Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill 2019

Cat Barker
Foreign Affairs, Defence and Security Section

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House: House of Representatives
Portfolio: Home Affairs
Commencement: Refer to page 5 of this Digest for details.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the Federal Register of Legislation website.

All hyperlinks in this Bills Digest are correct as at January 2020.
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The Bills Digest at a glance

A statutory review of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (the AML/CTF Act) and the associated Rules and Regulations was completed in April 2016. The review examined the operation of the anti-money laundering and counter-terrorism financing (AML/CTF) regime, the extent to which the policy objectives of the regime remain appropriate, and whether it remained appropriate for achieving those objectives. The review also took account of the findings and recommendations of the Financial Action Task Force’s (FATF) 2015 evaluation of Australia’s compliance with the international AML/CTF standards, which was completed while the review was underway.

The Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill 2019 (the Bill) includes the second set of amendments proposed in response to the review recommendations.

The Bill will amend the AML/CTF Act to:

- update provisions relating to reporting entities’ customer due diligence obligations, including by expanding the circumstances under which they may rely on procedures undertaken by third parties
- place stricter controls around correspondent banking relationships
- update and simplify the ‘tipping off’ offence (the offence is intended to prevent information about a suspicious matter report made by a reporting entity reaching the person to whom the report related)
- update secrecy offences and provisions regulating access to Australian Transaction Reports and Analysis Centre (AUSTRAC) information and
- consolidate currently separate reporting requirements for cross-border movements of physical currency and bearer negotiable instruments.

The Government estimates that the amendments to expand the circumstances in which reporting entities may rely on customer due diligence conducted by third parties will save industry $3.1 billion in compliance costs over ten years.

The Bill will also:

- amend provisions in Division 400 of the Criminal Code Act 1995 (Criminal Code) that relate to the money laundering offences in that Division, to address barriers to successful prosecution of those offences and
- amend the Australian Federal Police Act 1979 (AFP Act) to insert an offence of dishonestly representing that a police award has been conferred.

Non-government parties and independents do not appear to have publicly stated their positions on the Bill as at the date of this Digest.

The Bill has been referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 7 February 2020. While raising some specific issues with aspects of the Bill, most submissions made to the inquiry were supportive of the measures in the Bill.
Purpose and structure of the Bill
The Bill contains a single Schedule of seven Parts.

The purpose of Parts 1–5 of Schedule 1 of the Bill is to amend the AML/CTF Act to:

• update provisions relating to reporting entities’ customer due diligence obligations, including by expanding the circumstances under which they may rely on procedures undertaken by third parties (Part 1)
• place stricter controls around correspondent banking relationships (Part 2)
• update and simplify the ‘tipping off’ offence (the offence is intended to prevent information about an suspicious matter report made by a reporting entity reaching the person to whom the report related) (Part 3)
• update secrecy offences and provisions regulating access to AUSTRAC information (Part 4) and
• consolidate currently separate reporting requirements for cross-border movements of physical currency and bearer negotiable instruments (Part 5).


The purpose of Part 6 of Schedule 1 of the Bill is to amend provisions in Division 400 of the Criminal Code that relate to the money laundering offences in that Division, to address barriers to successful prosecution of those offences.

The purpose of Part 7 of Schedule 1 is to amend the AFP Act to insert an offence of dishonestly representing that a police award has been conferred.

Commencement details
Sections 1–3 of the Bill will commence on Royal Assent.

Parts 1–4 of Schedule 1 will commence on a day or days to be fixed by proclamation or six months after Royal Assent, whichever occurs first.

Part 5 of Schedule 1 will commence on proclamation or 18 months after Royal Assent, whichever occurs first.

Parts 6 and 7 of Schedule 1 will commence the day after Royal Assent.

Background¹

International anti-money laundering and counter-terrorism financing framework
FATF is an intergovernmental body established to develop and promote national and international policies to combat money laundering and terrorist financing. It was established in 1989 by the Group of 7 (G7) and Australia has been a member since 1990.²

The FATF Recommendations, first issued in 1990 and fully revised most recently in 2012, set the international benchmark for money laundering and terrorist financing counter measures.³ While

¹ Parts of this section of the Digest have been reproduced, with some adaptations, from C Barker, Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017, Bills digest, 47, 2017–18, Parliamentary Library, Canberra, 25 October 2017.
not binding under international law, they are supported by leading intergovernmental institutions such as the G20, United Nations, World Bank and the International Monetary Fund. Monitoring of member jurisdictions through a system of mutual evaluation and formalised processes for identifying high-risk or non-cooperative countries provide incentives for countries to fully implement the FATF Recommendations.

Some of the key requirements under the FATF Recommendations are for countries to:

- criminalise money laundering and terrorist financing and enable the freezing, restraint and recovery of associated funds or assets
- establish a financial intelligence unit (FIU) that serves as a national centre for the collection, analysis and dissemination of information about potential money laundering or terrorist financing
- require financial institutions and other ‘designated non-financial businesses and professions’ (DNFBPs, such as casinos, real estate agents, legal professionals and accountants) to undertake thorough customer due diligence and maintain proper records
- require financial institutions and DNFBPs to report suspicious transactions to the FIU
- require financial institutions and DNFBPs to develop programs against money laundering and terrorist financing
- ensure financial institutions are subject to adequate regulation and supervision and that appropriate sanctions are available to deal with non-compliance
- establish measures to prevent the misuse of legal persons and legal arrangements by money launderers and
- afford each other the widest measure of international cooperation, including through mutual legal assistance, extradition, freezing, restraint and confiscation of funds and assets, and timely and constructive exchanges of information.

Amongst the 2012 revisions to the FATF Recommendations was the introduction of an enhanced and overarching risk-based approach aimed at better enabling countries and the private sector to target resources to higher risks and apply simplified measures to lower risks across the AML/CTF regime.

**Australia’s anti-money laundering and counter-terrorism financing regime**

The AML/CTF Act and related Rules provide the framework for the Australian regulatory regime aimed at preventing and detecting money laundering and terrorism financing. The AML/CTF Act applies to ‘designated services’ provided by financial institutions, bullion dealers, digital currency exchanges and the gambling industry, as well as designated remittance service providers. Australia’s AML/CTF regulator and financial intelligence unit, AUSTRAC, has summarised the key obligations under Australia’s AML/CTF regime as follows:

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6. FATF, FATF Recommendations, op. cit.

7. Ibid., recommendation 1.
Entities providing a ‘designated service’ under the AML/CTF Act are ‘reporting entities’ and are subject to a range of obligations. These include:

- enrolling with AUSTRAC as a reporting entity (and also registering if they provide a designated remittance service)
- conducting customer identification, verification, ongoing due diligence and transaction monitoring
- reporting suspicious matters, threshold transactions (cash or certain e-currency transactions of AUD10,000 or more) and international funds transfer instructions
- conducting a money laundering and terrorism financing risk assessment
- developing and maintaining an AML/CTF program
- conducting AML/CTF training for employees and agents
- making and retaining certain records for seven years.

The AML/CTF Act also requires the reporting of cross-border movements of physical currency (whether carrying, mailing or shipping) and, upon request, bearer negotiable instruments (BNIs) such as cheques, travellers cheques and money orders (when carried by an individual).  

Like the FATF Recommendations, Australia’s AML/CTF regime is premised on a risk-based approach to regulation.

AUSTRAC analyses the information contained in reports it receives, along with other inputs, to develop financial intelligence that it shares with partner agencies, including law enforcement agencies, the Australian Taxation Office and international counterparts.

