



Asia/Pacific Group  
on Money Laundering

**Financial action Task Force**  
**Asia/Pacific Group on money laundering**

**THIRD MUTUAL EVALUATION REPORT ON**  
**ANTI-MONEY LAUNDERING AND**  
**COMBATING THE FINANCING OF TERRORISM**

**AUSTRALIA**

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## **EXECUTIVE SUMMARY**

### **Preface - information and methodology used for the evaluation**

1. The evaluation of the anti-money laundering (AML) and combating the financing of terrorism (CFT) regime of Australia was based on the Forty Recommendations 2003 and the Nine Special Recommendations on Terrorist Financing 2001 of the Financial Action Task Force (FATF), and was prepared using the AML/CFT Methodology 2004. The evaluation was based on the laws, regulations and other materials supplied by Australia, and information obtained by the evaluation team during its on-site visit to Australia from 10-23 March 2005, and subsequently. During the on-site mission, the evaluation team met with officials and representatives of all relevant Australia government agencies and the private sector. A list of the bodies met is set out in Annex 5 to the mutual evaluation report.

2. The evaluation was conducted by a team of assessors composed of FATF and APG experts in criminal law, law enforcement and regulatory issues. The evaluation team consisted of: Mr. John Sullivan, Detective Inspector, Ontario Provincial Police, OIC Operational Support, RCMP Proceeds of Crime Branch, Canada (law enforcement expert); Mr. Lee Radek, Senior Counsel, U.S. Department of Justice, Asset Forfeiture and Money Laundering Section, United States (legal expert); Mr. Syed Mansoor Ali, Financial Crimes Investigation Wing, National Accountability Bureau, Pakistan (financial expert); Mr. Christopher Malan, Senior Manager, Compliance and Prevention, Financial Intelligence Centre, South Africa (financial expert); Mr. John Carlson and Mr. Kevin Vandergrift from the FATF Secretariat; and Mr. Eliot Kennedy from the APG Secretariat. The experts reviewed the institutional framework, the relevant AML/CFT laws, regulations, guidelines and other requirements, and the regulatory and other systems in place to deter money laundering (ML) and the financing of terrorism (FT) through financial institutions and Designated Non-Financial Businesses and Professions (DNFBP), as well as examining the capacity, the implementation and the effectiveness of all these systems.

3. This report provides a summary of the AML/CFT measures in place in Australia as at the date of the on-site visit or immediately thereafter. It describes and analyses those measures, and provides recommendations on how certain aspects of the system could be strengthened (see Table 2). It also sets out Australia's levels of compliance with the FATF 40+8 Recommendations (see Table 1).

## Executive Summary

### 1. Background Information

1. This report provides a summary of the AML/CFT measures in place in Australia as at March 2005 (the date of the on-site visit). The report describes and analyses those measures and provides recommendations on how certain aspects of the system could be strengthened. It also sets out Australia's levels of compliance with the FATF 40 + 9 Recommendations (see attached table on the Ratings of Compliance with the FATF Recommendations). The Australian Government recognises the need for an effective AML/CFT regime and is currently updating its legislation to implement the revised FATF Recommendations.

2. While narcotics offences provide a substantial source of proceeds of crime, the majority of illegal proceeds are derived from fraud-related offences. One Australian Government estimate suggested that the amount of money laundering in Australia ranges between AUD 2—3 billion per year. Australia recognises and is responding to the continuing challenges posed by increasingly well resourced and well organised transnational crime networks.

3. Criminals use a range of techniques to launder money in Australia. Generally, money launderers seek to exploit the services offered by mainstream retail banking and larger financial service and gaming providers. Visible money laundering is predominantly carried out using the regulated financial sector, particularly through the use of false identities and false name bank accounts facilitated by forged documents to structure and transact funds. Money launderers often move funds offshore by using international funds transfers. Money launderers also move funds through smaller or informal service providers such as alternative remittance dealers. Australian authorities also identified other methods that served as money laundering vehicles: cash smuggling into and out of Australia, and the use of legitimate businesses to mix proceeds of crime with legitimately earned income/profits. Law enforcement has also recognised a growing trend in the use of professional launderers and other third parties to launder criminal proceeds.

4. A wide range of financial institutions exists in Australia. These include depository corporations (such as banks, building societies and credit co-operatives); financial markets; insurance corporations and pension funds (life insurance, general insurance, superannuation funds); other financial corporations, including financial intermediaries (such as financial unit trusts and investment companies); financial auxiliaries (such as securities brokers, insurance brokers and flotation corporations); foreign exchange instrument dealers, money remittance dealers and bureaux de change.

5. The full range of designated non-financial businesses and professions exist in Australia. Casinos (mainly supervised at the State/Territory level), dealers in precious metals and stones, and lawyers are subject to some AML/CFT requirements. Notaries, real estate agents, accountants, and trust and company service providers (called professional company incorporation providers) also operate in Australia.

6. Australia has a federal system of government that consists of the Federal government, six State governments and two Territory governments. The main criminal law powers rest with the States and Territories, while Commonwealth legislation is generally restricted to criminal activity against Commonwealth interests, Commonwealth officers or Commonwealth property. Money laundering and the financing of terrorism are dealt with at both the Federal and State level<sup>1</sup>.

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<sup>1</sup> References in this report to legislation are to Federal laws, unless otherwise stated.

## 2. Legal Systems and Related Institutional Measures

7. Australia has a comprehensive money laundering offence. Money laundering is criminalised under the revised Division 400 of the *Criminal Code Act 1995*, which came into effect in January 2003. Previous money laundering offences date back to 1987. Division 400 creates a range of penalties for offences depending on the level of knowledge (knowing and wilful, recklessness, negligence) and the value of the property involved. Predicate offences include all indictable offences—i.e., those with a minimum penalty of 12 months imprisonment.

8. Australia generally pursues money laundering via proceeds of crime action using the *Proceeds of Crime Act* (POCA); however, the key issue in terms of effective implementation of the money laundering offence is the low number of money laundering prosecutions at the Commonwealth level (ten dealt with summarily and three on indictment since 2003, with five convictions), indicating that the regime is not being effectively implemented. Money laundering is also criminalised at the State and Territory level, and these offences vary in comprehensiveness. The lack of statistics on State and Territory prosecutions and convictions for ML prevents an evaluation of their effectiveness.

9. The *Suppression of the Financing of Terrorism Act 2002* (SoFTA), which came into force in July 2002, amended a number of existing Acts to implement Australia's obligations under the UN Suppression of the Financing of Terrorism Convention and relevant UN Security Council Resolutions. As amended, the *Criminal Code Act 1995* now contains several offences related to the financing of terrorism: receiving funds from or making funds available to a terrorist organisation; providing or collecting funds to facilitate a terrorist act. While broadly satisfactory, this offence does not specifically cover the collection of funds for a terrorist organisation or provision/collection of funds for an individual terrorist. This should be rectified. There have not been any prosecutions for terrorist financing.

10. Australia's provisional measures and measures for confiscation are comprehensive and appear effective. The *Proceeds of Crime Act 2002* (POCA) provides for both conviction- and civil-based forfeiture of proceeds. The conviction-based scheme covers instrumentalities used in, intended for use in, the commission of an offence and property of corresponding value. Competent authorities have a wide range of powers to identify and trace property. Amounts forfeited at the Commonwealth level may be somewhat low, but this could be attributable to the federal nature of the Australian system of government. For 2003-2004, at the Commonwealth level there were 70 confiscations with a total value of AUD 10 million. Australian authorities indicated that approximately 10–20% of these cases involved money laundering or offences against the *Financial Transactions Reports Act 1988* (FTR Act). None involved the financing of terrorism. Significant amounts have also been confiscated at the State level under State-based confiscation legislation.

11. United Nations Security Council Resolutions 1267, its successor resolutions, and 1373 are implemented through the revised *Charter of the United Nations Act 1945* (CoTUNA) and its Regulations of 2002. Assets of "proscribed persons" (which are designated by the UN 1267 Committee) or other persons or entities (which are designed by the UN 1267 Committee or listed by the Minister of Foreign Affairs) must be frozen without delay. This mechanism is enforced by creating an offence for dealing in any such freezable assets. This must occur without prior notification to the persons involved. The Regulations do not explicitly cover the funds of those who finance terrorism or terrorist organisations (outside of the context of specific terrorist acts). In any case, the final decision of whether to list a person, entity or asset is up to the Minister.

12. Australia's Department of Foreign Affairs and Trade (DFAT) maintains one consolidated list of individuals and entities to which the asset freezing sanctions apply, and this list is kept updated and available on DFAT's website. The list contains over 540 names, including all 443 names from the S/RES/1267 list plus approximately 89 other names designated under the regulations implementing S/RES/1373 and designated by the Minister. Overall, the system appears effective—there have been two freezings of funds from the consolidated list, including one freezing of funds that remains in place, of approximately \$2,000 of an entity named to the consolidated list by the Minister.

13. The Australian Transaction Reports Analysis Centre (AUSTRAC) is Australia's Financial Intelligence Unit (FIU) and has a dual role as both an FIU and AML/CFT regulator. AUSTRAC was established in 1989 as an independent authority within the Australian Government's Attorney-General's portfolio. AUSTRAC collects financial transaction reports information from a range of prescribed cash dealers, including the financial services and gaming sectors, as well as solicitors and members of the public.

14. Under the FTR Act, "cash dealers" (types of financial institutions covered by the Act, which include casinos, bookmakers and bullion sellers) submit a range of financial transaction reports to AUSTRAC, including reports on suspicious transactions (SUSTRs) and international funds transfers (IFTIs) (regardless of amount). They are also required to report significant cash transactions (SCTRs) and large incoming or outgoing currency movements (ICTRs) involving AUD 10,000 or more. Solicitors are also required to report significant cash transactions. This information is made available on-line to AUSTRAC's 28 partner agencies. In addition, AUSTRAC analyses this information and disseminates it in the form of financial intelligence to its partner agencies, comprising Federal, State and Territory law enforcement, social justice and revenue collection agencies, as well as AUSTRAC's international counterpart FIUs. AUSTRAC has issued numerous Guidelines and Information Circulars to assist cash dealers in implementing their reporting obligations. AUSTRAC has direct or indirect access to financial, administrative, and law enforcement information.

15. AUSTRAC is an effective FIU and has been an active member of the Egmont Group since 1995. AUSTRAC utilises sophisticated technologies to assist in analysing the numerous reports it receives—approximately 9 million IFTIs, 2 million SCTRs, 12,000 SUSTRs, and 25,000 ICTRs in 2004. The 154 AUSTRAC personnel are adequate for it to effectively perform its FIU functions.

16. Commonwealth, as well as State and Territory, authorities have adequate legal powers for gathering evidence and compelling production of documents, as well as a wide range of special investigative techniques at their disposal, including controlled deliveries, undercover police officers, electronic interception and other relevant forms of surveillance and search powers. At a national level, the Australia Federal Police (AFP) enforces most Commonwealth Criminal law and the office of the Commonwealth Director of Public Prosecutions (CDPP) prosecutes offences against Commonwealth law, including prosecution of Commonwealth money laundering offences and terrorism financing offences. The authorities in Australia have adequate powers, structures, staffing and resources to investigate and prosecute money laundering and terrorist financing. While the legal measures are comprehensive, they are not fully effective, as investigators generally do not investigate and refer money laundering as a separate charge, and number of prosecutions for the money laundering is low.

17. Australia has a comprehensive system for reporting cross-border movements of currency above AUD 10,000 to AUSTRAC. However, there is no corresponding system for declaration or disclosure of bearer negotiable instruments.

### **3. Preventive Measures – Financial Institutions**

18. Australia's legislative framework does not distinguish between financial institutions or specify AML/CFT obligations for financial institutions on the basis of risk. Nevertheless, the Australian Government indicated that it has developed its existing AML/CFT system in light of international and local law enforcement experience with a view to developing requirements that do not place undue burdens on businesses and customers.

19. Obligations under the FTR Act apply to "cash dealers." While this covers a broad range of financial institutions in Australia, the FTR Act does not yet cover the full range of financial institutions as defined in the FATF Recommendations, such as certain financial leasing companies and debit and credit card schemes. Securitisation firms, electronic payment system providers, and certain managed investment schemes are covered where they also hold a financial services licence covering the dealing in securities or derivatives. In addition, particular obligations, such as reporting and record-keeping might vary between types of cash dealers.

20. Overall, as regards the customer due diligence (CDD) regime, most obligations date to the FTR Act 1988 and therefore do not meet the current standards. The Australian Government understands the need for improvement and is currently drafting legislation to implement the requirements of the revised 40 Recommendations. Under the current legislation there is a complex and indirect obligation to identify and verify customer identity; it is limited to the context of “account” facilities with the “cash dealers”, and therefore does not cover all situations where business relationships are established. Customer identification/ verification is not required at the account opening stage; rather accounts below the prescribed low value (AUD 1,000 per day or AUD 2,000 in a month) can operate indefinitely without customer identification until such time as the thresholds are triggered. While customers must be identified when reporting cash transactions over AUD 10,000, there is no reporting or identification requirements for other non-cash occasional transactions of USD/ EUR 15,000 or more. The methods of verifying the customer identification are also inadequate and should be tightened.

21. There is no general obligation under the FTR Act to identify and verify the details of the beneficial owner. Nor are there specific obligations regarding politically exposed persons (PEPs), correspondent banking or to have policies in place or take such measures as needed to prevent the misuse of technological developments in ML/FT, or specific and effective CDD procedures that apply to non-face to face customers.

22. FTR Act allows cash dealers to rely on identification conducted by a third party called an “acceptable referee.” However, the current list of acceptable referees is overly broad and includes many entities that are unregulated (for AML/CFT or any other purpose). And while financial institutions relying on third parties are ultimately responsible for compliance with the FTR Act, the other provisions of Recommendation 9 are not required.

23. Banking secrecy or confidentiality does not inhibit the implementation of the FATF Recommendations. AUSTRAC, the Australian Prudential Supervisory Authority (APRA), and the Australian Securities and Investment Commission (ASIC) have broad authority to access information from entities under their supervision.

24. Under sections 20, 23, 27C and 27D of the FTR Act, reporting entities have both direct and implied recordkeeping and record accessibility obligations. Certain cash dealers (“financial institutions” as defined under section 3 of the FTR Act) have broad record-keeping obligations to keep documents relating to the identity verification of customers, their operation of “accounts” and individual transaction activity of these accounts. However, financial institutions (which includes only authorised deposit taking institutions, co-operative housing societies, “financial corporations” as defined in the Australian Constitution, casinos, and totalisator agency boards) are one category of “cash dealers”. Therefore, for example, the FTR Act obligations would not include records of transactions from securities and insurance institutions, or foreign exchange dealers or money remitters, as they are either not financial institutions or do not hold “accounts” as defined under the Act. All information that is kept is readily accessible by the competent authorities.

