUSTRAC is not given power to vary this time period.

#### *Breach of notice*

- 72 Section 204 refers to consequences of breach of a notice requirement. It is an offence to fail to comply with a notice issued under subsection 202(2) of the AML/CTF Act. The offence is punishable by imprisonment for six months or 30 penalty units.
- 73 Section 205 of the AML/CTF Act states that a person is not excused from giving information or documents under a notice on the ground that information or documents might tend to incriminate them.
- 74 Subsection 205(2) of the AML/CTF Act states that the information given or document produced is not admissible against the person, other than:
- in civil proceedings under the AML/CTF Act or proceedings under the POC Act:
  - in criminal proceedings for an offence under the AML/CTF Act or an offence under the *Criminal Code Act 1995* (Cth) (the Criminal Code) that relates to the AML/CTF Act.
- 75 Whilst subsection 205(2) provides an immunity it is extremely limited and does not apply in relation to civil or criminal matters that 'relate' to the AML/CTF Act, POC Act or Criminal Code as appropriate. It is difficult to see what other purposes the notices may 'relate' to given the requirements for content of a notice under section 203 of the AML/CTF Act. Therefore, the protection from civil and criminal proceedings afforded by section 205 is necessarily limited.

- 76 AUSTRAC considers that 'information' is to be distinguished from 'documents'. 'Information' is not defined in the AML/CTF Act and therefore has its ordinary meaning. The Macquarie Dictionary<sup>9</sup> relevantly defines information as:

Information

1. knowledge communicated or received concerning some fact or circumstance; news:  
*\*Numerous Australian writers have also raised similar objections to the way television news increasingly blurs the boundaries between information and entertainment. --*  
CATHARINE LUMBY, 1999.
2. knowledge on various subjects, however acquired.
3. the act of informing.
4. the state of being informed.

- 77 'Information' in AUSTRAC's view permits the conduct of an interview or other form of oral or face to face communication. AUSTRAC relies by way of contrast on the definition of 'document' in section 25 of the Acts Interpretation Act as referring to any paper or other material on which writing, marks, figures, symbols, sounds, images are recorded or able to be reproduced. AUSTRAC considers that Part 15 Division 9 permits AUSTRAC to require the production of a document including downloading or creation of a document that tabulates or summarises information contained, for example, in a database or other record.
- 78 Section 206 of the AML/CTF Act states that if a person, officer, employee or agent provides information under a notice, then for the purposes of Division 400 and Chapter 5 of the Criminal Code, the person is taken not to have been in possession of that information at any time.
- 79 Section 206 therefore protects a person who gives information under a subsection 202(2) notice from being regarded as in possession of the information for the purposes of Division 400 (offences of money laundering) and Chapter 5 (offences against the security of the Commonwealth, including the financing of terrorism).
- 80 Section 207 of the AML/CTF Act states that it is an offence to disclose the existence or nature of a notice, if the notice has specified that information about the notice must not be disclosed. Under subsection 207(2) a person may disclose the existence or nature of a notice to a legal practitioner for the purpose of obtaining legal advice. Under subsection 207(3) of the AML/CTF Act a reporting entity may disclose the existence or nature of the notice to other members of that reporting entity's designated business group.
- 81 The offence under section 207 does not apply unless the notice specifically states that information about the notice must not be disclosed. However even if the notice does so specify, a reporting entity to whom the notice is directed may disclose its existence to the persons referred to in subsections 207(2) and (3).
- 82 AUSTRAC considers that section 202 does not abrogate a person's right to claim legal professional privilege over information or documents the subject of a notice. This view is consistent with section 242 of the AML/CTF Act which states that the AML/CTF Act does not affect the law relating to legal professional privilege. This means that persons responding to a notice must clearly identify any documents which fall within the notice over which a claim is sought to be made, and the basis on which a claim is pressed.

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<sup>9</sup> The Macquarie Dictionary Online © 2009 Macquarie Dictionary Publishers Pty Ltd.

## **Notices to cash dealers under the FTR Act**

83 AUSTRAC's powers to serve notices on cash dealers are set out in the following sections in the FTR Act:

- subsection 16(4) – notice to a cash dealer to give the AUSTRAC CEO further information relating to information contained in a report of a suspect transaction
- subsection 24(5) – notice to a cash dealer to give AUSTRAC details of persons who open accounts in false names etc
- section 27E – notice to cash dealer, solicitor, solicitor corporation or a partnership of solicitors to give access to business premises.

### **Subsection 16(4) notice**

84 Subsection 16(4) of the FTR Act provides that the AUSTRAC CEO, a relevant authority,<sup>10</sup> or an investigating officer, may request a cash dealer to provide further information to the AUSTRAC CEO regarding information given to AUSTRAC under subsections 16(1) or 16(1A) (reports of suspect transactions) of the FTR Act. An investigating officer may only request further information if the officer is carrying out an investigation arising from or relating to the information contained in the report.