**FATF evaluation and statutory review**

The Attorney-General’s Department completed a statutory review of the *AML/CTF Act* and the associated Rules and Regulations in April 2016. The review examined the operation of the AML/CTF regime, the extent to which the policy objectives of the regime remain appropriate, and whether it remained appropriate for achieving those objectives. The review also took account of the findings and recommendations of FATF’s 2015 evaluation of Australia’s compliance with the international AML/CTF standards, which was completed while the review was underway.

The review produced a long list of recommendations (84 in total), but many of them addressed only what should happen, not how. While the report provided a clear framework for modernising the AML/CTF regime, this meant there was significant work left to be done before some of the amendments could be brought before the Parliament.

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11. FATF, *Anti-money laundering and counter-terrorist financing measures: Australia: mutual evaluation report*, FATF, Paris, April 2015. The evaluation found Australia to be fully compliant with 12 standards, largely compliant with 12, partially compliant with ten and non-compliant with six. Of the 16 standards for which Australia was rated as partially compliant or non-compliant, 12 relate to the legislative framework.
The Government has been progressing consultations on and implementation of the review recommendations in phases, with the first of the resulting legislative amendments (including AML/CTF regulation of digital currency exchange providers) enacted by the Anti-Money Laundering and Counter-Terrorism Financing Amendment Act 2017 (the 2017 Act).

The Bill includes the second set of amendments proposed in response to the review recommendations. The ‘Key issues and provisions’ sections of this Digest include information on the FATF and statutory review recommendations each set of amendments seeks to address.

Committee consideration

**Senate Legal and Constitutional Affairs Legislation Committee**

The Bill has been referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 7 February 2020. Details of the inquiry are at the [inquiry homepage](#).

**Senate Standing Committee for the Scrutiny of Bills**

The Senate Standing Committee for the Scrutiny of Bills noted that the Bill includes several offence-specific defences to existing or proposed offences in the AML/CTF Act. The Committee recognised that the defendant will bear only an evidential rather than a legal burden in relation to those defences. However, it stated that it expected any reversal of the burden of proof to be justified (which had not been done in this instance) and questioned whether these defences met the criteria for offence-specific defences set out in the Government’s Guide to Framing Commonwealth Offences. Accordingly, the Committee requested the Minister’s advice as to why offence-specific defences are proposed (as opposed to including the matters as elements of the relevant offences).

The Minister’s response stated, in part:

> The offence-specific defences in the Bill allow Australian Transaction and Reports Analysis Centre information to be recorded, disclosed or otherwise used for specific purposes. The purpose of a defendant in recording, disclosing or otherwise using this information is a matter that is peculiarly within their knowledge. While external circumstances may be used as evidence of the existence of this underlying purpose, the defendant is the only person who can state with certainty their purpose in recording, disclosing or using that information.

> Noting this, it would be significantly more difficult and costly for the prosecution to prove that the defendant did not record, disclose or otherwise use the information for a permitted purpose, than it would be for the defendant to point to the permitted purpose underpinning their conduct.

The Minister undertook to table an Addendum to the Explanatory Memorandum to address the Committee’s concerns. An Addendum had not been tabled as at the date of this Digest.

The Committee noted the Minister’s advice and welcomed the decision to table an Addendum.

15. Scrutiny of Bills Committee, Scrutiny digest, 10, 2019, op. cit., p. 36.
Policy position of non-government parties/independents

Non-government parties and independents did not appear to have publicly stated their positions on the Bill as at the date of this Digest.

Position of major interest groups

Eight submissions to the Senate Legal and Constitutional Affairs Legislation Committee’s inquiry into the Bill had been published as at the date of this Digest.

The Synod of Victoria and Tasmania, Uniting Church in Australia supported the Bill, and Chartered Accountants Australia and New Zealand, the Institute of Public Accountants and the Australian Criminal Intelligence Commission (ACIC) supported particular amendments of relevance to those organisations.16

The Australian Financial Markets Association (AFMA) was broadly supportive of the measures in the Bill affecting its members and affiliates, but suggested several relatively minor amendments, some of which concerned the Rules. With respect to the Bill, AFMA considered that the requirements for written records and approval by senior officers relating to vostro accounts were too prescriptive and the timeframes too short; and that some of the exemptions to the tipping off offence should be broader.17

Illion considered that the amendments allowing for increased reliance on customer due diligence conducted by third parties could be problematic if the organisation completing the due diligence makes an error, and incorrect information is then relied upon by others. It also considered that the estimated savings of $3.1 billion in compliance costs associated with that measure appear overstated, and stated that it ‘would welcome further transparency on how these figures were derived’.18

The Financial Services Council (FSC) suggested several amendments. It suggested that the current broader protection (in existing section 38) for reliance on customer due diligence previously conducted by third parties be retained, arguing that attributing liability to relying entities would be likely to increase duplication and undermine the intention of the amendments. With respect to

16. Synod of Victoria and Tasmania, Uniting Church in Australia, Submission to Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill 2019 [Provisions], [Submission no. 5], n.d.; Chartered Accountants Australia and New Zealand, Submission to Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill 2019 [Provisions], [Submission no. 1], 10 December 2019 (supported allowing reporting entities to share information about suspicious matter reports with auditors, and expanding the circumstances in which reporting entities may rely on customer due diligence conducted by third parties); Institute of Public Accountants, Submission to Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill 2019 [Provisions], [Submission no. 2], 12 December 2019 (supported expanding the circumstances in which reporting entities may rely on customer due diligence conducted by third parties, expanding exemptions to the tipping off offence, changes to the framework for use and disclosure of AUSTRAC information, and deeming money or property provided by undercover officers as part of a controlled operation as proceeds of crime); Australian Criminal Intelligence Commission, Submission to Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill 2019 [Provisions], [Submission no. 7], 9 December 2019 (supported changes to the framework for use and disclosure of AUSTRAC information).

17. Australian Financial Markets Association (AFMA), Submission to Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill 2019 [Provisions], [Submission no. 3], 13 December 2019. A vostro account is an account a financial institution holds on behalf of another financial institution.

bearer negotiable instruments (BNIs), the FSC sought confirmation that obligations relating to reporting of cross-border movements do not apply to reporting entities, asked for the Explanatory Memorandum to include examples of specific BNIs, and sought an early indication of the information that reporting entities would need to provide AUSTRAC about receipt of monetary instruments into Australia. The FSC also considered that some of the exemptions to the tipping off offence should be broader.19

The Australian Remittances and Currency Providers Association made some general comments and a suggestion about the tipping off offence that were not specific to the amendments proposed to that offence in the Bill, stating:

Very particularly in instances of de-banking, banks take shelter under this provision for not having to provide any reason or not having to communicate at all while exiting relationships.

It would be wise and useful if this amendment provides explanation or some guidelines as to how to make good use of this provision by only applying this provision while a reportable matter exist [sic].20

Financial implications

The Explanatory Memorandum states that the Bill will be implemented within existing resources.21

The Government estimates that the amendments proposed in Part 1 of Schedule 1 of the Bill to expand the circumstances in which reporting entities may rely on customer due diligence conducted by third parties will save industry $3.1 billion in compliance costs over ten years.22

Statement of Compatibility with Human Rights

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill engages the rights to freedom of expression and to privacy, and that it is compatible with those rights on the basis that any limitations are reasonable, necessary and proportionate.23

Parliamentary Joint Committee on Human Rights

The Parliamentary Joint Committee on Human Rights had not yet reported on the Bill at the time of publication of this Digest.