25. Australia has a mandatory system for reporting all international funds transfer instructions to AUSTRAC. The reports contain the ordering customer’s name, location (i.e. full business or residential address) and customer’s account number. These reports are maintained in AUSTRAC’s database and are a useful source of intelligence information. Despite the comprehensive reporting system, the main elements of SR VII are not required. There is no requirement: to include the originator information as part of the funds transfer instruction itself, that similar obligations also apply to domestic transfers; for intermediary financial institutions to maintain all the required originator information with the accompanying wire transfer; or for beneficiary financial institutions to have risk-based procedures in place for dealing with incoming transfers that do not have adequate originator information.

26. There are no specific requirements for cash dealers to pay special attention to complex, unusual large transactions, or unusual patterns of transactions that have no apparent or visible economic or lawful purpose, or set out their findings in writing. As part of the obligation to report suspicious transactions,



cash dealers (but not the full scope of financial institutions as required in the FATF Recommendations) would be required to recognise and report transactions suspected of being relevant to the investigation of an offence. However, this indirect obligation to monitor transactions does not cover the full monitoring obligation for all complex, unusual large transactions, or unusual patterns of transactions, or transactions with no visible economic purpose.

27. AUSTRAC Guidelines and Information Circulars assist cash dealers to identify high risk and NCCT countries and advise cash dealers on the need to scrutinise such transactions involving these countries in order to determine whether they should be reported as STRs according to the FTR Act. Nevertheless, the Guidelines and Information Circulars are not enforceable. Australia should adjust its legislation to clarify obligations under Recommendation 21 in its Guidelines and Information Circulars and make these measures legally enforceable.

28. Cash dealers are required to report all transactions suspected of being relevant to the investigation or prosecution of any breach of taxation law or any Commonwealth or Territory offence. A transaction is reportable if there is an attempted transaction and regardless of the amount being transacted. Measures providing “safe harbour” and criminalising tipping off are also comprehensive. AUSTRAC provides general feedback in the form of statistics on the number of disclosures, with appropriate breakdowns, and on the results of the disclosures; and some information on current techniques, methods and trends as typologies in some quarterly newsletters; however, AUSTRAC is encouraged to provide more sanitised examples of actual money laundering cases and/or information on the decision or result of an STR filed.

29. Overall, the regime for reporting suspicious transactions is effective and comprehensive except for the current limitation on the scope of “cash dealers” and the concern that the scope of the terrorist financing offence could slightly limit the reporting. In 2004, AUSTRAC received over 12,000 STRs from a wide range of cash dealers. The number of STRs filed over the past several years and the range of entities reporting is positive; numbers of reports have been steadily increasing for several types of cash dealers, notably banks, credit unions, casinos, and finance corporations.

30. AUSTRAC also receives reports regarding of significant cash transactions equal to or greater than AUD 10,000. As with all the reports that AUSTRAC collects, reports of large cash transactions are stored on the AUSTRAC database and can be accessed by authorised staff within its 28 Partner Agencies.

31. The requirement for cash dealers to have AML/CFT policies and internal controls is merely implicit within the FTR Act as part of the obligation on cash dealers to identify account signatories and to report potentially suspicious activity which may be linked to both money laundering and terrorist financing. Currently, a number of sectors have voluntarily introduced AML/CFT policies and internal controls commensurate with their size and exposure to AML/CFT risk. However, there are no specific requirements to oblige financial institutions to have in place institutionalised AML/CFT internal controls, policies and procedures and to AML/CFT risk and to communicate these procedures to their employees.

32. The FTR Act also applies outside Australia. Therefore, Australian authorities have indicated that foreign branches and subsidiaries of Australian banks are required to comply with the FTR Act’s provisions, to the extent that host country laws and regulations permit. However, there is not a requirement that, where the minimum AML/CFT requirements of the home and host countries differ, branches and subsidiaries in host countries must apply the higher standard, or to inform the home country supervisory if this is not possible because of local law.

33. Australia’s banking authorisation process effectively precludes the establishment and operation of “shell banks” within the jurisdiction. However, Australia should also prohibit financial institutions from entering into, or continuing, correspondent banking relationships with shell banks and require financial institutions to satisfy themselves that respondent financial institutions in a foreign country do not permit their accounts to be used by shell banks.

34. Australia has a functional approach to financial sector supervision. AUSTRAC is the AML/CFT regulator. AUSTRAC’s regulatory role includes an ongoing monitoring program to ensure cash dealer

compliance with the requirements of the FTR Act. APRA is the prudential supervisor and regulator of the Australian financial services sector. ASIC, the financial market and conduct regulator, enforces and regulates company and financial services laws in order to protect consumers, investors, shareholders and creditors.

35. AUSTRAC's powers include criminal sanctions for non-compliance and an injunctive power (although the latter is used in limited circumstances). The lack of administrative sanctions means in practice that formal sanctions are generally not applied. However, Australia notes that agreed remedial action with the cash dealer, while not a formal sanction, successfully encourages improvements. The regulatory sanctions available in the broader Australian financial supervisory and regulatory environment include criminal, civil and administrative mechanisms.

36. APRA and ASIC have wide-ranging powers to remedy breaches of their relevant legislation, which apply to entities as well as their directors and officers (e.g. senior management). Powers include the ability to compel specific remedial actions, disqualify persons for management or directorship functions, and revoke a license or authorisation to operate. Australia notes that these powers would apply for non-compliance with the FTR Act if the breach created risks or breaches relevant to APRA's and ASIC's legislation. However, it was unclear to the evaluation team how these would be applied in practice, as there are no express powers to remove management or revoke a license for a breach of AML/CFT requirements. No sanctions have yet been applied by APRA or ASIC for AML/CFT failings.

37. Entities must be authorised or licensed by APRA in order to carry out a banking, general insurance, life insurance or superannuation business in Australia. Some entities providing remittance services or bureaux de change services are also licensed under the Australian Financial Services License (AFSL) requirements; however, there is no general obligation to license or register all money/value transfer (MVT) services operators and bureaux de change. Australia needs to extend licensing or registration requirements to the remaining financial institutions not covered by current arrangements.

38. MVT services operators are subject to FTRA requirements, and AUSTRAC has made progress in identifying MVT services operators and bringing them into the reporting regime. AUSTRAC maintains a current list of the names and addresses of MVT service operators of the operators it has identified. However, MVT service operators are not required to maintain a current list of its agents.

39. Overall, the evaluation team did not find the implementation of the AML/CFT supervisory system to be effective in terms of the standards required by the revised 40 Recommendations. The supervisory system would also be enhanced if co-ordination on AML/CFT matters between all the relevant authorities were to be improved. There is a need to foster greater formal cooperation amongst relevant financial sector supervisors and regulators on AML/CFT issues and operational developments going forward.

40. AUSTRAC's on-site supervision activities do not cover the full range of compliance tools available to it under the FTR Act. AUSTRAC currently focuses on education visits and has conducted only two compliance inspections of banks in the last two years. However, educational visits include inspections of records to ascertain whether an entity is a cash dealer, and if so, whether they have reporting obligations and whether they are complying with them. Australia also notes that education visits can result in agreed remedial action with the cash dealer which, while not a formal sanction, successfully encourages improvements. Nevertheless, the Australian government needs to develop an on-going and comprehensive system of on-site AML/CFT compliance inspections across the full range of financial institutions. There should also be specific measures that enable the regulator to disqualify management or directors or revoke a license to operate for specific AML/CFT failings. There is also a need to introduce a comprehensive administrative penalty regime for AML/CFT failings.

41. AUSTRAC's current resources for AML/CFT compliance appear limited; to be an effective regulator under the revised FATF standards, substantial dedicated financial resources should be directed toward the Reporting and Compliance section to increase staff numbers and to train existing staff. Supervisory skills and training pertaining to the conduct of on-site inspections and enforcement-related activities should also be enhanced.

#### **4. Preventive Measures – Designated Non-Financial Businesses and Professions**

42. Some DNFBPs have some CDD and record-keeping obligations under the FTR Act. Casinos and bullion sellers are “cash dealers” and therefore subject to the FTR Act’s customer identification requirements and record-keeping requirements, although these requirements generally pertain to the opening of an account or conducting significant cash transaction (i.e., those over AUD 10,000; approximately USD 7,500). Solicitors must also identify customers when reporting significant cash transactions. While trustees and managers of unit trusts, as financial institutions, are covered as reporting entities under section 3(g) of the FTR Act, trust and company service providers (TCSPs) generally do not fall within this definition. Generally, the provisions lack effectiveness due to inherent problems in the process of identification and verification as discussed in Section 3 of the report. Under the present legal regime, most DNFBPs operating in Australia do not have mandatory CDD, record keeping and other obligations as required under in Recommendation 12.

43. Casinos and bullion sellers, as cash dealers, are required to report STRs to AUSTRAC. However, other DNFBPs do not have similar obligations, nor are they required to develop internal policies, procedures, internal controls, ongoing employee training and compliance programs in respect of AML/CFT. There are not adequate, enforceable measures for DNFBPs to pay special attention to transaction involving certain countries, make their findings available in writing, or apply appropriate counter-measures.

44. Casinos have a generally comprehensive system for licensing and satisfactory regulation by the State and Territory authorities. Casinos, bullion sellers and to some extent solicitors are covered by the FTR Act and are thus monitored by AUSTRAC to a limited extent for the purposes of AML/CFT compliance. AUSTRAC has issued Guidelines that cover these cash dealers. However, other DNFBPs are not covered under the FTR Act and, thus, most lack effective regulatory and monitoring systems to ensure compliance with AML/CFT requirements. The criminal sanctions of the FTR Act would also apply; however, the lack of administrative sanctions coupled with an absence of criminal prosecutions of DNFBPs suggests that sanctions are generally not applied for breaches of AML/CFT requirements.

45. Australia has extended AML coverage to other businesses and professions, which have been identified as areas of greater money laundering vulnerability. Most notably, the FTR Act applies to bookmakers and Totalisator Betting Service Providers (as part of the broader gambling industry). Australia has also encouraged the development and use of modern and secure techniques for conducting financial transactions that are less vulnerable to money laundering.

#### **5. Legal Persons and Arrangements & Non-Profit Organisations**

46. Australia has a national system to record and make available useful information on the ownership and control of its corporations, which constitute the vast majority of legal persons in Australia, although there is no requirement to disclose beneficial ownership. Information on these companies is publicly available. Additional requirements for publicly listed companies ensure that relevant information on beneficial ownership and control of these entities is accessible. Law enforcement authorities and ASIC also have powers to obtain information on ownership and control, and beneficial ownership, where it exists. However, Australia should consider broadening its requirements on beneficial ownership so that information on ownership/control is more readily available in a more timely manner.

47. Tax information from certain trusts and law enforcement powers provide the means to access certain information on beneficial ownership and control of certain trusts. However, overall, these mechanisms to obtain and have access in a timely manner to beneficial ownership and control of legal arrangements, and in particular, the settlor, the trustee, and the beneficiaries of express trusts, are not sufficient.

48. Australia has reviewed its non-profit organisation sector and has taken some measures to ensure that these entities are not used to facilitate the financing of terrorism; however, the reviews have not resulted in the actual implementation of any additional measures. Australia should consider more thoroughly reviewing the adequacy of laws and regulations in place to ensure that terrorist organisations cannot pose as legitimate non-profit organisations. Australia should give further consideration to implementing specific measures from the Best Practices Paper to SR VIII or other measures to ensure that funds or other assets collected by or transferred through non-profit organisations are not diverted to support the activities of terrorist organisations.

## **6. National and International Co-operation**

49. Extensive mechanisms have been put in place within the Federal government and between the Federal and State Governments for co-ordination and co-operation. However, there is scope to improve co-operation/co-ordination between AUSTRAC, ASIC and APRA, and also to enhance co-operation at the policy level.

50. Australia appears to have fully implemented all the measures required in S/RES/1267 (and its successor resolutions) and S/RES/1373, and these measures appear effective. These measures appear to be effective. Australia has implemented the vast majority of the relevant sections of the Vienna, Palermo, and CFT Conventions.

51. Australia has a comprehensive system for providing mutual legal assistance and co-operating fully with other jurisdictions. The obligations for mutual assistance apply to terrorist financing and terrorist acts in the same way that they apply to other offences and situations. Australia's mutual legal assistance mechanisms are set out in the *Mutual Assistance in Criminal Matters Act 1987*. The obligations for mutual assistance apply to terrorist financing and terrorist acts in the same way that they apply to other offences and situations. The legislation provides for the production, search and seizure of information, documents or evidence (including financial records) from financial institutions or other natural or legal persons, and the taking of evidence and statements from persons. Assistance is not prohibited or subject to unreasonable, disproportionate or unduly restrictive conditions.

52. The system enables Australia to provide legal assistance without having entered into a treaty with the other jurisdiction involved; however Australia has entered into 24 bi-lateral agreements to accommodate countries that require a treaty to be in place. Dual criminality is not required; however, it is a discretionary ground for refusing assistance. Australian authorities indicated that this would only apply to the use of coercive powers and would not apply to less intrusive and non-compulsory measures. Foreign orders can be enforced, including: forfeiture orders (which includes laundered property and proceeds), pecuniary penalty orders (which designate a value rather than a property), restraining orders, production orders, monitoring orders, and search warrants to identify and seize property.

53. The Attorney-General's Department receives all incoming requests for mutual legal assistance requests and refers them to the necessary State or Territory authority, or to the CDPP for those involving the Commonwealth. Both agencies keep comprehensive statistics on requests received and answered, including the nature of the case and offences. In 2003-2004, the Attorney-General's Department received 179 new requests for legal assistance; 10 involved money laundering and 8 involved terrorism. In the same time period, the CDPP received a total of 41 requests, including 3 for money laundering, and 4 for Proceeds of Crime Act offences. Both departments have adequately responded in a timely manner to the vast majority of requests.

54. Australia has a generally comprehensive system for extradition. The *Extradition Act 1988* does not include money laundering or terrorist financing as extradition offences *per se*. However, an "extradition offence" is defined as one for which the maximum penalty is a period of imprisonment for not less than 12 months. Therefore, this would cover all Commonwealth money laundering offences from Division 400 of the Criminal Code, apart from the most minor offences which concern recklessly or negligently dealing in the proceeds of crime of less than AUD1000. For extradition to Commonwealth countries except Canada

and the United Kingdom, an offence with a penalty of not less than two years is required. This scheme currently applies to 64 countries and territories.