85 A subsection 16(4) notice may only be issued to a cash dealer that has made a report under subsections 16(1) or 16(1A) of the FTR Act. The notice must specify the further information to be provided. The cash dealer is only required to provide the information to the extent that the cash dealer has it.

86 Subsection 16(5AA) of the FTR Act provides that a cash dealer that provides further information under subsection 16(4) must not disclose to anyone else that the information has been given, or any other information from which the person to whom the information is disclosed could reasonably be expected to infer that that information had been given.

87 A cash dealer who breaches subsection 16(5AA) would have committed an offence under subsection 16(5B) of the FTR Act.

88 The penalty for the offence is imprisonment for no more than 2 years or a fine or both. The maximum fine that may be imposed is the maximum term of imprisonment (in months) multiplied by 5 and then multiplied by \$110 (the amount of a penalty unit).

### **Subsection 24(5) notice**

89 Subsection 24(5) of the FTR Act requires a cash dealer to make a record where a person discloses to a cash dealer a different name or different names by which the person is commonly known, and to provide a copy of that record to the AUSTRAC CEO on written request.

90 Subsection 24(6) of the FTR Act provides that a person commits an offence if they refuse to comply with a notice given to a person under subsection 24(5). A penalty of imprisonment

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<sup>10</sup> Subsection 16(6) defines 'relevant authority' as the Commissioner of the AFP, the Integrity Commissioner, the CEO of the Australian Crime Commission, the Commissioner of Taxation, or the CEO of Customs. Subsection 16(6) defines 'investigating officer' as a taxation or customs officer, an AFP member, a staff member of the ACLEI, or an examiner or member of staff of the ACC.

for not more than 2 years or 120 penalty units or both for an individual, or 600 penalty units for a body corporate, applies in relation to the offence.

### **Section 27E notice**

- 91 Subsection 27E(1) of the FTR Act provides that the AUSTRAC CEO is able, by written notice, to require a cash dealer, a solicitor, solicitor corporation or a partnership of solicitors to give the authorised officer named in the notice access on the day and during the hours stated in the notice to the business premises described in the notice.
- 92 Section 3 defines an authorised officer to mean an AUSTRAC member of staff whose appointment under section 27A of the FTR Act by the AUSTRAC CEO for the purposes of the FTR Act is in force. This is comparable with the meaning of 'authorised officer' as defined in the AML/CTF Act.
- 93 A notice may only be issued under subsection 27E(1) for the purpose of monitoring compliance by a cash dealer (under section 27C of the FTR Act) or a solicitor, solicitor corporation, or partnership of solicitors (under section 27D of the FTR Act). A subsection 27E(1) notice cannot be used to gain access to business premises for any other purpose.
- 94 Sections 27C and 27D of the FTR Act prescribes what information an authorised officer is entitled to inspect. A summary of the requirements of sections 27D and 27E is reproduced in the Legislative Attachment at the end of this PLI.
- 95 A section 27E notice would therefore only be given to a cash dealer, a solicitor, solicitor corporation or a partnership of solicitors to monitor compliance with the following sections of the FTR act:
- Sections 7, 16 and 17B (cash dealer);
  - Section 8 (cash dealer who is an approved cash carrier);
  - Section 20 (cash dealer) or any undertaking given under section 8A (identifying cash dealer); and/or
  - Sections 24C and 24D (cash dealer who is a bullion seller);
  - Section 15A (solicitor-related entities).
- 96 Subsection 27E(2) of the FTR Act provides that the hours of access specified in a section 27E notice must occur during business hours of the premises. Subsection 27E(3) provides that a cash dealer, a solicitor, solicitor corporation or a partnership of solicitors must comply with a notice issued under subsection 27E(1).
- 97 Paragraph 28(1)(b) of the FTR Act provides that a person commits an offence if they refuse or fail to comply with a notice given to a person under subsection 27E(3). A penalty of imprisonment for not more than 2 years or 120 penalty units for an individual, or 600 penalty units for a body corporate, or both, applies in relation to the offence.

## Related Information

### AUSTRAC publications

The *AUSTRAC Public Legal Interpretation No. 4 of 2008 – What constitutes a reporting entity* provides AUSTRAC's views on who is a provider of a 'designated service' and therefore who is a 'reporting entity'.

The *AUSTRAC Public Legal Interpretation No. 6 – Suspect transactions and suspicious matter reports* provides AUSTRAC's view on how the tipping off provisions in the AML/CTF Act affect reporting entities.