Identification procedures (customer due diligence): key issues and provisions in Part 1 of Schedule 1

The requirement for reporting entities to carry out applicable customer identification procedures (to identify potential customers and verify that the information they provide is correct) is a core


22. Ibid. See further the Regulation Impact Statement appended to the Explanatory Memorandum.

23. The Statement of Compatibility with Human Rights can be found at page 5 of the Explanatory Memorandum to the Bill.
component of the AML/CTF framework. The amendments in Part 1 of Schedule 1 are proposed to address deficiencies identified in FATF’s most recent evaluation of Australia’s compliance with the FATF Recommendations and in the statutory review.

**Requirement to carry out customer identification**

**FATF evaluation and statutory review conclusions and recommendations**

The 2015 FATF evaluation found several deficiencies in Australia’s compliance with FATF Recommendation 10 (customer due diligence (CDD)), including that there were ‘no requirements relating to not proceeding or terminating the business relationship when CDD is unable to [be] complied with or to stop performing CDD if there is a risk of tipping off’.24 The FATF evaluation also criticised the lack of a requirement to consider submitting a suspicious matter report (SMR) where a service is not provided because a reporting entity cannot complete its customer due diligence.25

In light of FATF’s concerns, the statutory review recommended:

The AML/CTF Act should be amended to explicitly prohibit reporting entities from providing a regulated service if the applicable customer identification procedure cannot be carried out and require reporting entities to consider making a suspicious matter report in such situations.26

**Proposed amendments**

**Item 1** of Schedule 1 will repeal and replace section 32 of the AML/CTF Act. The amendments make it more explicit that a reporting entity must not start providing a designated service to a customer unless it has completed the applicable customer identification procedure, addressing the first part of the deficiency noted above. The same exceptions to the general prohibition (which is a civil penalty provision) will continue to apply.27

A note will be included under proposed subsection 32(1) with a cross-reference to section 41, under which SMRs are made. While not an explicit direction, the inclusion of the note will indicate to reporting entities that making an SMR is something that could be considered in such a circumstance.

**Reliance on procedures undertaken by third parties**

**FATF evaluation and statutory review conclusions and recommendations**

The 2015 FATF evaluation found several deficiencies in Australia’s compliance with FATF Recommendation 17 (reliance on third parties), in particular:

- It is not explicitly provided that the reporting entity relying on a third party remains ultimately responsible for CDD measures.

- There is no obligation to gather information in relation to the regulation and supervision of the third party located abroad or on the existence of measures in line with Recommendations 10 and 11 for the third parties located abroad and regulated by foreign laws.

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25. Ibid., p. 156.


27. If the Federal Court is satisfied that a person has contravened a civil penalty provision under the AML/CTF Act, it may order the person to pay a pecuniary penalty. The maximum penalty that may be imposed is 100,000 penalty units for a body corporate and 20,000 for other persons: AML/CTF Act, section 175 (see further on civil penalties Division 2 of Part 15).
The geographic risk has not been taken into account when determining in which countries the third parties can be based.\(^\text{28}\)

The statutory review concluded that Australia should implement a new model for reliance on third parties for CDD, based on the UK model and consistent with the FATF Recommendations. It recommended:

The AML/CTF Act should be amended to expand the ability of reporting entities to rely on customer identification procedures performed by a third party, subject to the following conditions:

(a) where the third party agrees to being relied on, the relying business remains ultimately responsible for the customer due diligence measures, and

(b) where the third party is outside of Australia, the third party is subject to appropriate regulation and similar customer identification requirements as are applicable in Australia.\(^\text{29}\)

**Proposed amendments**

Section 38 of the *AML/CTF Act* and the Rules currently allow reporting entities to rely on applicable customer identification procedures (ACIP) undertaken by other reporting entities in limited circumstances, specifically:

- where a licensed financial adviser arranges for a customer to receive a designated service from a second reporting entity (e.g. where a financial adviser refers a customer to a bank, the bank can rely on the ACIP carried out by the adviser), and

- where a customer of one member of a designated business group becomes a customer of another member of the designated business group, and is required to undergo the ACIP.\(^\text{30}\)

Reporting entities are not generally able to rely on CDD conducted outside Australia.\(^\text{31}\) The Explanatory Memorandum notes:

Feedback from reporting entities has indicated that existing section 38 of the Act is of limited utility because it does not enable reliance in Australia or overseas on an ACIP or other customer identification procedure undertaken by other related parties (such as other members of a ‘designated business group’ within the meaning of this Act, or a ‘related body corporate’ within the meaning of the *Corporations Act 2001*).\(^\text{32}\)

**Item 6** of Schedule 1 of the Bill will repeal and replace section 38 to expand the circumstances in which reporting entities may rely on CDD conducted by third parties without a formal agreement or arrangement being in place. In addition, **item 5** will insert proposed sections 37A and 37B, under which reporting entities will be able to rely on CDD conducted by third parties under a written agreement or arrangement.

\(^{28}\) FATF, *Anti-money laundering and counter-terrorism financing measures: Australia: mutual evaluation report*, op. cit., p. 22 (see also pp. 162–163). Australia was rated as partially compliant with FATF Recommendation 17.


\(^{30}\) Explanatory Memorandum, p. 16. See further: *Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (AML/CTF Act)*, section 6 (item 54 of table 1) and section 38; *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)*, Chapter 7.

\(^{31}\) Ibid.

\(^{32}\) Explanatory Memorandum, p. 16.
Reliance under a written agreement or arrangement

Proposed subsections 37A(1) and (2) will allow a reporting entity to enter into a written agreement or arrangement with another person under which the entity relies on ACIP or other prescribed customer identification procedures carried out by the other person. Such reliance will only be permitted where:

- at the time of entering into the agreement or arrangement, the reporting entity had reasonable grounds to believe that each of the requirements prescribed by the Rules were met
- the agreement or arrangement is in force
- the reporting entity has complied with proposed section 37B in relation to the agreement or arrangement (which will require the reporting entity to carry out assessments in accordance with the Rules and at times worked out in accordance with the Rules, and to record the outcome in writing within ten business days)
- the reporting entity is providing, or proposes to provide, a designated service to a customer
- the reporting entity has obtained information about the identity of the customer from the other person under the agreement or arrangement and
- the requirements prescribed by the Rules are satisfied.

The Explanatory Memorandum appears to indicate that the Rules will require that:

- where the other person is based in Australia, it must be another reporting entity and
- where the other person is based overseas, it must be ‘subject to appropriate AML/CTF regulation and supervision’, and the reporting entity must give consideration to the money laundering and terrorism financing (ML/TF) risks of the country in which the other person is based.  

The ability to rely on the agreement or arrangement will be suspended if, following an assessment required under proposed section 37B, the reporting entity does not have reasonable grounds to believe that each of the requirements prescribed by the Rules is being met, and will recommence if and when the reporting entity has reasonable grounds to believe that each of the requirements prescribed by the Rules is being met.  

A reporting entity will generally have reasonable grounds to believe that the relevant requirements are being met where they have previously reached this conclusion and they are not aware of any circumstances that could bring this conclusion into significant doubt. Situations where significant doubt could arise could include those where a significant breach, or a series of other breaches, is detected, there is relevant adverse media or adverse information about the third party relied upon, inadequate communication from the relied-upon third party in response to queries by the reporting entity, or there has been considerable change in money laundering or terrorism financing risk that would render current arrangements inappropriate.

...Throughout the suspension period, reporting entities will be required to undertake the ACIP themselves, or rely on a ‘CDD arrangement’ entered into with another party that has undertaken an ACIP or other customer identification procedure on the relevant customer in accordance with the requirements of section 37A.