55. Dual criminality is a requirement for extradition from Australia. As the terrorist financing offence in Australia does not specifically cover collection of funds for terrorist organisations or the provision/collection of funds for individual terrorists, there is a concern that the dual criminality requirement for extradition could preclude extradition for these acts, and this should be rectified.

56. Regarding other forms of international co-operation, the capacity for and extent of information exchange at the FIU, law enforcement, prudential and corporate levels is significant and seems to be working well. AUSTRAC currently has exchange instruments with 37 counterpart FIUs. Presently, the AFP has 63 federal agents in 30 offices in 25 countries to exchange information as required. The AFP is presently negotiating in excess of 30 international agreements with partner law enforcement agencies. APRA and ASIC also exchange information with their overseas counterparts.

# 1..... OVERVIEW

## 1.1 General information on the country and its economy

1. Australia occupies a land area of about 7.7 million square kilometres, making it the 6<sup>th</sup> largest country in the world and roughly the size of the 48 contiguous states of the United States. Australia's population is currently just over 20 million.
2. 2004-05 is Australia's fourteenth consecutive year of economic growth. Australia has averaged growth of 3.0 per cent per annum over the last five years. In June 2005, Australia's unemployment rate was 5.0 per cent, its lowest level since November 1976. Inflation is currently low, at 2.5 per cent through the year to the June quarter 2005. Australia's recent economic growth has been driven by strong domestic demand, while net exports have subtracted from growth.
3. The services sector accounts for around 70 percent of Australian industry, with the largest service-based industries being property and business services, finance and insurance and health. Of the non-services sector, the largest industry is manufacturing. Australia's exports are dominated by goods exports, in particular resources (around 30 per cent of total exports), and rural commodities and manufactures (around 20 per cent each).
4. Australia is one of the major centres of capital market activity in the Asia-Pacific region. Annual turnover across Australia's over-the-counter (OTC) and exchange-traded financial markets was AUD<sup>2</sup> 69 trillion in the year to June 2004. Australia's total stock market capitalisation is almost USD 500 billion, making it the eighth largest market in the world, and the second largest in the Asia-Pacific region behind Japan.<sup>3</sup> Australia's foreign exchange market is ranked seventh in the world by turnover, with the USD/AUD the fourth most activity traded currency pair in the world. Australia's current account deficit was AUD 15.6 billion in the March quarter 2005 (7.2 per cent of GDP).
5. Australian has a federal system of government that consists of the Federal government, six State governments and two Territory governments. The main criminal law powers rest with the States and Territories. Commonwealth legislation is generally restricted to criminal activity against Commonwealth interests, Commonwealth officers or Commonwealth property (wherever located within Australia). The Australian Parliament's role in making legislation is therefore limited to specific "heads of power" issues including, trade and commerce with other countries, and among the States; taxation; currency, banking, other than State banking; external affairs; and other matters referred to the Australian Parliament by the States. State and Territory legislation relates to criminal activity against any non-Commonwealth interests located within the geographical area of the particular State or Territory. Accordingly, the majority of criminal law proceedings in Australia are State or Territory proceedings. There are ongoing efforts by the Commonwealth, State and Territory governments to 'harmonise' their respective criminal laws as far as possible.
6. Australia's Federal Parliament consists of two houses, a Senate and a House of Representatives. The Australian Constitution also established a High Court of Australia, which can decide cases in first instance and on appeal from other federal courts or State or Territory courts. There is also a system of federal courts below the High Court, established by legislation. The establishment of a federal judiciary did not affect the State judiciaries; each State continues to have its own Supreme Court and inferior courts.

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<sup>2</sup> The exchange rate as of 10 March 2005 was: 1 USD = 1.26 AUD; 1 AUD = .79 USD.

<sup>3</sup> FTSE International Ltd and Normura Group All-World Review Oct 2004.

## **1.2 General Situation of Money Laundering and Financing of Terrorism**

7. Drug importation/trafficking, tax fraud, corporate fraud and bank fraud are the major sources of illegal proceeds within Australia. While narcotics offences provide a substantial source of proceeds of crime, the majority of illegal proceeds are derived from fraud-related offences. As in other developed economies, money laundering in Australia is a significant, widespread and ongoing activity fuelled by, and reflective of, the amount of profit generated by crime. While the full extent of money laundering is difficult to quantify, one Australian government estimate suggested that the amount of money laundering in Australia ranges between AUD 2—3 billion per year.

8. Indications are that the majority of illegally obtained funds are obtained through crimes committed within Australia, but there is also evidence of overseas crime groups transferring the proceeds derived from crimes committed overseas to Australia. The majority of overseas matters are connected to frauds where money has either been laundered into Australia for the purpose of acquiring assets or has been laundered through Australia to overseas countries.

9. As in other developed economies, money laundering in Australia covers a broad range of activity ranging from small scale laundering of stolen goods and money through to highly sophisticated schemes to conceal and exploit the proceeds of drug trafficking, people smuggling and other organised transnational criminal activity. Australia recognises and is responding to the continuing challenges posed by increasingly well resourced and well organised transnational crime networks.

10. Criminals use a range of techniques to launder money in Australia. Generally, money launderers seek to exploit the services offered by mainstream retail banking and larger financial service and gaming providers. Visible money laundering is predominantly carried out using the regulated financial sector, particularly through the use of false identities and false name bank accounts facilitated by forged documents to structure and transact funds. Money launderers often move funds offshore by using international funds transfers. Money launderers also move funds through smaller or informal service providers such as alternative remittance dealers. Australian authorities also identified other methods that served as money laundering vehicles: cash smuggling into and out of Australia, gaming and gambling activity, and the use of legitimate businesses to mix proceeds of crime with legitimately earned income/profits. Law enforcement has also recognised a growing trend in the use of professional launderers and other third parties to launder criminal proceeds.

11. While the essential features of money laundering activity have not changed, Australia's implementation of global E-commerce and other technological developments have increased the money laundering opportunities available to criminal groups. A number of emerging trends have been identified within Australia as potentially affecting the risk of money laundering/terrorist financing. These include: the increased use of accounts or credit/debit card or stored value facilities available from other jurisdictions; and the increased use of alternative payment systems via the internet that provide the possibility of converting funds into a virtual currency such as e-credits and e-gold that disburse funds overseas without any reporting obligations.

12. The types of groups involved in laundering operations range from highly organised established criminal networks to smaller opportunistic criminal groups. Established criminal networks are often 'entrepreneurial' and involve a core group or key individuals. Such groups often combine expertise and resources to commit crimes, most usually drug trafficking, and maintain a range of strategic relationships to facilitate their illicit activities.

13. To date no links have been identified between known money laundering syndicates within Australia and terrorist organisations, although the potential for the use of some money laundering methodologies (cash smuggling, structuring, gambling, business interests, remittance services) to finance terrorist groups remains and is being closely monitored. Recent and ongoing investigations of terrorist activity conducted by national security and law enforcement agencies have been facilitated by Australia's transaction reporting regime. As these matters have yet to come to trial, details of the techniques used cannot be made public.

14. It is likely that terrorist networks in the region will explore other options for financing their activities to avoid existing legislative controls. For example, the misuse of legal arrangements, commercial vehicles or non-profit organisations is a recognised method by which to funnel terrorist financing, especially into less regulated jurisdictions. However, Australia is monitoring developments closely in co-operation with regional and international intelligence and law enforcement agencies and will take appropriate steps to address emerging threats.

### **1.3 Overview of the Financial Sector and DNFBPs**

#### *a. Overview of Australia's financial sector<sup>4</sup>*

15. The financial sector is Australia's third largest industry sector, contributing around AUD\$60 billion to the Australian economy in 2003-04 (or 7.7 per cent of GDP). This was more than twice that of the agricultural sector and around 80 per cent greater than the mining sector, two traditionally strong contributors to Australia's economic wellbeing.

16. Australia has a sophisticated modern financial system. The financial system is in a sound condition, is generally well regulated, and exhibits a strong risk management culture. The regulatory framework for the Australian financial system was substantially reformed in 1998 in response to the recommendations of the 1997 report of the Financial System Inquiry (FSI, also known as the 'Wallis Report'). The FSI made a series of recommendations designed to promote an efficient, responsive, competitive and flexible financial system that would underpin stronger economic performance, consistent with financial stability, prudence, integrity and fairness. In addition the authorities have undertaken measures to strengthen financial supervision and have implemented key recommendations of the 2003 Royal Commission that investigated the collapse of HIH Insurance Group of companies. The banks, as important financial intermediaries, are sound, well capitalised, well managed and highly profitable with low credit losses. The financial environment remains favourable from a financial stability outlook

17. A wide range of financial institutions exists in Australia. These include depository corporations (such as banks, building societies and credit co-operatives); financial markets; insurance corporations and pension funds (life insurance, general insurance, superannuation funds); other financial corporations, including financial intermediaries (such as financial unit trusts and investment companies); financial auxiliaries (such as securities brokers, insurance brokers and flotation corporations); foreign exchange instrument dealers, money remittance dealers and bureaux de change. The following chart sets out the types of financial institutions that carry out the financial activities listed in the Glossary of the FATF 40 Recommendations.

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<sup>4</sup> See Annex 2 for further details on financial institutions in Australia, including how many of each type of financial institution exists.



Type of financial activity (see the Glossary of the 40 Recommendations)	Type of financial institutions that perform this activity in Australia <sup>5</sup>
Acceptance of deposits and other repayable funds from the public	Authorised deposit-taking institutions (ADIs): Banks, building societies, credit unions <sup>6</sup>
Lending (including consumer credit; mortgage credit; factoring, with or without recourse; and finance of commercial transactions (including forfeiting))	ADIs Specialised credit card institutions Finance companies (e.g. GE, AGC) and non-bank lenders (e.g. AIMS/securitisation firms) Includes 'micro' lenders such as 'pay day' lenders
Financial leasing (other than financial leasing arrangements in relation to consumer products)	Lease financing entities including finance companies
The transfer of money or value (including financial activity in both the formal or informal sector (e.g. alternative remittance), but not including any natural or legal person that provides financial institutions solely with message or other support systems for transmitting funds)	ADIs Money remittance businesses (e.g. Western Union) Informal remittance (hawala)
Issuing and managing means of payment (e.g. credit and debit cards, cheques, traveller's cheques, money orders and bankers' drafts, electronic money)	ADIs Specialist credit card institutions Debit and credit card schemes (e.g. Visa, Mastercard, Bankcard) Electronic payment systems providers (e.g. BPAY, PayPal) Bureaux de change Ancillary non-cash payment facility providers—e.g. phone companies (paying for meter parking or vending machine purchases by SMS), providers of pre-paid phone cards, providers of gift vouchers, etc.
Financial guarantees and commitments	ADIs Providers of deposit bonds and other insurers
Trading in: (a) money market instruments (cheques, bills, CDs, derivatives etc.) (b) foreign exchange; (c) exchange, interest rate and index instruments; (d) transferable securities; (e) commodity futures trading.	ADIs Investment banks/firms (securities/derivatives dealers/ market makers) Money market firms (foreign exchange derivatives dealers/ market makers)
Participation in securities issues and the provision of financial services related to such issues.	ADIs Investment banks/ firms/ underwriters (securities dealers) Other licensed financial service providers (e.g. financial advisers and custodians)
Individual and collective portfolio management (covers mgt. of collective investment schemes such as unit trusts, mutual funds, pension funds)	Superannuation fund trustees Life insurers Investment companies Fund managers (dealers/ financial advisers) Managed investment operators (responsible entities) Other licensed financial service providers (e.g. financial advisers, accountants and lawyers)
Safekeeping and administration of cash or liquid securities on behalf of other persons	Licensed financial service providers (e.g. custodians, lawyers and managed investment operators (responsible entities))

<sup>5</sup> This table is a guide only. Australia's financial sector regulation is primarily *function*-based rather than *institution*-based. Whether an entity is legally able to perform a particular financial activity will generally depend on whether it has the appropriate licenses and/or other authorisations and meets the associated conditions, not the nature or structure of the entity and its other functions.

<sup>6</sup> Australia's larger banks provide a full range of financial products and services in addition to performing a traditional banking function.

Type of financial activity (see the Glossary of the 40 Recommendations)	Type of financial institutions that perform this activity in Australia <sup>5</sup>
Otherwise investing, administering or managing funds or money on behalf of other persons.	Licensed financial service providers (e.g. agents, custodians and lawyers)
Underwriting and placement of life insurance and other investment related insurance (including insurance undertakings and insurance intermediaries (agents and brokers))	Life insurers Life insurance brokers/ life insurance agents Financial advisors (if holder of an AFSL_ Reinsurers
Money and currency changing	Bureaux de change Includes ADIs and other businesses performing bureaux de change functions

18. Australia has a functional, as opposed to an institutional, approach to financial sector regulation. Accountability for the operational or day-to-day supervision of financial institutions and markets lies with the regulators. The functional approach assigns the main AML/CFT responsibility to AUSTRAC and other related agencies such as the AFP. The financial sector regulators may indirectly assist these agencies in the performance of their functions through the sharing of relevant information that is collected in the course of exercising their supervision, monitoring and investigation and data collection powers.

*b. Overview of designated non-financial businesses and professions (DNFPBs)*

19. **Casinos:** Australia has 13 casinos that directly and indirectly contributed \$5.9 billion in GDP to the Australian economy in 2003 and generated \$8.6 billion in industry sales.<sup>7</sup> While internet gambling is prohibited in Australia under national gambling legislation, there remains one State approved internet gambling casino, which was established before national gambling legislation came into operation.<sup>8</sup> Licensing and supervision of casinos is conducted at the State and Territory level; however, casinos have certain national AML obligations under the *Financial Transactions Reports Act 1988* (FTR Act). In addition to casinos, Australia also has a number of bookmakers, gambling houses, and totalisator agency boards.

20. **Real estate agents:** There are approximately 10,000 real estate businesses in Australia employing about 77,000 people. The number of persons employed as real estate agents at 30 June 2003 was about 68,000, of which 53% were franchised real estate agents and 47% were non-franchised real estate agents.<sup>9</sup> Most real estate businesses have less than 20 people, and the majority are those are businesses with 4 people or less. The real estate sector is regulated at the State and Territory level.

21. **Dealers in precious metals and dealers in precious stones:** Includes gold bullion sellers, which are subject to certain AML obligations under the FTR Act.