The *AUSTRAC Public Legal Interpretation No. 11 - International funds transfer instructions and electronic funds transfer instructions* provides AUSTRAC's view on the powers of the AUSTRAC CEO to give notices to entities such as beneficiary or ordering institutions involved in electronic funds transfer instructions including under Part 5 of the AML/CTF Act.

AUSTRAC Public Legal Interpretations can be accessed via AUSTRAC's website at: [www.austrac.gov.au/pli.html](http://www.austrac.gov.au/pli.html)

The *AUSTRAC Regulatory Guide* contains guidance on obligations under the AML/CTF Act. Chapter 9 contains information regarding reporting entity's reporting obligations to AUSTRAC. Chapter 11 contains information regarding the designated services set out in section 6 of the AML/CTF Act. The AUSTRAC Regulatory Guide is available on the AUSTRAC website at: [www.austrac.gov.au/regulatory\\_guide.html](http://www.austrac.gov.au/regulatory_guide.html).

AUSTRAC has release *Guidance note 08/04 Record-keeping requirements* to provide assistance to reporting entities regarding their record-keeping obligations under the AML/CTF Act and certain chapters of the AML/CTF Rules in *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)*.

AUSTRAC's Enforcement Policy sets out AUSTRAC's current policy for the use of its enforcement powers under both the FTR Act and the AML/CTF Act, including failure to respond to notices. AUSTRAC's Enforcement Policy is available on the AUSTRAC website at: [http://www.austrac.gov.au/enforcement\\_policy.html](http://www.austrac.gov.au/enforcement_policy.html)

## Legislation Attachment

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](http://www.comlaw.gov.au/comlaw/management.nsf/lookupindexpagesbyid/IP200627290?OpenDocument)

The *Financial Transaction Reports Act 1988* is available in consolidated form at: <http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/2F9BC997FF6B9A4BCA2575D600154590?OpenDocument>

A summary of provisions of sections 27C and 27D of the FTR Act referred to in the PLI are set out below:

Type of reporting entity	Monitoring compliance under which section of the FTR Act?	Type of information which can be inspected	Relevant provision in the FTR Act
Cash dealer	Cash dealer's compliance with: <ul style="list-style-type: none"><li>▪ Section 7</li><li>▪ Section 16; and</li><li>▪ Section 17B</li></ul>	(a) any records kept at, or accessible from, the premises that relate to the dealer's obligations under sections 7, 16 and 17B; and  (b) any system used by the cash	Subsection 27C(2)

		<p>(c) dealer at the premises for keeping those records; and any reports retained at, or accessible from, the premises under sections 7, 16 and 17B; and</p> <p>(d) any system used by the cash dealer in connection with:</p> <p>(i) preparing reports under those sections; or</p> <p>(ii) sending such reports to the AUSTRAC CEO; or</p> <p>(iii) retaining such reports.</p>	
Cash dealer	Cash dealer's compliance with: <ul style="list-style-type: none"> <li>▪ Section 20; and</li> <li>▪ Any undertaking given under section 8A.</li> </ul>	<p>(a) records of account information and signatory information kept at, or accessible from, the premises; and</p> <p>(b) any system used by the dealer at those premises for keeping such records.</p>	Subsection 27C(3)
Cash dealer who is an approved cash carrier	Cash carrier's record-keeping obligations referred to in section 8	<p>(a) records containing reportable details (within the meaning of that section) of significant cash transactions to which the cash dealer is a party that are kept at, or accessible from the premises; and</p> <p>(b) any system used by the dealer at those premises for keeping such records.</p>	Subsection 27C(2A)
Cash dealer who is a bullion seller	Bullion seller's compliance with sections 24C and 24D	<p>(a) records of information compiled or obtained in the course of obtaining an identification record for a party to a bullion transaction, being records kept at, or accessible from, the premises; and</p> <p>(b) any system used by the bullion seller at the premises for keeping such records.</p>	Subsection 27C(4)
Solicitor/solicitor corporation or a partnership of solicitors	Compliance with section 15A	<p>(a) any records kept at, or accessible from the premises that relate to the obligations of the solicitor, corporation or partnership under section 15A; and</p> <p>(b) any system used by the solicitor, corporation or partnership at the premises for keeping those records; and</p> <p>(c) any reports retained at, or accessible from, the premises under that section; and</p> <p>(d) any system used by the solicitor, corporation or partnership in connection with:</p> <p>(i) preparing reports under section 15A;</p> <p>(ii) sending such reports to the AUSTRAC CEO; or</p> <p>(iii) retaining such reports.</p>	Subsection 27D(2)

## 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](mailto:help_desk@austrac.gov.au)
- telephone 02 9950 0827 or 1300 021 037 (a local call within Australia).

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