34. Proposed subsections 37A(3) and (4).
35. Explanatory Memorandum, p. 16.
Proposed subsection 37B(2) will provide that proposed subsection 37B(1), which sets out the requirements to undertake and keep records of regular assessments of agreements and arrangements, is a civil penalty provision. The maximum penalty that may be imposed for a breach of a civil penalty provision in the AML/CTF Act is 100,000 penalty units for a body corporate and 20,000 for a person other than a body corporate.  

Reliance in other circumstances

Proposed section 38 will allow reporting entities to rely on ACIP or other prescribed customer identification procedures carried out by another person when providing designated services if:

- the reporting entity:
  - has obtained the resulting information about the identity of the customer from the other person and
  - has reasonable grounds to believe that it is appropriate to rely on that procedure in relation to that designated service, having regard to the risk it may reasonably face that the provision of the service might involve or facilitate money laundering or terrorism financing and
- the requirements prescribed in the Rules are satisfied.

As with proposed section 37A, this provision will allow for reliance on third parties based in Australia or overseas. Again the Explanatory Memorandum appears to indicate that the Rules will require that where the other person is based overseas, it must be ‘subject to appropriate AML/CTF regulation and supervision’, and the reporting entity must give consideration to the ML/TF risks of the country in which the other person is based.

The requirement for the reporting entity to turn its mind to whether the particular customer identification procedure carried out is appropriate to the particular service to be provided is consistent with the risk-based approach on which the AML/CTF framework is based.

Liability for breaches of requirement to carry out CDD before providing services

The Explanatory Memorandum states that reporting entities relying on written agreements or arrangements made under proposed section 37A would not be held liable for ‘isolated breaches’ of section 32 (which, as amended by item 1, will provide that reporting entities must not start providing a designated service to a customer unless it has carried out ACIP) committed by the other person relied on. However, if the reporting entity fails to undertake sufficient due diligence to ensure the other person’s procedures are adequate, it would lose the protection afforded by the agreement or arrangement and become liable under section 32.

The Explanatory Memorandum states that, in contrast, reporting entities will remain liable for breaches by the other person relied on under proposed section 38. However, this distinction is not reflected in the text of the two provisions.

Liability for customer identification procedures by agents

Section 37 of the AML/CTF Act provides that the principles of agency apply in relation to the carrying out of ACIP or an identity verification procedure by a reporting entity. Item 4 will insert a

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36. AML/CTF Act, subsections 175(4) and (5). A penalty unit is currently $210: Crimes Act 1914 (Cth), subsection 2AA(1).
37. Explanatory Memorandum, p. 17.
38. Ibid., pp. 15–16.
39. Ibid., p. 15 (see also pp. 56, 62 (Regulatory Impact Statement)).
40. Ibid., p. 17.
note under subsection 37(1) to clarify that a reporting entity (not its agent) will be liable for civil penalties for contraventions of Part 2 of the AML/CTF Act for providing designated services to customers without carrying out ACIP.

Key aspects of proposed amendments will be set out in the Rules

Key aspects of these proposed reliance arrangements will be set out in the Rules. While the Explanatory Memorandum states that the third party requirements are set out in ‘new Chapter 7’ of the Rules, a draft of the revised chapter did not appear to have been released for public consultation as at the date of this Digest. The absence of draft Rules makes it difficult to assess the extent to which the proposed amendments are consistent with FATF Recommendation 17.

Correspondent banking: key issues and provisions in Part 2 of Schedule 1

Correspondent banking refers to the provision of banking services by one financial institution to another. Part 8 of the AML/CTF Act prohibits financial institutions from entering into a correspondent banking relationship with another person reckless as to whether the other person is a shell bank or a financial institution that has a correspondent banking relationship with a shell bank. It also requires financial institutions to carry out risk assessments before they enter and while they remain in a correspondent banking relationship involving a vostro account, and to carry out due diligence assessments if warranted by a risk assessment.

FATF evaluation and statutory review conclusions and recommendations

The 2015 FATF evaluation rated Australia as non-compliant with FATF Recommendation 13 on correspondent banking because:

- due diligence assessments are required only in some cases (depending on a risk assessment), and do not cover all required matters
- financial institutions do not have specific obligations relating to ‘payable-through accounts’ and
- it is unclear whether the prohibitions extend to correspondent banking relationships with institutions that do not currently have correspondent banking relationships with shell banks, ‘but would theoretically be permitted to engage in such a relationship in future’.

Based on FATF’s concerns and industry consultations, the statutory review recommended that:

- the AML/CTF Act and Rules should be amended ‘to simplify and streamline the correspondent banking obligations to establish a one-step process for conducting due diligence assessments on respondent financial institutions that is consistent with the FATF standards’
- the Rules should be amended to require financial institutions to consider the quality of ML/TF supervision conducted in the country of the other institution in their due diligence assessments and
- the AML/CTF Act should be amended to:
  
  (a) broaden the definition of correspondent banking in line with international approaches that are consistent with the FATF standards

41. Ibid., pp. 15, 17.
42. AML/CTF Act, section 95. FATF defines shell banks as follows: ‘Shell bank means a bank that has no physical presence in the country in which it is incorporated and licensed, and which is unaffiliated with a regulated financial group that is subject to effective consolidated supervision’: FATF, ‘Glossary of the FATF Recommendations’, FATF website, n.d.
43. AML/CTF Act, sections 96–98.
(b) require financial institutions to undertake specific due diligence in relation to payable-through accounts consistent with the FATF standards, and

c) prohibit financial institutions from entering into a corresponding banking relationship with an institution that is able to enter into a correspondent banking relationship with a shell bank. 45

**Proposed amendments**

The 2017 Act included amendments to address the recommendation to expand the definition of correspondent banking. Part 2 of Schedule 1 contains amendments to address the remaining review recommendations, so far as they concern the AML/CTF Act.

Item 11 will repeal sections 94–99 of the AML/CTF Act and replace them with proposed sections 94–96. The key changes compared to the existing provisions are that:

• financial institutions will be prohibited from entering into a correspondent banking relationship with a financial institution that permits its accounts to be used by a shell bank; and will be required to terminate a correspondent banking relationship if they become aware that the other financial institution permits its accounts to be used by a shell bank 46

• the requirement to prove that a financial institution was reckless as to the relevant matter (for example, that another person is a shell bank) will be removed 47

• financial institutions will be required to undertake due diligence assessments before entering into any correspondent banking relationship that will involve a vostro account, and to undertake ongoing assessments of all such relationships 48

• a senior officer must decide whether to continue a correspondent banking relationship involving a vostro account after each ongoing due diligence assessment and 49

• if a financial institution enters into any correspondent banking relationship that will involve a vostro account, it must prepare a written record within 20 days setting out the responsibilities of each institution under that relationship. 50

As is currently the case, the provisions containing the requirements and prohibitions are civil penalty provisions. 51

**Tipping-off offence: key issues and provisions in Part 3 of Schedule 1**

**Statutory review conclusions and recommendations**

The offence of tipping off in section 123 of the AML/CTF Act is intended to prevent information about a suspicious matter report (SMR) reaching the person to whom the report related. The

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46. Proposed paragraphs 95(1)(c) and (2)(c) and (d).
47. Proposed subsection 95(1) (which removes the recklessness standard provided for under existing subsection 95(1)). The Explanatory Memorandum states: ‘This will reduce unnecessary complexity and ensure industry are clear about their obligations under the Act. The concept of recklessness undermines the intent of the prohibition which is to impose an obligation on financial institutions to know that they are not dealing with a shell bank or a financial institution that has a correspondent banking relationship with a shell bank’ (p. 19).
48. Proposed section 96. Due diligence assessments are currently required only in some cases (where warranted by a prior risk assessment): AML/CTF Act, subsections 97(2) and 98(2).
49. Proposed paragraph 96(3)(d). As is currently the case, senior officers will be required to approve entering into such relationships: AML/CTF Act, subsection 99(1); proposed paragraph 96(1)(b).
50. Proposed subsection 96(2).
51. Proposed subsections 95(4) and 96(4).
statutory review found that stakeholders generally supported the rationale for the offence, but indicated that the existing provisions prevent:

- multinational financial institutions from taking a global risk management approach to customers who hold accounts in multiple jurisdictions, and sharing information about SMRs with foreign parent entities, and
- reporting entities from providing information to AML/CTF auditors to demonstrate the entity’s compliance with AML/CTF obligations.  