22. **Lawyers, notaries and other independent legal professionals:** There are approximately 40-45,000 practicing lawyers (solicitors and barristers) in Australia. Barristers present cases before the courts or provide more complicated legal advice, while solicitors engage in all other legal business with clients. The nine largest firms each have 100-200 partners and over 1,000 employees overall. Barristers must be independent from partnership firms and generally only accept business from solicitors. The regulation of the legal profession in Australia is conducted at the State and Territory level, although solicitors have cash transaction reporting obligations under the FTR Act.

23. **Accountants:** During 2001-2002, accounting practices in Australia employed 81,000 people and earned \$7,700 million in income. The number of accounting practices has grown by 17 per cent since 1995-96 to over 9,800 practices. In 2001-02, over two thirds of accounting practices were sole proprietor/principal businesses, employed 29 per cent of all accounting practices workers, and accounted

<sup>7</sup> Source: Australian Casino Association (ACA).

<sup>8</sup> Lassiters internet casino located in Alice Springs, Australia.

<sup>9</sup> Source: Real Estate Institute of Australia (REIA).

for 19 per cent of the total income earned. The largest practices (those with 20 or more principals or partners) employed an average of 1,824 people each. Accountants' main sources of income included business taxation (37 per cent of all income), personal accounting and taxation work (18 per cent) and auditing and assurance work (17 per cent). Accountants are subject to the codes of practice and guidelines of their respective professional bodies such as the ICAA and CPA Australia

24. **Trust and company service providers:** Trust and company services providers are not identified or regulated as a specific industry sector in Australia. However, approximately 121,000 companies are registered each year of which around 80% are registered electronically. Of those registered electronically the majority would have been registered by company service providers (called professional company incorporation providers in Australia). The balance of companies registered would have been in paper format and again the majority would have been by company service providers. These businesses generally do not deal directly with the public; rather, their direct clients tend to be intermediaries (lawyers, accountants, as well as financial planners and public companies) that are forming businesses on behalf of their clients.

25. Services such as establishing new companies, superannuation funds, unit trusts through company incorporation and registration services, and trust documentation, offering ongoing compliance and maintenance services for the life of a company or a trust are also done through existing law firms and accounting practices.

## 1.4 Overview of commercial laws and mechanisms governing legal persons and arrangements

26. The types of legal persons and legal arrangements that exist in Australia include companies, partnerships, incorporated associations, co-operatives and trusts.<sup>10</sup>

27. **Companies:** There are two basic types of companies in Australia: public companies and proprietary limited companies. All prospective companies must apply to register with the Australian Securities and Investment Commission (ASIC). The company must submit details of: the proposed company name, the class and type of company; the registered and principal business office; director and secretary; share structure; and members' share. Companies are owned by one or more shareholders (which may be legal or natural persons). Proprietary companies must have at least one director, while public companies must have at least three directors and one company secretary. Directors must be natural persons but may be nominees. There is only a nominal minimum capital required for start up. There are also public listed companies, which have further identification and disclosure requirements.

28. **Partnerships, limited partnerships, incorporated associations, co-operatives, etc,** are regulated by State and Territory Governments. While regulatory structures differ from State to State, certain common characteristics are evident:

- **Partnerships:** A partnership is an association formed to carry on business with a view to profit to members. Partnerships are not separate legal entities and hence not a legal person. The partners are jointly and severally liable for the obligations incurred in the name of the partnership. Partnerships are not subject to registration requirements. In a limited partnership, the limited partner has limited liability and it is limited to the amount the partner contributes to the capital of the firm as appears on the register. Limited partnerships must register with the State or Territory and provide information on the nature and identity of the partners and the nature of their liability; State regulatory offices are required to keep a register of limited partnerships that is available for inspection by the public.
- **Unincorporated Associations:** The term 'unincorporated association' is commonly applied in Australia in relation to a society, chamber, institute, union, club, federation, council, league or

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<sup>10</sup> See Annex 3 for further details on legal persons and arrangements in Australia.

guild which is essentially voluntary in nature and which exists for the purpose of giving expression to the desire of a group of persons to further a common interest or purpose. There is no statutory law governing their operation. Unincorporated associations are not subject to registration or ongoing compliance requirements.

- ***Incorporated Associations:*** State and Territory legislation allows for incorporation of associations, societies, clubs, institutions or bodies formed or carried on for any lawful purpose that have no less than five members. Incorporated associations are immune from personal liability at the suit of third parties in their capacity as members. All incorporated associations must hold an annual general meeting and submit financial statements to members, which must give a true and fair view of the financial position of the association. The public officer must lodge an annual statement with the regulator within one month after the annual general meeting.
- ***Co-operatives:*** Co-operatives are considered to be separate legal entities and are subject to annual reporting requirement. Their members co-operate for a common purpose, for instance, running a kindergarten. Co-operatives are usually non-profit associations, although co-operatives are run as a business. There are various types: non-trading co-operatives (non-profit); trading co-operatives (commercial enterprises, often in the agricultural sector); and financial services co-operatives that generally engage in deposit taking and lending to individuals, and are commonly referred to as Non Bank Financial Institutions. These co-operatives include building societies, credit unions, co-operative housing societies and friendly societies. These entities are subject to prudential supervision by APRA.
- ***Trusts:*** Aspects of trusts are governed by statute; States and Territories have passed laws setting out the rights and duties of trustees generally. Express trusts are created by a declaration of trust and the terms of trusts are usually set out in a written trust instrument. Specific types of trusts relevant to the financial system are subject to federal regulation, including managed investment schemes (public unit trusts and cash management trusts) regulated by ASIC and superannuation trusts regulated by APRA.

## **1.5 Overview of strategy to prevent money laundering and terrorist financing**

### ***a. AML/CFT Strategies and Priorities***

29. The objective of the Australian Government is to create a financial environment hostile to money laundering, terrorist financing, tax evasion and other serious crimes. The Australian system places a priority on the ability of competent authorities to actively monitor suspicious activity and identify money trails. High priority is given to the continued fine-tuning of Australia's system for analysing and targeting financial intelligence information that will lead to the detection and prosecution of money laundering, terrorist financing, tax fraud and evasion and other criminal activity.

30. The Australian Government is committed to ensuring that AUSTRAC and law enforcement agencies make the best possible use of technological developments in combating increasingly sophisticated money laundering techniques. The Australian government indicates that intelligence-led policing has proven to be effective in the fight against money laundering, terrorist financing, and associated criminal activity, and will continue to form the basis of our AML/CFT program.

31. A recent priority of Australia's AML/CFT program has been the enhancement of its capacity to detect, prevent and prosecute terrorist financing through the introduction of anti-terrorism laws in 2002 including provisions to ensure the freezing of potential terrorist assets. Major initiatives have been undertaken in the Asia/Pacific region to enhance regional capacity to fight terrorism and the financing of terrorism, including the establishment of the Jakarta Centre for Law Enforcement Cooperation in Indonesia and initiatives in the Solomon Islands, Papua New Guinea and other Pacific jurisdictions to strengthen regional capacity against terrorism.

32. Within Australia, significant additional funding has been provided to intelligence and law enforcement agencies to enhance counter terrorist capacity. The AFP has dedicated Financial Investigation Teams in all regional offices throughout Australia. These teams work closely with Joint Counter Terrorist Teams (made up of Federal and State police) in providing specialist investigation support to assist in the location and analysis of financial records. These new teams are being established out of direct Government Funding and are a high priority.

33. The Australian Government has committed to a process for reforming Australia's AML/CFT system to implement the revised FATF 40 + 9 Recommendations. The Attorney-General's Department (AGD) is co-ordinating this process, which will significantly re-shape Australia's current AML/CFT program in line with contemporary international best practice. A draft exposure bill is expected to be released for public comment in late 2005. As part of this process, the Australian Government is consulting a range of non-financial businesses and professions such as real estate agents, jewellers, and the legal and accountancy professions on measures to ensure that they are able to contribute to Australia's AML/CFT programs. The Australian Government is also consulting the financial sector on proposed enhancements to current customer due diligence, reporting and record keeping obligations.

***b. The institutional framework for combating money laundering and terrorist financing***

***(i) Ministries***

34. The ***Attorney-General's Department (AGD)*** coordinates the development of Australia's AML/CFT program including legislative initiatives to improve its effectiveness. The AGD participates in international efforts to combat money laundering and organised crime and has a particular role in assisting the development of anti-money laundering legislation in the Asia/Pacific region. The AGD has carriage of Civil Justice, Criminal Justice, Courts Administration and National Security issues and is the central authority administering international mutual assistance and extradition programs.

35. The ***Treasury*** provides advice on government budget policy issues and taxation arrangements, the formulation and implementation of effective macroeconomic policy and on policy processes and reforms that promote a secure financial system and sound corporate practices. The Treasury oversees a number of portfolio agencies including APRA and ASIC and has policy responsibility for Australia's financial sector regulatory framework. Treasury has no direct portfolio responsibility for combating money laundering or terrorist financing.

36. The ***Department of Foreign Affairs and Trade*** facilitates and oversees Australia's contribution to issues of international concern, such as treaties and conventions. The Department of Foreign Affairs administers the *Charter of the United Nations Act 1945* and its supporting *Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002* which implement United Nations Security Council Resolutions (UNSCR) 1373 and 1267.

***(ii) Criminal Justice and Operational Agencies***

37. ***Commonwealth Director of Public Prosecutions (CDPP)***: The primary role of the CDPP's office is to prosecute offences against Commonwealth law and to recover proceeds of Commonwealth crime. The main cases prosecuted by the CDPP involve drug importation and money laundering, offences against the *Corporations Act*, fraud on the Commonwealth (including tax fraud, medifraud and social security fraud), terrorism offences and people smuggling.

38. ***Australian Transaction Reports and Analysis Centre (AUSTRAC)***: AUSTRAC is Australia's Financial Intelligence Unit and performs the dual roles of both an intelligence unit and an AML regulator. In its intelligence role AUSTRAC plays a central role in the collection and development of financial intelligence, providing analytical support to the financial investigations of its partner agencies and providing financial intelligence to overseas counterparts. AUSTRAC is also the AML regulator.

39. ***Australian Federal Police (AFP)***: At the Federal level, most money laundering investigations are conducted by the AFP, the agency tasked with the primary investigation of breaches of Commonwealth law. In April 2003 the AFP established a Counter Terrorism Division to undertake intelligence-led investigations to prevent and disrupt terrorist acts. Joint Counter Terrorism Teams, comprising AFP members and State and Territory police, are now in place.

40. ***Australian Crime Commission (ACC)***: The ACC is Australia's only national (multi-jurisdictional) law enforcement agency. Its powers cover Commonwealth, State and Territory jurisdictions and include coercive powers that strengthen its ability to counteract organised crime of national significance. The ACC also maintains a national criminal intelligence database and provides strategic advice to its Board in the form of national criminal threat assessments and national law enforcement priorities. The ACC hosts the Proceeds of Crime Case Studies Desk, which was established in August 1999, to share information between Australian law enforcement agencies on money laundering and tax evasion methodologies and investigative techniques. The Proceeds of Crime Desk contains a number of case studies in relation to money laundering matters as well as a contact list to encourage contact and cooperation between Australian law enforcement agencies. The ACC Board is made up of all Commonwealth, State and Territory police commissioners, the Director General of Security, the Chair of the Australian Securities and Investment Commission, the CEO of the Australian Customs Service and the Secretary of the Attorney General's Department. The ACC's overarching role is to strengthen law enforcement nationally. It does this by working collaboratively with all other Commonwealth, State and Territory law enforcement and regulatory agencies to enhance their intelligence and enforcement capabilities in relation to nationally significant organised crime. Consequently, the ACC has a strong focus on large scale money laundering, organised tax evasion and FTR offences.

41. ***Australian Customs Service (ACS)***: The ACS is responsible for the collection of reports relating to the inbound or outbound cross-border carriage of currency, the detection of unreported currency movements and the seizure of funds. Offences detected by the ACS are referred to the AFP for investigation, prosecution and forfeiture action.

42. ***Australian Taxation Office (ATO)***: The ATO is the Australian Government's principal revenue collection agency, and is part of the Treasury portfolio. Its role is to manage and shape tax, excise (excluding customs duty) and superannuation systems that fund services for Australians. The ATO works in close co-operation with law enforcement agencies such as the AFP, ACC and the FIU and AML/CFT regulator AUSTRAC, where their interests and activities overlap.

43. ***State and Territory police forces*** identify and prosecute State level money laundering offences. Higher level law enforcement bodies such as the ***New South Wales Crime Commission*** are also tasked with the investigation and prosecution of serious criminal offences and the restraint and seizure of criminal proceeds. These agencies regularly coordinate their criminal intelligence and investigations through the ACC where criminal matters extend beyond State/Territory jurisdictions.

(iii) *Financial sector bodies—government*

44. The financial sector regulators are not specifically tasked with regulatory responsibilities for combating money laundering and terrorist financing. The regulatory objectives are providing prudential supervision, market integrity, investor protection, sound corporate governance and financial system stability.

45. ***Australian Prudential Regulatory Authority (APRA)***: APRA is responsible for the prudential regulation of all deposit-taking institutions (both Commonwealth and State), general insurance, life insurance (including friendly societies) and superannuation. APRA seeks to ensure that entities are prudently managed so that they are able to meet their financial promises to depositors and policy holders.

46. ***Australian Securities and Investments Commission (ASIC)***: ASIC is an independent statutory agency responsible for promoting market integrity and consumer protection in financial services and

corporate regulation. It regulates Australian corporations, financial markets (including stock exchanges), and financial service providers (including investment advisors, securities dealers, general and life insurance brokers, and foreign exchange dealers).

47. ***Reserve Bank of Australia (RBA)***: RBA is Australia's central bank and has responsibility for developing and implementing monetary policy, for the safety and efficiency of the payments system, and for the overall stability of the financial system. However, it does not supervise or regulate any individual financial institutions.

(iv) *Financial sector bodies—associations*

48. ***Australian Bankers' Association (ABA)***: Twenty-five banks are members of the ABA, which works to provide analysis, advice and advocacy and contributes to the development of public policy on banking and other financial services. One key elements of the ABA's work is the ongoing development of industry codes and standards.

49. ***Insurance Council of Australia (ICA)***: The ICA represents the interests of the Australian general insurance industry. The ICA was established to act as the peak body for general insurance companies in Australia licensed under the *Insurance Act 1973*.

50. ***Investment and Financial Service Association (IFSA)***: IFSA represents the interests of its members who are Australian organisations whose activities involve life insurance, retail investment management, wholesale investment management (including superannuation), or reinsurance. IFSA also plays a role in industry self-regulation. All IFSA members are required to adhere to IFSA's Code of Ethics, and a range of Standards & Guidance Notes. These Standards and Guidance Notes are designed assist and inform investors.

51. ***Credit Union Services Corporation Australia Ltd. (CUSCAL)***: CUSCAL represents 85% of credit unions in Australia. As an industry body it supports and promotes credit unions as competitive and successful providers of financial services. It is focused on developing and implementing industry strategy and representing credit unions on industry issues.

52. ***Australian Association of Permanent Building Societies (AAPBS)***: The AAPBS represents the interests of its members who are Building Societies. They monitor, analyse and advise Societies on policy and regulatory developments and assist Societies in the implementation of regulatory requirements.

53. ***Financial Planning Association of Australia (FPA)***: The FPA is the professional association of qualified financial planners in Australia, playing a role its self regulation. The FPA administers the financial planners' professional code of ethics, which is of a mandatory and enforceable nature. The FPA represents the interests of its members and provides education, training and information.

54. ***Securities and Derivatives Industry Association (SDIA)***: The SDIA is the peak industry body representing 65 stockbroking firms and over 1300 practitioners across Australia, representing over 98 per cent of the market. The SDIA represents the stockbroking industry on industry issues and provides professional education and training.

55. ***International Banks and Securities Association of Australia (IBSA)***: The IBSA represents international and investment banks in Australia. The IBSA aims to promote Government policies and business conditions that support a strong financial sector and works actively with the Australian Government in developing and promoting standards of high conduct by participants.

56. ***Securities Institute of Australia (SIA)***: The SIA represents individuals in the securities and financial services industry and has more than 11,000 members and 14,000 students in 59 countries. Its plays an educational role in promoting a code of ethics and code of conduct.

(v) *Regulatory bodies, SROs, and Associations for DNFbps*

57. **Casinos:** Casino regulations are administered by **State and Territory gaming authorities**, which oversee the fitness and propriety of licensees and exercise scrutiny of casino operations on a day to day basis. This is often conducted by a State Casino Control Authority working on-site in coordination with State or Territory police. AUSTRAC oversees AML compliance for casinos under the FTR Act and the Financial Transaction Reports Regulations 1990.

58. **Australian Casino Association (ACA):** All 13 Australian casinos are representatives of ACA, which represents the interests of the Australian casino industry at a government and community level and assists the casino industry in its development as an industry that is both economically sustainable and socially responsible. The ACA provides advice and responses to Federal, State, and Territory governments on a range of issues as well as developing industry wide frameworks.

59. **Law Council of Australia (LCA):** The LCA is comprised of all 14 law societies and bar associations of the States and Territories; LCA therefore represents 40,000 legal practitioners across the country. LCA represents the legal profession at the national level, speaks on behalf of its constituent bodies on national issues affecting the legal profession, and promotes the administration of justice, access to justice and general improvement of the law. LCA is not a self-regulatory organisation (SRO), but it has issued policy guidelines such as its “Blueprint for the Structure of the Legal Profession” and “Model Rules for Professional Conduct & Practice.” The LCA has also worked with the Commonwealth and State Governments to draft a model bill harmonising requirements of the legal profession across the country.

60. **State and Territory Law Societies:** Legal professionals are bound by their professional obligations and State legislation governing their practice. Supervision arrangements for legal professionals in most States are undertaken by the State Law Societies who acts as self-regulatory organisations (SROs) to monitor adherence with these statutory obligations. These consist of ACT Bar Association, Law Society of the Australian Capital Territory, New South Wales Bar Association, Law Society of New South Wales Law Society of the Northern Territory, Northern Territory Bar Association, Bar Association of Queensland Inc, Queensland Law Society, Law Society of South Australia , Law Society of Tasmania, The Victorian Bar Inc, Law Institute of Victoria, Law Society of Western Australia, and Western Australian Bar Association.

61. **Accountants:** Accountants are subject to the codes of practice and guidelines of their respective professional bodies. The principal professional bodies are the CPAA and the ICAA.

62. **CPA Australia (CPAA):** CPA Australia (CPAA) is an association of 105,000 finance, accounting and business professionals. CPAA plays a self-regulatory role for its members. All members are required to comply with a Code of Professional Conduct and undertake continuing professional development. CPAA has internal disciplinary procedures to handle complaints about members.

63. **Institute of Chartered Accountants in Australia (ICAA):** The ICAA represents 40,000 members who work mainly in chartered accounting firms that offer their services to the public. The ICAA plays a self-regulatory role for its members. All members are required to comply with a Code of Professional Conduct and complete continuing professional education. The ICAA has internal disciplinary procedures to handle complaints about members.

64. **The National Institute of Accountants (NIA):** The National Institute of Accountants (NIA) represents around 13,000 members working in industry, commerce, government, academia and private practice. NIA plays a self-regulatory role for its members. All members are required to comply with a Code of Ethics and take part in continuing education. NIA has an internal disciplinary process to handle complaints about members

65. **Real Estate Institute of Australia (REIA):** The REIA is the national professional association for the real estate industry in Australia. REIA provides advice to the Federal Government, Opposition, media, and the public on a range of issues affecting the property market. The Real Estate Institute of Australia (REIA) has eight members, comprised of *the State and Territory Institutes Real Estate Institutes* (REIs),



and through them approximately 6,500 real estate firms and licensed agents (about 70 per cent of the industry nationally) are collectively represented. Neither REIA nor the State and Territory REIs are self-regulatory organisations.

**c. *Approach concerning risk***

66. On a general level, the Australian Government's priorities for its AML/CFT program are based on its considered assessment of identified risks. Within the context of agreed AML/CFT priorities, AUSTRAC and Australian Government law enforcement agencies structure their operations to enable them to respond rapidly to emerging AML/CFT threats and opportunities. Areas of particular focus have included alternative remittance and underground banking systems, the role of accounting and legal service professionals in money laundering and the use of identity fraud to facilitate money laundering. However, preventative measures do not incorporate or differentiate specific risk-based approaches within requirements for financial institutions.

**d. *Progress since the last mutual evaluation or assessment***

67. The Second mutual evaluation report of Australia (of December 1996) identified the following deficiencies and recommendations that are addressed as described below.

68. *The need for greater international administrative co-operation between AUSTRAC and other financial investigation units.* Australia has made impressive progress in this area. Amendments to the FTR Act in 2002 improved AUSTRAC's authority to exchange financial intelligence. Australia sped up its negotiation of Exchange Instruments (EIs) and now has 37 EIs in place with counterparts, and is using them effectively.

69. *Deficiency of clear and comprehensive statistical data on the performance of the system to measure effectiveness.* AUSTRAC has taken measures to improve the systems through which feedback from domestic agencies, both in terms of the number of investigations value added, and the value of tax assessments assisted, by AUSTRAC information. Partner agencies have indicated that since 1995 FTR data have assisted 1,109 investigations, with ATO assessments assisted by FTR information totalling over AUD 501 million. Australia has also kept comprehensive statistics on international co-operation as well as money laundering investigations, prosecutions, and convictions at the Commonwealth level. However, better statistics are still needed at the State and Territory levels.

70. *Recommendation for greater attention by the Reserve Bank and Treasury to anti-money laundering policies to further emphasise the necessity of banks to adhere strictly to anti-money laundering measures.* The regulatory framework for the Australian financial system was substantially reformed in 1998 in response to the recommendations of the 1997 report of the Financial System Inquiry (FSI, also known as the 'Wallis Report'). The FSI made a series of recommendations designed to promote an efficient, responsive, competitive and flexible financial system that would underpin stronger economic performance, consistent with financial stability, prudence, integrity and fairness. The Government accepted the majority of the FSI recommendations, including replacing the existing industry based approach to financial system regulation with a functional and objectives based approach. As a result, the framework for Australian financial sector regulation is now organised on functional lines incorporating prudential regulation through APRA, market integrity and consumer protection through ASIC and broader financial system stability through the RBA. AUSTRAC complements this broader framework through its role as Australia's AML/CFT regulator.

71. As part of the restructuring of financial sector regulation, supervision and regulation of banks and other deposit-taking institutions was passed from the RBA to a new institution, APRA, in July 1998. The RBA, therefore, no longer has a direct role in the supervision or regulation of individual financial institutions.

72. *The use of alternate banking system by criminal groups.* AUSTRAC has made important progress in the past two years in seeking out alternative remittance systems, educating them on AML requirements, and incorporating them into the existing AML framework.

73. *The FTR Act should address solicitors who are allowed to open trust accounts or confidential accounts on behalf of their clients.* At the time of the evaluation, the Attorney General's Office indicated that amendments will be made to the FTR Act to include an obligation on solicitors to report suspicious transactions in relation to their trust accounts. While the FTR Act has been amended to provide for an obligation on solicitors to report SCTRs in relation to their trust accounts under section 15A of the FTR Act, there remains a need to legislate for the more general obligation on solicitors to report any suspicious transaction pertaining to money laundering activity concerning their clients. Australia plans to incorporate solicitors into the overall AML/CFT framework with its new legislation incorporating the revised FATF Recommendations.

74. *It is unclear how the FTR Act requirements are applied to bureaux de change and to other non-bank financial institutions (e.g. remittance dealers). A strict system of registration and enhanced supervision should be considered.* FTR Act requirements apply to bureaux de change and remittance dealers and Australia has made efforts to bring alternative remittance dealers and bureaux de change into the previously existing compliance regime under the FTR Act; however, there is no requirement that all of these entities be licensed or registered. Australian authorities advise that an alternative policy on the registration of ARS is being developed which seeks to avoid the imposition of rigid standards or an onerous licensing regime that would negatively affect the current level of compliance reporting under the FTR Act or run the risk of driving the informal remittance sector underground.

## 2. LEGAL SYSTEM AND RELATED INSTITUTIONAL MEASURES

### Laws and Regulations

#### 2.1 Criminalisation of Money Laundering (R.1 and 2)

##### 2.1.1 Description and Analysis

###### *Recommendation 1*

75. Money laundering is criminalised under the revised Division 400 of the *Criminal Code Act 1995*, which went into effect in January 2003.<sup>11</sup> Division 400 creates a range of penalties for offences depending on the level of knowledge (wilful and intent, recklessness, negligence) and the value of the property involved. Predicate offences are all indictable offences as set out under the Act's *proceeds of crime* definition section 400.1. Under Commonwealth law, an indictable offence is one whose penalty is a minimum of 12 months imprisonment. Division 400 replaced the money laundering offence previously contained in section 81 of the *Proceeds of Crime Act* (POCA) 1987.

76. Division 400 of the Code prohibits receiving, possessing, concealing or disposing of property, importing or engaging in banking transactions involving the proceeds of federal or foreign offences or property intended to be used as an instrumentality of such an offence.

77. The definitions of *proceeds of crime* and *property* set out under section 400.1 are expansive, extending to money or other property of “every description”, whether located in Australia or overseas, that has been realised directly or indirectly from the commission of an indictable offence.

78. Offences in Division 400 of the Criminal Code extend to proceeds of any foreign offences that, if they had occurred in Australia, would have been an offence under Commonwealth, State or Territory law. Under section 400.1, property “situated in Australia or anywhere else” may be the proceeds of crime. Dealing with assets located outside Australia would still constitute an offence.

79. According to Sections 400.1 and 400.2, offences in Division 400 of the Criminal Code apply to anyone who deals with the proceeds of crime, regardless of whether that person committed the predicate offence. The Criminal Code also makes clear that the prosecution does not need to establish that an offence has been committed in relation to the money or property in order for those assets to be considered proceeds of crime. Section 400.13 indicates that “To avoid doubt, it is not necessary, in order to prove for the purposes of this Division that money or property is proceeds of crime, to establish: (a) a particular offence was committed in relation to the money or property; or (b) a particular person committed an offence in relation to the money or property.” However, even under the new regime, the prosecution must still prove beyond a reasonable doubt that the proceeds are the proceeds of a crime, even if it is not necessary to establish proof of any particular crime.

80. Part 2.4 of the *Criminal Code Act 1995* deals with extensions of criminal responsibility and outlines the ancillary offences that apply to all Commonwealth offences, including those in Division 400. These include attempting, aiding, abetting, counselling or procuring, incitement and conspiracy.

###### *Additional Elements*

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<sup>11</sup> Division 400 of the Criminal Code is attached as Annex 4.

81. In certain circumstance the offences in Division 400 will apply to conduct that occurs outside Australia, even where that conduct is not an offence in the other country, because the offences carry category B extended geographical jurisdiction. Section 15.2 of the *Criminal Code Act 1995* outlines the extent of category B extended geographical jurisdiction, which includes offences committed outside of its Territory where the result of the conduct occurs in Australia or the natural person committing the offence is an Australian citizen or resident or the legal person is incorporated under Australian law, and the following conditions are met: 1) the offence is an ancillary offence; 2) the offence occurs wholly outside Australia; and 3) the primary offence occurs or is intended by the person committing the crime to occur wholly or partly in Australia. Australian law also provides for unconditional extraterritorial jurisdiction in some instances

82. The offences contained in Division 400 are well drafted and very flexible (given the matrix of punishment depending up on the threshold of the crime and level of knowledge as described under Recommendation 2), presenting the most appealing set of options for successful prosecution possible. However, the Commonwealth's statistics displayed above call attention to an issue of concern—a dearth of money laundering prosecutions and convictions.

83. Conversation with Australian authorities led to the following explanation of the reason for the absence of prosecutions for money laundering: almost all the money laundering cases that could be brought involved self money laundering, that is, the dealing of proceeds of crime by the perpetrator of that crime him or herself. In such cases, Australian judges invariably sentence the predicate crime and the money laundering offences concurrently. Since Money laundering requires proof of additional elements, prosecutors eschew these charges because bringing them does not lead to additional benefit. An additional reason cited for the lack of prosecutions is the difficulty in proving that the predicate offence was a violation of Commonwealth law, as opposed to State or Territory law. This element is required for federal jurisdiction to exist.

84. Authorities from the State of New South Wales also pointed to the fact of concurrent sentences as the reason for a similar lack of prosecutions at the State level. In addition, some States suffer from inferior money laundering statutes.

85. In addition, the current Division 400 of the Criminal Code, with its broad sentencing structure, has only been in effect since January 2003. Australian authorities indicated that, although a relatively small number of prosecutions against this Division have been completed, there were an increasing number of matters progressing through the court system, and they expect this trend to continue.

## ***Recommendation 2***

86. The offences contained in sections 400.3 to 400.8 of the Criminal Code apply to natural and legal persons who knowingly, recklessly or negligently engage in money laundering activity. The fault element of intention can be satisfied from inferences drawn from evidence of objective factual circumstances.