The review recommended amendments to the AML/CTF Act to permit Australian reporting entities to share SMR-related information with foreign parent entities (which are not reporting entities) and with external auditors.  

**Proposed amendments**

The amendments will implement both of the changes recommended by the statutory review.

The existing tipping off offence includes several provisions prohibiting reporting entities from disclosing certain information, followed by several exceptions under which disclosures may be made. The Bill will simplify the prohibitions and expand the exceptions.

**Item 19** will repeal subsections 123(1)–(3) and replace them with **proposed subsections 123(1) and (2)** to simplify the prohibitions on disclosure. The prohibitions remain substantively the same; they ban disclosures to a person other than an AUSTRAC entrusted person (and limited others) of certain information about SMRs and in response to notices from AUSTRAC to provide documents or information in relation to an SMR or a report on a threshold transaction or international funds transfer instruction. The Explanatory Memorandum states that the change ‘responds to concerns from reporting entities about the complexity of obligations under the Act’ and addresses the review’s overarching recommendation to simplify the AML/CTF Act to provide greater clarity to reporting entities.  

**Item 24** will insert a new exception so that disclosures can be made to someone appointed or engaged to audit or review a reporting entity’s AML/CTF program (**proposed subsection 123(5B)**), accompanied by a prohibition on secondary disclosure other than to another person in connection with the audit or review (**proposed subsection 123(5C)**).

Subsections 123(7) and (7A) set out an exception for disclosures to other reporting entities within a designated business group or corporate group of which both reporting entities are a part, and a prohibition on secondary disclosure except to another reporting entity in the same group for the purpose of providing information about the risks involved in dealing with the customer.  

**Item 26** will repeal those subsections and replace them with **proposed subsections 123(7)–(7AC)**. These provisions are similar to the ones they replace, the main change being that disclosures will now be able to be made to foreign members of corporate and designated business groups. Disclosures will be permitted to a body corporate that belongs to the same corporate group (**proposed subsection 123(7)**) or a person that belongs to the same designated business group (**proposed subsection 123(7AB)**) if:

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52. AGD, AML/CTF Review, op. cit., p. 122.
53. Ibid., pp. 121–124 (Recommendation 14.2).
54. Explanatory Memorandum, p. 22.
55. Designated business group is defined in section 5 of the AML/CTF Act, and corporate group in subsection 123(12).
• the body corporate/other person is also a reporting entity or
• the body corporate/other person:
  – is regulated by foreign laws that give effect to some or all of the FATF Recommendations and
  – has given a written undertaking for protecting the confidentiality and controlling the use of
    the information, and ensuring that the information will only be used for the purpose for
    which it was disclosed.

As is currently the case, such disclosures will only be permitted for the purpose of providing
information about the risks involved in dealing with the customer.\(^{56}\) AFMA and the FSC suggested
that disclosures should also be permitted for additional purposes. The FSC considered that
permitted purposes should include ‘reporting, investigation and escalation’, while AFMA
suggested that legitimate purposes would include ‘centralised financial crime teams that perform
similar functions across multiple jurisdictions, or potentially holding companies that have board
and senior management oversight in relation to the reporting entity’.\(^{57}\)

AFMA and the FSC both also considered that the exemption to the tipping off offence for the
purpose of obtaining legal advice (in subsection 123(5), including as amended by item 23) should
apply to disclosures relating to notices issued under section 49 (seeking further information
following a suspicious matter report) as well as those relating directly to suspicious matter
reports.\(^{58}\)

**Proposed subsections 123(7AA) and (7AC) will limit secondary disclosure of information shared
under proposed subsections 123(7) and (7AB) in the same way as the existing provisions.**

The Explanatory Memorandum states:

> The intention of the expanded exception reflects a need to allow reporting entities, and related entities
> that are part of their global structures, to more effectively manage the risks associated with the
> international footprint of their business. Specifically, entities will be able to manage the risk posed by
> particular customers, noting that some reporting entities already regularly receive SMR and related
> information from foreign-related entities but are unable to reciprocate the disclosure. The revised
> exception to the tipping off offence is consistent with FATF Recommendation 18 by supporting
> information sharing within corporate groups for the purposes of mitigating and managing money
> laundering and terrorism financing risks.\(^{59}\)

**Secrecy and access to information, and AUSTRAC CEO functions: key issues
and provisions in Part 4 of Schedule 1**

**Statutory review conclusions and recommendations on secrecy and access**

The statutory review found that the complexity of the secrecy and access provisions in the
AML/CTF Act was a major concern for partner agencies, and that there was ‘significant support for
simplifying Part 11 [of the Act] to establish a more flexible and effective framework for sharing
AUSTRAC information that keeps pace with new approaches to investigating serious crime’.\(^{60}\) The

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56. **Proposed paragraphs 123(7(f) and 123(7AB)(f).**
57. FSC, Submission to Senate Legal and Constitutional Affairs Legislation Committee, op. cit.; AFMA, Submission to Senate Legal
    and Constitutional Affairs Legislation Committee, op. cit., p. 3.
58. FSC, Submission to Senate Legal and Constitutional Affairs Legislation Committee, op. cit.; AFMA, Submission to Senate Legal
    and Constitutional Affairs Legislation Committee, op. cit., p. 4.
60. AGD, AML/CTF Review, op. cit., pp. 115.
review recommended development of a simplified model for sharing information collected under the AML/CTF Act that:

- [is] responsive to the information needs of agencies tasked with combating ML/TF and other serious crimes
- supports collaborative approaches to combating ML/TF and other serious crime at the national and international level, and
- establishes appropriate safeguards and controls that are readily understood and consistently applied.  

Specifically, the review concluded that the new framework should:

- update the definition of AUSTRAC information to reflect the full range of information in AUSTRAC's possession
- clarify the scope of the AUSTRAC CEO’s powers to collect, retain and disseminate AUSTRAC information
- clarify the scope of powers and obligations for those holding and using AUSTRAC information
- expand the permissible uses of appropriate types of AUSTRAC information [and]
- harmonise secrecy and access provisions under the AML/CTF Act with similar provisions under other legislation (where appropriate).  

Proposed amendments to secrecy and access framework

The amendments outlined below, taken together, are intended to address the issues identified by the statutory review. For example, proposed section 121 is intended to ‘more effectively facilitate information sharing with the private sector (including academia)’.  

Expanded definition of AUSTRAC information

Part 11 of the AML/CTF Act concerns disclosures of and access to AUSTRAC information. Item 40 of Schedule 1 will repeal the existing definition of AUSTRAC information in section 5 of the AML/CTF Act and replace it with a broader definition to remedy issues highlighted by the statutory review. The review found that the existing definition (and the definition of eligible collected information on which it relied) is ‘narrow in practice and does not anticipate all the ways in which information is collected or obtained’ by AUSTRAC. For example, it does not cover reports about suspicious transactions from anyone other than a reporting entity, or tip-offs about alleged breaches of regulatory obligations.  