87. There are numerous levels of punishment set out in the statute. Each level is based upon a matrix of the amount of property in which the accused was dealing, and the degree of intent or knowledge he or she possessed. The statute provides for differing charges for five thresholds and cross referencing these amounts with three different levels of intent: knowing and wilful, reckless, and negligent. (These terms are defined in Section 5 of the Criminal Code.) Each of the levels of offence is subject to a different level of punishment. For instance, a person who deals in property valued at over one million Australian dollars can be sentenced to 25 years imprisonment if the money or property is, and the person believes it to be, proceeds of crime, or the person intends that the money or property will become an instrument of crime.

Amount	Knowing and Wilful	Reckless	Negligent
\$1,000,000	25yrs	12yrs	5yr
\$100,000	20yrs	10yrs	4yrs
\$50,000	15yrs	7yrs	3yrs
\$10,000	10yrs	5yrs	2yrs
\$1,000	5yrs	2yrs	1yrs
Any Amount	12 months	6 months	10 penalty units

88. Such a broad range of available penalties based upon amounts involved (which is an indicator of the harm to society) and upon level of knowledge and intent, provides a complex but effective legal tool to ensure that the sanctions for money laundering are adequate and proportionate. The statute allows the charging authority maximum flexibility in ensuring that the charges brought and the punishment faced is appropriate to the level of the crime.

89. Section 400.9 of the Criminal Code also contains a money laundering offence for persons who possess or deal with property that is reasonably suspected of being the proceeds of crime. There is a defence if the person can show that he or she had no reasonable grounds to suspect that the property was derived from some form of unlawful activity. The maximum penalty for an offence against section 400.9 is imprisonment for two years, irrespective of the value of property involved in the offence.

90. However, the offence has been used very little. And in the five prosecutions that have taken place, sentences have been low: two received sentences of up to two years, two received suspended sentences (with probation) of up to two years, and one received a bond. This may be the result of low amounts of proceeds being involved, and/or from a temptation for prosecutors to undercharge offences in order to ensure convictions more readily. In particular instances the prosecution might decide to proceed with these lower penalty offences where the available evidence would not satisfy the higher level fault element of intention but could satisfy the lower level fault elements of recklessness or negligence.

#### Legal persons

91. The criminal sanctions for money laundering apply to legal as well as natural persons. Part 2.5 of the Criminal Code sets out the general principles, physical and fault elements of corporate criminal responsibility. The Code applies to bodies corporate in the same way as it does to individuals. Section 12.1 indicates that a body corporate may be found guilty of an offence punishable by imprisonment by imposing a fine instead. According to section 12.3, to prove intention, knowledge or recklessness, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence. This could be done by proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

92. Prosecution of such legal persons does not bar or otherwise affect any parallel proceedings, whether judicial or administrative. As indicated in section 400.16 "This Division is not intended to exclude or limit the operation of any other law of the Commonwealth or any law of a State or Territory."

#### Statistics

93. At the Federal level, since 2000 there have been 51 charges under the POCA and the money laundering offence of the Commonwealth Criminal Code (which came into effect in January 2003)— The following table summarises the legislation that applies and charges dealt with summarily and on indictment and according to the legislation used.

Act		2000-2001	2001-2002	2002-2003	2003-2004	2004-2005*	Total
Proceeds of Crime Act 1987	summary	3	3	5	6	0	17
	indictment	5	7	2	3	4	21
Division 400 of the Criminal Code 1995	summary				4	6	10
	indictment				2	1	3
TOTAL (summary/indictment)		8 (3/5)	10 (3/7)	7 (5/2)	15 (10/5)	11 (6/5)	51

\*from 1 July 2004—25 May 2005

94. The following table summarises information on the number of defendants whose charges were proven, acquitted, discontinued or other for the period 1 January 2000 to 7 March 2005:

Defendants	Money laundering POC Act	Money laundering Criminal Code
Proven	28	5
Acquitted	2	0
Discontinued	10	0
Other	1	0
Total	41	5

95. For the defendants prosecuted under Division 400 of the Criminal Code, Australia indicated that the following convictions and penalties were received.

- 4 received a sentence involving imprisonment and:
  - all of these received a sentence including imprisonment for a period of up to or including 2 years and;
  - 2 were released forthwith and received a recognizance release order on condition that they be of good behaviour for a specified period.
- 1, a juvenile, received a bond

96. For the defendants prosecuted under the POCA, for the period of 1 January 2000 to 4 March 2005, that the following convictions and penalties were received.

- 19 received a sentence involving imprisonment. Of these:
  - 13 received a sentence including imprisonment for a period of up to or including 2 years;
  - 4 received a sentence including imprisonment for a period of more than 2 years up to or including 5 years;
  - 2 received a sentence of greater than 5 years; and
  - 3 were released forthwith and received a recognizance release order on condition that they be of good behaviour for a specified period;
- 3 received bonds under section 20(1)(a) of the *Crimes Act 1914*; and
- 10 received bonds under section 20(1)(b) of the *Crimes Act 1914*.

### State and Territory offences

#### *New South Wales*

97. As mentioned above, the States and Territories are the primary enforcers of criminal law. While statistics from these jurisdictions were generally unavailable, the assessors surveyed laws in the various States, concentrating on the most populous State, New South Wales. In New South Wales, the Confiscation of Proceeds of Crime Act 1989, Section 73 sets out the offence of money laundering:

“The person engages, directly or indirectly, in a transaction that involves money, or other property, knowing that the money or property is proceeds of a serious offence, or the person receives, possesses, conceals, disposes of or brings into New South Wales any money, or other property, knowing that the money or property is proceeds of a serious offence. A person shall not be convicted of an offence under

this section unless the prosecution proves beyond reasonable doubt that, at the time the person: (a) engaged in a transaction involving money or property, or (b) received, possessed, concealed, disposed of or brought into New South Wales money or property, and (c) the person knew the money or property was proceeds of unlawful activity.”

98. New South Wales officials indicated that this was one of the most difficult money laundering offences to prove in Australia, because it essentially required proof of the predicate offence. As a result, successful prosecutors were limited to self-laundering cases, with only five successful prosecutions for the money laundering offence from July 1997 to January 2005.

99. New South Wales officials indicated that a total of 7,686 persons were charged for receiving or handling proceeds of crime in 2003. A range of penalties were issued including 386 imprisonments, 823 fines, and 362 bonds without supervision, while 60 persons charged in 2003 had no conviction recorded. These cases include the five money laundering charges in addition to numerous other charges of possession of stolen goods and possession of money from the sale of illicit drugs.

#### *Victoria*

100. In Victoria, model money laundering legislation was recently enacted that follows the Commonwealth statute in that it prohibits all types of dealing with the proceeds of crime and attaches differing levels of punishment based upon the knowledge and intent of the person so dealing. The statute similarly prohibits dealing in property which is to become the instrumentality of an offence. Unlike the Commonwealth statute, the Victoria law does not vary punishment based upon the value of the property involved.

### **2.1.2 Recommendations and Comments**

101. The Australian Commonwealth statutory scheme addressing money laundering is robust and well drafted, and broadly meets all the essential criteria. What is missing is a record of effective implementation and use of the money laundering offence, particularly at the Commonwealth level, to show that the laws are fully effective. The number of money laundering prosecutions appears to be low. While proceeds of crime action is pursued by Australian agencies routinely in criminal investigations involving money laundering, Australia’s record of prosecutions indicates that money laundering is not yet dealt with as a separate and serious offence. Police generally do not investigate or refer money laundering as a separate charge. Prosecutors indicate that in practice cases were generally brought under the predicate offences only.<sup>12</sup>

102. Commonwealth officials indicated that the same issues arise on the State level, resulting in very few prosecutions for money laundering. The NSW Crime Commission and DPP indicated that the predicate offence had to be proved for a money laundering conviction, and even if this difficulty could be overcome, it was unlikely that a conviction for money laundering would have any consequence in terms of the defendant’s sentence due in part to concurrent sentencing. Cases are only brought when there appear to be broader, more sophisticated money laundering schemes. Since 1997 there have only been 5 successful prosecutions for money laundering.

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<sup>12</sup> Australia has recently advised of new strategies implemented to respond to the concerns raised during the FATF on-site visit. The consideration of money laundering offences under Division 400 of the *Criminal Code 1995*, in addition to any predicate offence and proceeds of crime action is now mandatory for all criminal investigations conducted by the AFP. In conjunction with investigating all crime types money laundering will, wherever possible, also be pursued. Australia has also advised that changes have been made to the collection of money laundering offence data within the AFP in response to the FATF’s concerns regarding the availability of appropriate statistical data. The AFP’s operational data base has been amended to separate *Criminal Code 1995* offences from those under the *FTR Act 1988*. This will allow the AFP to extract data for the specific offence of money laundering.

103. State statutes vary in their comprehensiveness, and there were no comprehensive statistics available with which to examine their use and effectiveness.

104. Australia needs to improve the implementation of its money laundering offence. Within its traditions and fundamental legal principles, Australia needs to find a way to provide incentive to its investigators and prosecutors to prosecute money laundering cases as separate and serious offences. Only through increased use of its robust statutory scheme can Australia demonstrate that it recognises that money laundering must be dealt with as a separate and serious offence, not merely as an ancillary to the predicate offence.

105. States and Territories should all adopt the national model contained in Division 400 of the Criminal Code (including the mental elements of knowledge, recklessness, negligence) to allow them a broader ability to prosecute and convict for money laundering.

### 2.1.3 Compliance with Recommendations 1 & 2

	Rating	Summary of factors underlying rating
R.1	LC	The lack of money laundering prosecutions indicates that the regime is not being effectively implemented.
R.2	LC	The regime for sanctions appears to be comprehensive, dissuasive and proportional but is not being effectively applied. In the cases where it has been applied, sentences appears to be low.
R.32	LC	There is a lack of State/territory statistics on prosecutions and convictions for ML.

## 2.2 Criminalisation of Terrorist Financing (SR.II)

### 2.2.1 Description and Analysis

106. The *Suppression of the Financing of Terrorism Act 2002*, which came into force in July 2002, amended a number of existing Acts to implement Australia's obligations under the UN Suppression of the Financing of Terrorism Convention, and relevant UN Security Council Resolutions. The amended acts include the *Criminal Code Act 1995*, the FTR Act, the *Mutual Assistance in Criminal Matters Act*, and the *Charter of the United Nations Act*.

107. As amended, The *Criminal Code Act 1995* now contains several offences related to the financing of terrorism. Section 102.6 criminalises "Getting funds to or from a Terrorist Organisation." A penalty of 25 years imprisonment applies if: (a) a person intentionally receives funds from, or makes funds available to, an organisation (whether directly or indirectly); and the organisation is a terrorist organisation; and (b) the person knows the organisation is a terrorist organisation. A penalty of 15 years applies if, rather than "knowing," the person is "reckless" as to whether the organisation is a terrorist organisation. This offence does not specifically cover the *collection* of funds for a terrorist organisation.

108. Section 102.1 of the Criminal Code defines "terrorist organisation." Certain specific organisations are listed, and the Minister can designate additional terrorist organisations through regulations.

109. Section 103.1 ("Financing Terrorism") of the Criminal Code also creates other terrorist financing offences. A penalty of life imprisonment applies if: (a) a person intentionally provides or collects funds; and (b) the person is reckless as to whether the funds will be used to facilitate or engage in a terrorist act. Although the range of offences is generally broad, the regime currently does not specifically criminalise the collection or provision of funds for an individual terrorist.



110. Australian authorities have noted that Section 103.1 of the Criminal Code refers not only to recklessness to funds being used to engage in a terrorist act, but also to facilitate a terrorist act. Therefore, according to Australian authorities, providing or collecting funds where the person is reckless as to whether they will be used to facilitate a terrorist act would cover the “collection of funds for a terrorist organisation” and “the collection or provision of funds for an individual terrorist.” However, the evaluation team did not find this sufficiently covers the provisions in SR II.

111. These offences do not require that the funds are actually used to carry out or attempt a terrorist act—under section 103.1(2), the offence is committed even if the terrorist act does not occur. Under sections 102.9 and 15.4 of the Criminal Code, all terrorist financing offences apply whether or not the conduct or the result of the conduct occurs in Australia.

112. The definition of *funds* under section 100.1 of the Criminal Code is an expansive definition which matches the definition found at Article 1(1) of the UN Terrorist Financing Convention 1999. As described under Recommendation 1, Part 2.4 of the Criminal Code extends criminal responsibility to the attempting, aiding or abetting of, the incitement of, or conspiracy to commit any offence.

113. All terrorist financing offences that exist in Australia are Commonwealth indictable offences. As all Commonwealth indictable offences are predicate offences for money laundering; terrorist financing offences are also money laundering predicates. It is also an offence to engage in any of the types of conduct set out in Article 2(5) of the Terrorist Financing Convention.

114. The same principles and provisions that apply to the offence of money laundering (as described in above), dealing with inference, criminal responsibility for legal persons, and the ability to hold parallel criminal and civil proceedings, also apply to the current terrorist financing offences in Australia.

## 2.2.2 Recommendations and Comments

115. Legal provisions criminalising the financing of terrorism are generally broad. However, Australia should specifically criminalise the collection or provision of funds for an individual terrorist, as well as the collection of funds for a terrorist organisation.

116. There have not yet been any prosecutions under the terrorist financing statutes. Therefore, the effectiveness of these measures cannot be determined.

## 2.2.3 Compliance with Special Recommendation II

	Rating	Summary of factors underlying rating
<b>SR.II</b>	LC	The range of offences are generally broad but do not specifically cover certain requirements of SR II: collection of funds for a terrorist organisation; collection or provision of funds for an individual terrorist
<b>R.32</b>	LC	(Adequate for SR II; there have been no prosecutions for terrorist financing.)

## 2.3 Confiscation, freezing and seizing of proceeds of crime (R.3)

### 2.3.1 Description and Analysis

117. The forfeiture, freezing and seizure of criminal proceeds is primarily covered by proceeds of crime legislation. The *Proceeds of Crime Act 1987* (POCA 1987) provides for a conviction based forfeiture of proceeds of crime scheme. The 1987 Act only applies to cases begun before 1 January 2003 and will be repealed once all cases under the Act are completed. The *Proceeds of Crime Act 2002* (POCA 2002)

provides for both conviction and civil based forfeiture of proceeds and extends and strengthens the conviction based forfeiture scheme of the 1987 Act.

118. The POCA 2002 provides a scheme to trace, restrain and confiscate the proceeds of crime against Commonwealth law. In some circumstances it can also be used to confiscate the proceeds of a crime against foreign law or the proceeds of a crime against State law, if those proceeds have been used in a manner that violates Commonwealth law.