The proposed definition will provide that AUSTRAC information means:

(a) information obtained by, or generated by, an AUSTRAC entrusted person under or for the purposes of this Act;

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61. Ibid., p. 124 (Recommendation 14.1).
62. Ibid., p. 123.
63. Explanatory Memorandum, p. 31.
64. AGD, AML/CTF Review, op. cit., p. 117.
(b) information obtained by an AUSTRAC entrusted person under or for the purposes of any other law of the Commonwealth or a law of a State or a Territory;

(c) information obtained by an AUSTRAC entrusted person from a government body;

(d) FTR information (within the meaning of the Financial Transaction Reports Act 1988).

**Item 39** will insert into section 5 a definition of **AUSTRAC entrusted person** that captures the CEO, Director, staff members, consultants, secondees (including from the private sector) and members of taskforces established by the CEO under **proposed paragraph 212(1)(db)** (see under ‘AUSTRAC CEO functions’ below).

**Item 42** will repeal the definition of **eligible collected information**.

**Simpler framework for access to AUSTRAC information**

Division 4 of Part 11 of the **AML/CTF Act** provides a framework for Australian agencies to access AUSTRAC information and for some of those agencies to communicate such information to foreign countries, law enforcement agencies and intelligence services. The statutory review found that the existing framework is ‘highly technical and prescriptive, with different requirements applying to different agencies’, causing confusion in agencies and ‘hamper[ing] the effective and efficient sharing of AUSTRAC information with a range of agencies and entities for legitimate purposes’.  

The review concluded that the framework should be simplified to provide greater clarity, and expanded to enable timely sharing of AUSTRAC information with:

- multi-agency task forces and ‘fusion bodies’ for law enforcement, intelligence-gathering and national security purposes
- some foreign agencies and multi-jurisdictional bodies for law enforcement, intelligence-gathering and national security purposes
- trusted private sector partners (including reporting entities) to assist them in understanding and managing ML/TF risks
- non-designated state and territory agencies for investigating a possible or probable breach of the law of the Commonwealth
- auditors who are assessing a reporting entity’s compliance with its CDD obligations, and
- private and public bodies engaged in policy development and research.

**Part 4** of Schedule 1 of the Bill will repeal and replace Division 4 of Part 11 and replace it with a less complex and more flexible framework for sharing AUSTRAC information.

Instead of individually designated agencies, the new provisions will apply to any **Commonwealth, State or Territory agency.** **Item 41** of Schedule 1 will insert a definition of this term into section 5 of the **AML/CTF Act** to provide that it means:

- a Commonwealth, state or territory agency, body or organisation that has functions in relation to, is responsible for, or deals with:
– law enforcement or the investigation of corruption or
criminal, security, foreign or financial intelligence

• a Commonwealth, state or territory agency, body or organisation that has functions in relation
to the protection of public revenue, oversight functions or regulatory functions

• a Department of the Commonwealth

• a Commonwealth, state or territory Royal Commission whose terms of reference include
inquiry into whether unlawful conduct has or might have occurred (for a state or territory
Commission, it must also be prescribed in the AML/CTF Rules)

• any other Commonwealth, state or territory agency, body or organisation prescribed in the
AML/CTF Rules

• a Commonwealth, state or territory task force established by a Minister under law that has
functions related to law enforcement or the investigation of corruption, criminal, security,
foreign or financial intelligence, protection of public revenue, oversight or regulation and

• a person who holds an office or appointment under Commonwealth, state or territory law,
where that office or appointment is prescribed by the AML/CTF Rules.

Proposed section 125 will permit the AUSTRAC CEO to authorise officials of a specified
Commonwealth, State or Territory agency to access specified AUSTRAC information for the
purposes of performing the agency’s functions and duties and exercising its powers. For state
and territory agencies, the CEO may only make an authorisation if the agency head has given a
written undertaking that officials of the agency will comply with the Australian Privacy Principles in
respect of certain AUSTRAC information.

Proposed subsection 127(1) will permit the AUSTRAC CEO to disclose AUSTRAC information to a
foreign government or agency if satisfied that:

• it is appropriate in all the circumstances of the case to do so and

• where the CEO considers it appropriate, the foreign government or agency has given an
undertaking for protecting the confidentiality of the information, controlling its use and
ensuring it is only used for the purpose for which it is disclosed.

Proposed subsection 127(2) will permit the heads of Commonwealth, State or Territory agencies
referred to in proposed subsection 127(3) and officials authorised by the heads of those agencies
to disclose AUSTRAC information to a foreign government or agency in equivalent circumstances.
In addition to the agency heads currently permitted to disclose AUSTRAC information to overseas
authorities (those of the Australian Federal Police (AFP), ACIC, and the six agencies comprising the
Australian Intelligence Community), proposed subsection 127(3) lists the Department (currently
Home Affairs), Attorney-General’s Department, Department of Foreign Affairs and Trade,
Australian Prudential Regulation Authority, Australian Securities and Investments Commission,
Australian Taxation Office and any other Commonwealth agency, authority, body or organisation
prescribed by the AML/CTF Rules.

Item 43 will insert a definition of foreign agency into section 5 of the AML/CTF Act under which it
will mean:

(a) a government body that has responsibility for:

(i) intelligence gathering for a foreign country; or

67. Item 49 repeals the definition of ‘official of a designated agency or non-designated Commonwealth agency’ under section 22,
and replaces it with a definition of an official of a Commonwealth, State or Territory agency.
(ii) the security of a foreign country; or

(b) a government body that has responsibility for law enforcement or investigation of corruption in a foreign country or a part of a foreign country; or

(c) a government body that has responsibility for the protection of the public revenue of a foreign country; or

(d) a government body that has regulatory functions in a foreign country; or

(e) the European Police Office (Europol); or

(f) the International Criminal Police Organization (Interpol); or

(g) an international body prescribed by the regulations for the purposes of this paragraph.

Under proposed subsection 121(4) (in Division 2 of Part 11), if an **AUSTRAC entrusted person** discloses AUSTRAC information to a person who is not an **AUSTRAC entrusted person, official** of a **Commonwealth, State or Territory agency** or a Commonwealth, state or territory Minister (in circumstances permitted under section 121), the AUSTRAC CEO may impose conditions in relation to the making of a record, or the disclosure or use of the information, by that person.

These access and disclosure provisions will be complemented by the updated secrecy offences outlined below.

**Updated secrecy offences**

The offence of unauthorised disclosure of information obtained under section 49, currently contained in section 122, will be replaced and moved to Part 3 of the **AML/CTF Act**, so that it is together with section 49. The other secrecy offences currently in Part 11 of the **AML/CTF Act** will also be repealed and replaced by items 51 and 55, but will remain in that Part. The maximum penalty for all of the existing and proposed offences is two years imprisonment and/or 120 penalty units.

The first two of the proposed secrecy offences outlined below are replacing similar existing offences. The remaining existing offences will be repealed, but the proposed offences are not directly comparable to those they will replace.

**Disclosure of information obtained under section 49**

Section 122 of the **AML/CTF Act** sets out restrictions on what an entrusted investigating official may do with information obtained under section 49 (which allows certain officers to require information from reporting entities or other persons if a reporting entity has communicated information to AUSTRAC under certain provisions). Section 122 will be repealed by item 51 of Schedule 1 and a simpler secrecy offence inserted into Division 6 of Part 3 (which includes section 49) by item 50.

Under proposed subsection 50A(1) it will be an offence for a person who is or has been an **entrusted investigating official** to make a record of, disclose or otherwise use information

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68. The other existing offences being repealed are in sections 127 (dealings with AUSTRAC information once accessed), 128 (relating to use and disclosure of information passed on by an official of a designated agency), 130 (disclosure by entrusted Commonwealth agency officials) and 131 (relating to use and disclosure of information passed on by an official of a non-designated Commonwealth agency). These offences will be repealed by item 55.
obtained under section 49 or proposed section 50A. The offence will be subject to exceptions in proposed subsections 50A(2) for disclosure or use in accordance with the person’s functions, duties or powers as an entrusted investigating official and disclosure to an AUSTRAC entrusted person or another entrusted investigating official in accordance with that person’s functions, duties or powers. A defendant will bear an evidential burden in relation to the exceptions, meaning he or she would need to adduce or point to evidence that suggests a reasonable possibility that the relevant exception applies.69

Disclosure and use by entrusted public official/AUSTRAC entrusted person

The existing offence for an entrusted public official disclosing AUSTRAC information obtained other than under Division 4 of Part 11 (in subsection 121(2)) will be replaced with an offence for a person who is or was an AUSTRAC entrusted person accessing, making a record of, authorising access to, disclosing or otherwise using AUSTRAC information (proposed subsection 121(1)). The new offence is broader, capturing making records, authorising access and other use in addition to disclosure. The exceptions in proposed subsection 121(2) are similar to those for the existing offence (most cover actions related to the AML/CTF framework). The exceptions in proposed subsection 121(3) are a simplified and broader version of disclosures currently permitted under Division 4 of Part 11. Instead of officials in particular agencies being permitted to disclose information to specific officials and ministers, disclosure will be permitted (through the exceptions) to:

- any official of a Commonwealth, State or Territory agency, for the purposes of, or in connection with, the performance or exercise of the official’s functions, duties or powers and
- any Commonwealth, state or territory Minister, for the purposes of, or in connection with, the performance of that Minister’s responsibilities.

A defendant will bear an evidential burden in relation to the exceptions.

Secondary dealings with information disclosed by AUSTRAC entrusted persons

Two new offences will apply to secondary dealings with AUSTRAC information disclosed by an AUSTRAC entrusted person under proposed subsection 121(2) to a person who is not an AUSTRAC entrusted person, an official of a Commonwealth, State or Territory agency or a Commonwealth, state or territory minister. The person to whom the information was disclosed will commit an offence if:

- the person:
  - is not subject to conditions imposed by the AUSTRAC CEO under proposed subsection 121(4) in relation to the information and
  - discloses the information to another person or
- the person:
  - is subject to conditions imposed by the AUSTRAC CEO under proposed subsection 121(4) in relation to the information
  - makes a record of, discloses or otherwise uses the information and
  - the making of the record, disclosure or use breaches a condition imposed by the CEO.70

70. Proposed subsections 121(5) and (6) respectively.
There are no exceptions or offence-specific defences to these offences.

Dealings with AUSTRAC information by officials of Commonwealth, State and Territory agencies

Under proposed subsection 126(1), it will be an offence for a person who is or has been an official of a Commonwealth, State and Territory agency to make a record of, disclose or otherwise use AUSTRAC information he or she obtained under proposed subsections 121(2) or (3), proposed section 125 or proposed subsection 126(2).

Several exceptions will apply under proposed subsections 126(2) (relating to the official duties of the person or certain others, and disclosures to foreign governments or agencies under proposed section 127) and 126(3) (disclosures for the purpose of or connected to actual, proposed or possible court or tribunal proceedings or obtaining legal advice).

A defendant will bear an evidential burden in relation to the exceptions.

Secondary disclosure of AUSTRAC information

Under proposed subsection 126(4), if AUSTRAC information is disclosed to a person under proposed subsection 126(3), it will be an offence to disclose that information to another person.

Exceptions will apply under proposed subsection 126(5) if the disclosure was for the purpose of or connected to actual, proposed or possible court or tribunal proceedings or obtaining legal advice, or if the disclosure was permitted under Division 4 of Part 11 of the AML/CTF Act. A defendant will bear an evidential burden in relation to the exceptions.

Unauthorised access to AUSTRAC information

Under proposed section 128, a person will commit an offence if he or she accesses AUSTRAC information where the access is not permitted by Part 11 of the AML/CTF Act. There are no exceptions or offence-specific defences to this offence.

Use or disclosure of AUSTRAC information disclosed in contravention of Part 11

Under proposed subsection 129(1), a person will commit an offence if:

- AUSTRAC information is disclosed to the person
- the disclosure to the person is in contravention of Part 11 of the AML/CTF Act and
- the person makes a record of, discloses or otherwise uses the information.

An exception will apply under proposed subsection 129(2) if the person discloses the information for the purposes of an appropriate authority investigating the disclosure that contravened Part 11. A defendant will bear an evidential burden in relation to the exception.

Permitted disclosures now all cast as exceptions

Other than the AUSTRAC CEO authorising access, no use or sharing of AUSTRAC information will be positively authorised under the Act. Permitted uses will instead be set out as exceptions to offences, for which defendants will bear an evidential burden. This is consistent with the existing secrecy offences that apply to entrusted public officials and entrusted investigating officials in Division 2 of Part 11, but is different to the current approach in Division 4 of Part 11 (which governs access to AUSTRAC information by agencies such as the ATO and intelligence agencies).
Use and disclosure of AUSTRAC information by ministers

AUSTRAC entrusted persons and officials of Commonwealth, state and territory agencies may disclose AUSTRAC information to:

• an official of a Commonwealth, state or territory agency, for the purposes of, or in connection with, the performance or exercise of the official’s functions, duties or powers and

• any Commonwealth, state or territory Minister, for the purposes of, or in connection with, the performance of that Minister’s responsibilities. 71

The offences for secondary dealings do not apply to AUSTRAC entrusted persons, Commonwealth, state or territory officials or Commonwealth, state or territory ministers. 72 However, while entrusted persons and Commonwealth, state and territory officials are subject to specific offences for dealings with AUSTRAC information that do not fall within specified exceptions, there does not seem to be an equivalent offence proposed to apply to ministers.

Taken together, the updated secrecy offences appear to permit disclosures to ministers for certain purposes, but unlike entrusted persons and other officials, there is no specific offence dealing with inappropriate use by a minister.

AUSTRAC CEO functions

Statutory review conclusions and recommendations

The statutory review concluded that the scope of the AUSTRAC CEO’s functions required updating to reflect the full range of work done by AUSTRAC, and considered that such changes would support the recommended reforms to the secrecy and access framework. 73 It recommended that the AML/CTF Act be amended to:

(a) give the AUSTRAC CEO the power to do all things necessary or convenient to be done for, or in connection with, the performance of his or her duties, and

(b) expand the scope of the functions of the AUSTRAC CEO to include:

• retaining, compiling and analysing AUSTRAC information

• facilitating access to, and the sharing of, AUSTRAC information to support domestic and international efforts to combat money laundering, terrorism financing and other serious crimes, and

• disseminating AUSTRAC information, where appropriate, to support government policy-making, industry education, public education and academic research. 74

Proposed amendments

The above recommendations were addressed in a general sense through amendments included in the 2017 Act. 75 Items 62 and 63 will add further specific functions intended to support the proposed expansions to the information-sharing framework and recognise initiatives such as the

71. Proposed subsections 121(3) and 126(2).
72. Proposed subsections 121(5) and (6).
74. Ibid., p. 136 (Recommendation 16.1).
Fintel Alliance, under which private sector representatives are seconded to AUSTRAC. The proposed additional functions are:

• to establish such task forces as the AUSTRAC CEO considers appropriate and
• to assist in the development of government policy or to assist academic research.