119. Property is defined broadly in the POCA 2002. Section 329 indicates that “property is the proceeds of an offence if it is wholly derived or realised, whether directly or indirectly, from the commission of the offence; or it is partly derived or realised, whether directly or indirectly, from the commission of the offence.” This includes property which may be held indirectly by another person. The property of a third party can be restrained if it is suspected that the property is either the proceeds or an instrument of the offence or is under the effective control of the suspect (sections 17 and 18).

120. The Act provides for two streams of recovery action: a conviction based stream, which is based on the provisions of the 1987 Act, and a civil based stream under which recovery action can be taken independently of prosecution.

121. Under the conviction based system, the Commonwealth may obtain:

- a) a conviction based forfeiture order;
- b) a conviction based pecuniary penalty order or
- c) automatic forfeiture following a conviction.

122. Under a conviction based forfeiture order, the proceeds of, or instrumentalities used or intended for use in the commission of an offence can be forfeited as part of the sentence (sections 48 and 329(2) of the POCA 2002). Under the pecuniary penalty order, the defendant is ordered to pay a penalty equal to the benefit he or she derived from the crime.

123. Automatic forfeiture, which can take place in cases where a person has been convicted of a serious offence, creates a rebuttable presumption that any property the person owns or controls is the proceeds of crime. Upon conviction, the defender is required to demonstrate the lawful origin of the property. If no evidence is given that tends to show that the property was not used in, or in connection with, the commission of the offence—the court must presume that the property was used in, or in connection with, the commission of the offence and forfeiture occurs (section 92). Serious offences include drug crimes, money laundering, terrorism, people smuggling, and fraud where the crime is punishable by at least three years imprisonment and the offence involves at least \$10,000 AUD.

124. Restraining orders under the POCA 2002 can be granted upon an affidavit of a law enforcement officer’s reasonable suspicion, provided he details the reasons for that suspicion. A restraining order is not required for all types of forfeiture under the act, but must be obtained before automatic forfeiture in conviction based proceedings, or person directed and asset directed forfeiture orders in civil actions.

125. The POCA legislation allows property to be restrained where it is proposed that a person be charged with an indictable offence, or where a person is suspected of committing an indictable offence (sections 17, 18 and 19 of the POCA 2002). The Director of Public Prosecutions can request a court to consider a restraining order application without notice being given to the owner of the property (sections 26(4) and 33).

126. The POCA 2002 provides a wide range of powers to allow authorities to identify and trace property, including examination orders, production orders, notices to financial institutions, and search and seizure provisions (Chapter 3, POCA 2002). Bona fide third parties can apply to have property excluded from a restraining or forfeiture order, and the court can order that items such as reasonable living expenses for dependents be paid out of restrained or forfeited property (sections 24, 29, 72 and 73). The court may also set aside a disposition of property that contravenes a restraining order (section 36).

## *Additional Elements*

127. The property of a terrorist organisation can be forfeited under the *Charter of the United Nations Act 1945*. There are no other provisions for the confiscation of property of organisations that are primarily criminal in nature.

128. In addition to updating the POCA 1987, the 2002 Act added a civil forfeiture scheme. Under this scheme, the court can order forfeiture if it is satisfied, to the civil standard of proof (basically the balance of probabilities), that a crime has been committed irrespective of whether any person has been prosecuted for that crime or convicted of it. A court will issue:

- a) *a person directed forfeiture order*: if property of a person is under restraint and a court finds, to the civil standard, that the person has committed a serious offence, and the person does not satisfy the court that the property was derived from a lawful source;
- b) *an asset directed forfeiture order*: if the property is under restraint and the court finds, to the civil standard that the property is the proceeds of a commonwealth offence, a foreign offence, or a State offence “of Commonwealth concern” (the proceeds of the offence are dealt with in a way that contravenes a Commonwealth law dealing with import/export, communications or banking), or if the court finds that the property is an instrument of a terrorism offence;
- c) *a person directed pecuniary penalty order*: if it finds, to the civil standard, that the person has committed a serious offence, and will do so in an amount equal to the proceeds of the particular offence and the proceeds of any other identified unlawful activity;
- d) *a literary proceeds order*: if it finds that a person has committed a crime against Commonwealth law and sold his or her story to the media. The final provision also applies to persons who have committed crimes against foreign law and sold their story in Australia.

129. This civil stream is intended to enhance the Commonwealth’s ability to forfeit criminal proceeds, particularly in cases where the perpetrator is a fugitive.

130. The following statistics relate to action taken by the CDPP under Commonwealth law (including the POCA 1987 and the POCA 2002).

	2000/2001	2001/2002	2002/2003	2003/2004
Number of restraining orders made	21	25	45	107
Value of property restrained	AUD 7.6 million	AUD 9.7 million	AUD 14.5 million	AUD 87.8 million
Number of confiscations*	109	80	52	70
Value of property recovered	AUD 6.2 million	AUD 6.9 million	AUD 3.4 million	AUD 10.4 million

\*forfeiture orders, pecuniary penalty orders, and automatic forfeiture following conviction

131. Australian authorities indicated that approximately 10% to 20% of these cases involved money laundering or offences against the *Financial Transactions Reports Act 1988*. None involved the financing of terrorism.

## State and Territory Situation

132. All States and Territories have their own confiscation legislation, which seeks to retrain and confiscate proceeds of State/territory offences.

### *New South Wales*

133. In New South Wales, the New South Wales Crime Commission (NSWCC), a multi-agency investigative and prosecutive body with broad powers, is active in forfeiture, and there is a robust civil forfeiture statute in place. The NSWCC administers the Criminal Assets Recovery Act 1990 (CAR Act); forfeiture of criminal assets also takes place through the NSW *Confiscation of Proceeds of Crime Act 1989* and the *Proceeds of Crime Act 2002*. Under New South Wales definitions, a proceeds assessment order is directed at recovering monies that can be shown to have been generated by illegal activity,

whereas an assets forfeiture order attaches to the amount of the person's property that cannot be shown to have been lawfully acquired.

134. The 2003/2004 figures show 129 restraining orders (up from 105 for the previous year) resulting in 64 completed applications for forfeiture orders, most by way of negotiated settlement, in an amount in excess of approximately AUD 10 million. An additional 42 applications for proceeds assessment orders were obtained by way of negotiated settlement, resulting in orders that total AUD 7.6 million for 2003/2004.

#### *South Australia*

135. Restraining orders granted in relation to defendants charged with a serious drug offence automatically convert into a forfeiture order 6 months after a conviction (or appeal), unless the defendant can show that the property comes within the specific exceptions outlined in the Act. Therefore, there is often a significant delay between the restraint of property under the Act and the conviction of a defendant and subsequent forfeiture of that property.

136. During the year 2003-2004, revenue deposited into the Victims of Crime Fund amounted to AUD 1.5 million, which represents an increase of 125% on the revenue collected in the previous year. These resulted from restraining orders for 25 defendants and forfeiture orders for 68 defendants.

#### *Western Australia*

137. In Western Australia, the majority of property confiscated follows a conviction and declaration that the convicted person is a drug trafficker, at which point all of the property of that person is confiscated to the State. While many individuals declared as drug traffickers have no assets, proceedings have been commenced against many declared drug traffickers during 2003/04. During 2003/2004, 71 people were declared drug traffickers. The proceeds of confiscated assets are paid into the Confiscation Proceeds Account and the Attorney General has the power to make grants from the account for a range of purposes. A total of \$719,815 was paid into the Confiscation Proceeds Account from property of declared drug traffickers. Western Australia's legislation also provides for confiscation from "illicit enrichment." This was viewed by Commonwealth and other State officials as the strongest in Australia.

#### *Victoria*

138. Victoria has an extensive confiscation statute. Before 2004, it was based primarily upon restraining orders and conviction-based forfeiture. Amendments to the Confiscation Act 1997, which came into force on 1 December 2003, expanded the number and type of offences which could be 'automatic forfeiture' offences as defined in Schedule 2 of the Act. To date these changes do not appear to have been reflected in the nature or number of Restraining Orders being obtained. In 2003-2004 there was a 47% increase in Restraining Orders granted over the previous year – from 128 to 188. The Act was also amended in 2004 to include civil forfeiture.

#### *Queensland*

139. In January 2003, the Criminal Proceeds Confiscation Act 2002 commenced. This act strengthened the existing Crimes (Confiscation) Act 1989 and implemented a civil confiscation scheme. Under this new legislation assets worth approximately AUD 6.5 million are subject to pending forfeiture applications. Between 1 July 2003 and 30 June 2004, assets restrained amounted to AUD 10.5 million.

#### *Australian Capital Territory (ACT)*

140. The Confiscation of Criminal Assets Act 2003 came into effect on 15 August 2003, replacing the *Proceeds of Crime Act 1991*. The new Act contains a conviction based recovery scheme but also provides for assets to be restrained where no charges are laid or where charges are yet to be laid. Assets can be

restrained through civil recovery and by application of penalty orders. During the reporting period \$68,995 was forfeited to the Territory and placed under the control of the Public Trustee.

### 2.3.2 Recommendations and Comments

141. The Commonwealth and New South Wales, Western Australia, and Victoria have extensive, and apparently effective, confiscation schemes involving a mixture of criminal and civil confiscation. Amounts forfeited at the Commonwealth level may be somewhat low, but this could be attributable to the federal nature of the government. Other States and Territories that have not yet adopted similar civil forfeiture schemes should consider doing so. Civil forfeiture for instrumentalities of crime could be considered.

### 2.3.3 Compliance with Recommendations 3

	Rating	Summary of factors underlying rating
R.3	C	
R.32	LC	(Confiscation statistics appear to be comprehensive.)

## 2.4 Freezing of funds used for terrorist financing (SR.III)

### 2.4.1 Description and Analysis

#### *Special Recommendation III*

142. Terrorist asset freezing measures in Australia were updated by the POCA 2002 and the *Suppression of the Financing of Terrorism Act 2002* (SoFTA) which were enacted to implement Australia's commitments under the UN International Convention for the Suppression of the Financing of Terrorism, S/RES/1267, S/RES/1373, and other UN Security Council resolutions addressing the freezing of terrorism-related property. The SoFTA amended the Financial Transaction Reports Act 1988, the *Charter of the United Nations Act 1945* (COTUNA), the *Criminal Code Act 1995* and the *Extradition Act 1988* and provided mechanisms to facilitate the rapid dissemination of financial data and intelligence. The *Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002* ("the Regulations") give effect to asset freezing requirements.

#### Freezing actions under S/RES/1267 and S/RES/1373

143. Regulation 6A of the Regulations designates "proscribed persons" (the Taliban, Usama bin Laden, a member of Al Qaida or any other person designated by the UN 1267 Committee) and indicates that the assets of these persons and of entities directly or indirectly controlled by them must be frozen in accordance with the relevant provisions of S/RES/1267, S/RES/1333 and S/RES/1390. These provisions require that the freezing occur without delay. As it is an offence under section 20 of COTUNA to allow the asset to be dealt with or facilitate the use of freezable assets, this indirectly requires that freezings occur without prior notification to the persons involved, as such notifications could allow the assets to be used or facilitate the use of the assets.

144. Section 15 of COTUNA also authorises the Minister of Foreign Affairs to list assets, class of assets, or person or entities through regulations and publication in the *Gazette*. Under Regulation 6, the Minister for Foreign Affairs (the Minister) "must list a person or entity if the Minister is satisfied that the person or entity is a person or entity mentioned in paragraph 1 (c) of Resolution 1373." The Minister may also "list an asset, or class of asset, if the Minister is satisfied that the asset, or class of asset, is owned or controlled by a person or entity mentioned in paragraph 1 (c) of Resolution 1373." (Resolution 1373 requires freezing of assets without delay.) This can occur without prior notification to the persons involved, but this does not appear to be a requirement.

145. This mechanism is enforced through sections 20 and 21 of COTUNA. Section 20 creates an offence for dealing in “freezable assets”, which are defined as those assets owned and controlled by “proscribed persons or entities” or other “listed persons” as well as other “listed assets” as designated by COTUNA’s regulations or by the Minister. The person commits an offence (5 year penalty) if it holds the asset and uses or deals with the asset, allows the asset to be used or dealt with, or facilitates the use of the asset or dealing with the asset. Section 21 creates an additional offence (5 year penalty) for a person who directly or indirectly makes an asset available to a proscribed person or entity.

146. Section 24 of COTUNA indemnifies asset holders against claims by asset owners where they take action in good faith and without negligence in purported compliance with the Act.

147. When Australia is notified by another jurisdiction that it has designated a person or entity as a terrorist, prompt consideration is given to whether the person or entity should be designated under Australia law. Australian authorities indicated that they liaise with intelligence officials from other countries in making these determinations. The cases are assessed drawing on various types of information, including supporting information provided by the other jurisdiction.

148. COTUNA (s. 14) defines “freezable asset” to mean an asset that is “owned or controlled” by a proscribed person or entity. The text of paragraph 1(c) of SC/RES 1373 is directly included in the COTUNA Regulation 6. Freezing actions extend to: “*funds and other financial assets* or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities *owned or controlled directly or indirectly* by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including *funds derived or generated from property owned or controlled directly or indirectly* by such persons and associated persons and entities.” The regulation is broad enough to cover both wholly and jointly owned assets. Persons mentioned in paragraph 1(c) of S/RES/1373 are listed, and their assets frozen.

149. The regulation inherently covers funds of designated entities and those involved in the commission of terrorist acts but does not explicitly cover those who finance terrorism or terrorist organisations (outside of the context of specific terrorist acts). While Australian authorities have indicated that the wording is sufficiently broad to cover these latter categories, the evaluation team was not convinced that it fully covers these provisions of SR III. In any case, the final decision of whether to list a person, entity or asset is up to the Minister, and this decision is not subject to parliamentary review.

#### Communication to financial institutions and procedures

150. In accordance with COTUNA’s Regulation 8, Australia’s Department of Foreign Affairs and Trade (DFAT) maintains one consolidated list of individuals and entities to which the asset freezing sanctions apply. The list contains over 540 names, including all 443 names from the S/RES/1267 list plus approximately 89 other names designated under the regulations implementing S/RES/1373 and designated by the Minister. The 89 names include names of persons or entities linked to terrorism in the region as well as certain Middle Eastern and Latin American organisations. The list is publicly available on DFAT’s website at [www.dfat.gov.au/icat/freezing\\_terrorist\\_assets.html](http://www.dfat.gov.au/icat/freezing_terrorist_assets.html).

151. Financial institutions and other organisations that deal with assets can register to receive email updates whenever the list is updated. List-matching software has been developed and made available (through the DFAT website) to these organisations to facilitate cross-checking of databases with the consolidated list.