Reports about cross-border movements of monetary instruments: key issues and provisions in Part 5 of Schedule 1

FATF evaluation and statutory review conclusions and recommendations

The 2015 FATF evaluation found Australia to be largely compliant with FATF Recommendation 32 on cash couriers. However, it found that Australia did not have dissuasive and proportionate sanctions available for breaches of cross-border reporting obligations.

The statutory review recommended several changes to the AML/CTF Act relating to cross-border movements of physical currency and bearer negotiable instruments (BNIs), some of which were addressed by the 2017 Act. Remaining recommendations include that:

• the existing reporting obligations for physical currency and BNIs should be consolidated, and cover physical currency, BNIs, bullion and other objects or instruments specified in the Rules
• the definition of BNI should be expanded to include gaming chips or tokens, plaques or letters of credit and other objects or instruments specified in the Rules
• the civil penalty for failing to comply with cross-border reporting requirements should be increased in line with international standards and
• the definition of eligible place should include other designated areas by way of regulation.

Proposed amendments

Consolidating reporting requirements for physical currency and BNIs

Currently the reporting requirements for physical currency and BNIs are set out in Divisions 2 and 3 of Part 4 of the AML/CTF Act respectively. Item 75 of Schedule 1 will repeal Divisions 1–3 of Part 4 (Division 1 is a simplified outline of Part 4) and replace them with proposed Divisions 1 and 2 to consolidate these two separate reporting regimes into one.

The consolidated reporting provisions will apply to monetary instruments, which under a definition inserted by item 69 will mean physical currency, BNIs and things prescribed by the Rules. The consolidated provisions will not apply to bullion. The definition of bearer negotiable instrument will not be expanded as recommended by the statutory review, but it would be possible to prescribe gaming chips or tokens and plaques or letters of credit as monetary instruments under the Rules.
Proposed Division 2 of Part 4 will largely replicate the repealed provisions relating to physical currency, but expand them to apply to all monetary instruments. The reporting threshold of $10,000 will remain the same, and breaches of reporting requirements will attract criminal and civil penalties as they do now (with the same maximum penalties). Provisions about when reports are required (currently under section 54) will be moved to the Rules.  

The Bill will make several consequential amendments to enforcement-related provisions. These include:

- expanding a related offence in section 143 of conducting transfers to avoid reporting cross-border movements of physical currency to instead apply to transfers conducted to avoid reporting of monetary instruments (items 76–81) and
- consolidating the search and questioning powers for physical currency and BNIs by repealing section 200 (which currently applies to BNIs) and amending section 199 (which currently applies to physical currency) to include all monetary instruments (items 95–115).

Increasing penalties in infringement notices for breaches of cross-border reporting requirements

Item 86 will repeal section 186, which currently specifies the applicable pecuniary penalty in an infringement notice issued for a breach of cross-border reporting requirements. Items 87–92 will expand section 186A, to make provision for the amount of penalty for breaches of Part 4 of the AML/CTF Act as well as Parts 3A, 6 and 6A. The effect of the amendments in items 86–89 will be to increase the penalty imposed in infringement notices issued for breaches of the cross-border reporting requirements in Part 4 of the Act.

Currently, the penalty is five penalty units for an alleged contravention involving physical currency or BNIs worth $20,000 or more, and otherwise, two penalty units.

The updated penalties will be:
- 60 penalty units or an amount specified in the Rules (for a body corporate) or
- 12 penalty units or an amount specified in the Rules (for a person other than a body corporate).

For more serious breaches, AUSTRAC may apply for a civil penalty order under Division 2 of Part 15 of the Act, as is currently the case. The amendments appear to address FATF’s concern with the civil penalty for breaches of cross-border reporting requirements, which concerned the amount available under infringement notices, not civil penalty orders.

Money laundering offences: key issues and provisions in Part 6 of Schedule 1

Division 400 of the Criminal Code contains tiered offences for money laundering, with higher penalties attached for offences involving larger quantities of illicit funds and a greater degree of fault. The Bill will make two changes to the application of these offences to address barriers to successful prosecution.

Application of offences relating to possible instruments of crime

Section 400.2A sets out the circumstances in which dealing with money or other property that is an instrument of crime must occur in order for the offences in sections 400.3–400.8 to apply. The

81. Proposed paragraph 53(7)(d).
provision limits the offences to the circumstances within Commonwealth legislative power set out in subsections 400.2A(3) and (4).

Subsection 400.2A(2) provides that the offences apply ‘if at least one of the circumstances described in subsections (3) and (4) exists’. Item 124 will repeal and replace subsection 400.2A(2) so that the offences apply if a circumstance described in subsection (3) exists and/or a circumstance described in subsection (4) exists. The change addresses uncertainty about whether the prosecution is currently required to prove both the existence of a circumstance in subsection (3) and a circumstance in subsection (4). The Explanatory Memorandum states that the change accords with the original intention of Parliament.

**Money or property provided as part of a controlled operation**

Controlled operations are covert operations in which participants are protected from criminal or civil liability that may otherwise arise. Proposed section 400.10A will provide that in a prosecution for an offence under section 400.3–400.8 of the *Criminal Code* in relation to a person dealing with money or other property:

... it is not necessary to prove that the money or property is proceeds of crime if it is proved that, as part of a controlled operation in relation to suspected offences against this Division, either of the following provided the money or property:

(a) a law enforcement participant in the controlled operation;

(b) a civilian participant in the controlled operation, acting in accordance with the instructions of a law enforcement officer.

The proposed provision is intended to apply only to the physical element of an offence that the money or property is the proceeds of crime, with the prosecution still required to prove the relevant fault element.

The Explanatory Memorandum states:

Where a controlled operation occurs, the CDPP is currently unable to commence a prosecution for dealing with the proceeds of crime offences given that the money or property dealt with is not in fact the proceeds of crime. Although it may be possible to rely on an extension of criminal liability by charging an individual for conspiracy or attempt, this often renders the prosecution more complex and difficult.

**Offence for dishonestly representing conferral of police awards: key issues and provisions in Part 7 of Schedule 1**

The Bill will insert a new offence of dishonestly representing conferral of police awards into the *AFP Act*. The offence in proposed section 62 will apply if a person dishonestly represents that a police award has been conferred on him or herself and will carry a maximum penalty of six months.

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82. *Explanatory Memorandum*, p. 48. The Explanatory Memorandum for the Act that inserted subsection 400.2A(2) does not address the intended operation of the subsection: *Replacement Explanatory Memorandum*, Crimes Legislation Amendment (Serious and Organised Crime) Bill (No. 2) 2010, p. 158.
83. Part IAB of the *Crimes Act 1914* provides the legislative framework for the Commonwealth controlled operations regime.
84. *Civilian participant, controlled operation, law enforcement officer and law enforcement participant* will have the same meanings as in the *Crimes Act*.
86. Ibid., p. 48.
imprisonment and/or 30 penalty units.\textsuperscript{87} \textit{Police award} will mean an award, commendation, citation, medal or other decoration that has been or will be conferred on the Commissioner or an AFP appointee for police services that are provided by the Commissioner or appointee.

\textsuperscript{87} Proposed subsection \textit{62(1)} and \textit{Crimes Act}, subsection \textit{4B(2)}. 