152. DFAT’s website also provides guidance on asset freezing laws and procedures, including a referral process to the AFP developed in consultation with the financial sector. Procedures for asset holders and the police to follow are also outlined in the Regulations 9 and 10.

153. In practice, the procedures and guidance appear to be well communicated to the financial sector; the financial industry was well aware of its obligations and procedures and expressed a clear commitment to

complying with them although it did indicate that additional guidance (such as more details or identifying information for listed names) would be helpful. The situation was not as clear for the non-financial sector, as the representative of the real estate industry, which could be at risk for holding and dealing in terrorist-financing related assets, was not aware of all the CFT obligations and procedures.

154. Authorities indicated that they generally receive about five inquiries a week from financial institutions inquiring about possible matches with the DFAT list, although after consultation it is usually the case that there was not enough corroborating information to confirm a match. There have been two freezings of funds from the consolidated list. One was a false name match from a legitimate business and was thereafter unfrozen. The second involved the freezing of funds, of approximately \$2,000 of an entity named to the consolidated list by the Minister. The funds remain frozen, although the entity is still challenging the freezing by challenging its listing (as described below).

#### Process for de-listing and unfreezing

155. Where the 1267 Committee removes a name from its list, it is automatically de-listed under Australian law. Under sections 16 and 17 of COTUNA, the Minister may also revoke the listing of a person or entity that he has previously listed if they are no longer associated with terrorism as provided in paragraph 1(c) of UNSCR 1373.

156. Under section 17 of COTUNA, a listed entity may apply to have the listing revoked. If after the review it is determined that they are not associated with terrorism as provided in paragraph 1(c) of S/RES/1373, the listing is revoked. Australian authorities indicated that the Minister has received three requests to have listings removed, two from listed entities and one from an NGO on behalf of a listed entity. Under section 25 of COTUNA, compensation is also available to asset owners whose assets are wrongly frozen. The procedure is outlined on DFAT's website.

157. Section 22 of COTUNA allows the Minister for Foreign Affairs to authorise the holder or owner of an asset to use or deal with assets in a “specific way.” Although it does not specify on what grounds such permission should be granted, the general nature of the provision would allow for the purposes laid out in S/RES/1452, such as payments for basic expenses, the payment of certain types of fees, expenses and service charges or for extraordinary expenses.

158. In addition to seeking a review of the listing under section 17, a person or entity that has had its funds frozen can make an application to the Federal Court for a review of the decision under the *Administrative Decisions (Judicial Review) Act 1977*. If the Court finds that the decision was made incorrectly (on procedural grounds—not on the merits)—it can set aside the decision and return the matter to the Minister for a new decision.

#### Freezing actions other than S/RES/1267 and S/RES/1373

159. In addition to the obligations COTUNA and its regulations, the POCA 2002 terrorist related funds or assets, including instruments (defined as used in or intended for use) are also subject to civil forfeiture measures. These measures include restraining orders and forfeiture orders. The CDPP has yet to use this authority in terrorist financing cases, however.

#### Sanctions for non-compliance and monitoring mechanisms

160. As indicated above, criminal sanctions of up to five years imprisonment apply for failure to comply with the obligations to freeze CFT related assets. In addition, s.26 of COTUNA also allows a court to issue an injunction restraining a person from engaging in any specific conduct if it has engaged, is engaging, or proposing to engage in conduct contravening the Act.

161. All major financial institutions run all transactions and accounts against the DFAT consolidated list to help ensure compliance with the provisions. AUSTRAC also runs its whole database against the DFAT list.

#### **2.4.2 Recommendations and Comments**

162. Australia's mechanisms to freeze and seize terrorist financing-related assets are comprehensive and appear to be effective. Australia especially appears to be comprehensively implementing its specific obligations under S/RES/1267 and S/RES/1373. However, Australia should consider specifying that obligations apply to funds of terrorists and those who finance terrorism, outside of the context of specific terrorist acts. .

163. Australia procedures for communicating terrorist-related freezing obligations are public and generally comprehensive; outreach and co-operation with the financial sector is especially effective. However, Australia should outreach further to DNFBP's to ensure that those sectors are aware of their obligations and procedures for complying.

#### **2.4.3 Compliance with Special Recommendation III**

	<b>Rating</b>	<b>Summary of factors underlying rating</b>
SR.III	LC	Measures are generally comprehensive and appear to be effective; however, Australian law does not explicitly cover funds of terrorists and those who finance terrorism or terrorist organisations outside of specific terrorist acts
R.32	LC	(Statistics on freezing of FT funds are adequate.)

#### **Authorities**

### **2.5 The Financial Intelligence Unit and its functions (R.26, 30 and 32)**

#### **2.5.1 Description and Analysis**

##### ***Recommendation 26***

164. The Australian Transaction Reports and Analysis Centre (AUSTRAC) is Australia's Financial Intelligence Unit (FIU) and has a dual role as both an FIU and anti-money laundering regulator. AUSTRAC falls within the portfolio of the Attorney General's office but is an independent and autonomous statutory agency. AUSTRAC is not an investigative agency and it fulfils its functions under the independently of law enforcement, revenue, national security and social justice agencies, providing support, without constraint or influence, to all agencies.

165. AUSTRAC was established in 1989 under section 35 of the *Financial Transaction Reports Act 1988* (FTR Act) as an independent authority within the Australian Government's Attorney General's portfolio. AUSTRAC collects financial transaction reports information from a range of prescribed cash dealers, including the financial services and gaming sectors, as well as solicitors and members of the public. This information is made available on-line to AUSTRAC's 28 partner agencies. In addition, AUSTRAC analyses this information and disseminates it in the form of financial intelligence to 28 partner agencies, comprising Federal, State and Territory law enforcement, social justice and revenue collection agencies, as well as AUSTRAC's international counterpart FIUs. It should be noted that each State has a separate *Financial Transactions Reports Act* with the object of the *Act* being to facilitate the enforcement of the laws of the State and to provide for the giving of further information in relation to suspect transactions reported under the *Financial Transaction Reports Act 1988* of the Commonwealth.



AUSTRAC also maintains an ongoing education program as part of its broader regulatory compliance mission.

166. The *FTR Act* requires cash dealers to submit a range of financial transaction reports to AUSTRAC. The reportable transactions are:

- Suspect Transactions – any transaction, or attempted transaction, where the cash dealer has reasonable grounds to suspect that the transaction may be relevant to an offence against any Commonwealth or Territorial law or may assist the enforcement of concerns about the entities, monies, or circumstances of the transaction. This includes transactions that may be preparatory to the commission of a financing of terrorism offence; or may be relevant to investigation of, or prosecution of a person for, a financing of terrorism offence;
- Significant Cash Transactions – any transaction with a cash component of AUD \$10,000 or more, or its equivalent in foreign currency;
- International Funds Transfer Instructions – any instruction for the transfer of funds that is transmitted electronically either into, or out of, Australia;
- Solicitors Reports and Casino Betting Reports – significant cash transactions from solicitors and casinos;
- International Currency Transfers – persons are required to report international currency transfers, which include the shipping, mailing or carrying of AUD \$10,000 cash or its equivalent in foreign currency, either into, or out of Australia.

#### Guidelines

167. Section 38 of the *FTR Act* requires the Director of AUSTRAC, “to issue guidelines to cash dealers about their obligations under this *Act* and the regulations” and “consult with cash dealers, or the representatives of cash dealers, and take into account any comments made in the course of consultations”. Industry guidance is provided via AUSTRAC Industry Guidelines, Information Circulars, AUSTRAC Help Desk and eLearning program.

168. The list of AUSTRAC Guidelines and Circulars is quite extensive including seven Guidelines with numerous addendums and 39 Information Circulars. These set out advice regarding various reporting and account opening obligations under the *FTR Act* and other developments relevant to reporting entities’ obligations. Suspect Transactions are covered by Guideline #1, Significant Cash Transactions are covered by Guideline #2, Account Signatory Verification by Guideline #3, Merchant Banks and Stock Brokers by Guideline #4, Casinos by Guideline #5, Solicitors by Guideline #6 and Bullion Sellers by Guideline #7. Each guideline provides the necessary information with respect to a description, onus to report, where to report, exemptions, contact information and several links which includes the forms.

169. The guidelines encourage all reporting entities to submit all *FTR* reports to AUSTRAC by means of electronic transmission through AUSTRAC’s EDDWeb system (Electronic Data Delivery System). The guidelines also provide information to reach the AUSTRAC Help Desk for assistance with respect to this.

170. Two-way feedback is facilitated through consultative fora with industry representatives and law enforcement agencies such as the Provider Advisory Group (PAG which include representatives from major cash dealers, industry bodies, AUSTRAC and other partner agencies) and the Gaming Provider Advisory Group (GPAG which include AUSTRAC, law enforcement agencies, the Australian Tax Office and gaming sector organizations).

171. There are estimated to be over 4,500 cash dealers in Australia and AUSTRAC works with as many as possible to ensure that the *FTR* information is consistent, within the requirements of the legislation, and of value to their partner agencies. During 2004, AUSTRAC received a total of 11,417,933 reports from cash dealers, solicitors and members of the general public. On average, AUSTRAC receives approximately 60,000 *FTR* reports per day. Although there is still some reporting on paper forms, over 99.9% of the reports were submitted electronically.

#### Access to information

172. AUSTRAC's intelligence analysts have access to information sources to undertake analysis of SUSTRs and other financial reports. These include Customs intelligence, public record information such as motor vehicle and drivers licence data, land titles, and other open source information. AUSTRAC also accesses several government databases:

- ALEIN (Australian Law Enforcement Intelligence Net - provides criminal intelligence assessments);
- ASCOT (Australian Securities and Investment Commission - contains ASIC's company and person details about current and former companies and limited business name information);
- CITEC (contains the national list of business names).

173. AUSTRAC works in conjunction with its partner agencies both in supporting and developing their investigations. It thereby benefits from financial, administrative or law enforcement information of other financial sector regulators such as ASIC or law enforcement bodies such as the Crime Commissions and State and Federal police. AUSTRAC is currently negotiating direct access to additional data sources in order to enhance its intelligence capability. AUSTRAC as the FIU functions collectively with its 28 partner agencies. Because of its partnership with these agencies, AUSTRAC believes it does not require direct access to all law enforcement data sources. As well as bilateral work with each of its 28 partner agencies, AUSTRAC participates in a number of joint agency and multilateral taskforces. In particular, the Financial Intelligence Assessment Team (FIAT) is a multi-agency group, the members of which have direct access to a number of law enforcement databases, as well as other law enforcement tools and powers. Nearly 2,500 partner agency staff have on-line access to AUSTRAC data as well as their own and other agencies' data.

#### Obtaining additional information

174. AUSTRAC and specified partner agencies are authorized to obtain from reporting parties, additional information to undertake its functions properly. The *FTRA* allows AUSTRAC and specified partner agencies to request further information from a cash dealer in relation to a Suspect Transaction Report previously submitted by that cash dealer. This ensures that further information relevant to a transaction, such as primary documents or additional information not originally included in the initial SUSTR, can be obtained. Section 16 (4) of the *Financial Transaction Reports Act* states:

“Where a cash dealer communicates information to the Director under subsection (1) or (1A), the cash dealer shall, if requested to do so by:

- (a) the Director;
- (b) a relevant authority; or
- (c) an investigating officer who is carrying out an investigation arising from, or relating to the matters referred to in, the information contained in the report;

give such further information as is specified in the request to the extent to which the cash dealer has that information.”

175. AUSTRAC indicated that it has an excellent relationship with most of the reporting parties and, thus, the STR is generally accompanied by most of the documentation needed to assist in its analysis. If the FIU or law enforcement does require further information they will approach the reporting parties directly and generally receive the information on a timely basis.

176. Under the FTR Act, AUSTRAC is authorized to disseminate financial transaction reports information both on a proactive and reactive basis to a number of domestic partner agencies and to international counterparts. AUSTRAC is authorised to provide access to its database of financial transaction reports data, and disseminate this information to prescribed bodies under sections 27 and 27AA of the FTR Act. Such bodies include national security, law enforcement and revenue agencies. AUSTRAC assists these agencies to identify and investigate money laundering, people smuggling, drug trafficking, terrorist financing, major fraud and other major crime as well as serious tax evasion. An

important tool in establishing effective relationships between AUSTRAC and domestic partner agencies is the establishment of a Memoranda of Understanding (MOU) with each agency. These agreements provide the framework within which the Director of AUSTRAC grants agencies access to FTR information and financial intelligence developed from that information. Online access was provided to 2,423 partner agency officers during the 2003-04 fiscal year. The Australian Taxation Office is entitled to all FTR information. Other specific agencies are granted access to, and use of FTR information include;

- Australian Crime Commission
- Australian Customs Service
- Australian Federal Police
- Australian Securities and Investments Commission
- Australian Security Intelligence Organisation
- Centrelink
- Child Support Agency
- Crime and Misconduct Commission (Queensland)
- Corruption and Crime Commission (Western Australia)
- Independent Commission Against Corruption (New South Wales)
- New South Wales Crime Commission
- Police Integrity Commission (New South Wales)
- State and Territory Police Services (7)
- State and Territory Revenue Authorities (8)

177. There are presently no formal sharing arrangements currently in place between AUSTRAC and APRA (Australian Prudential Regulation Authority). However, section 56(5) of the APRA Act and APRA regulation number 5 allow APRA to share otherwise protected information with designated entities including AUSTRAC. Similarly, aside from financial transaction report information protected under section 27 of FTR Act, there is no impediment to AUSTRAC sharing information with APRA for the purposes of the FTR Act or the performance or exercise of the functions or power of the AUSTRAC director under that Act. APRA currently has in place memorandums of understanding with government agencies including ASIC, the ATO, and the RBA under which each organization is required to use its best endeavours to provide information which is likely to assist the other agency in carrying out its particular regulatory function.

#### Protection of information

178. Information held by AUSTRAC is securely protected and disseminated only in accordance with the law. The official information AUSTRAC holds is protected according to the requirements of the *Privacy Act 1988* and the *Commonwealth Protective Security Manual*. AUSTRAC continues to maintain the integrity of its information by conducting regular audits and inspections of all classified information to ensure that current standards are maintained and that any improper use or disclosure of information is readily identified. A Protective Security Risk Review (PSRR) was undertaken in 2004 to identify risks facing AUSTRAC and to ensure that AUSTRAC met the security requirements specified by the Australian Government. The PSRR concluded that AUSTRAC had adequate strategies and procedures in place and is well placed to counter potential risks. Security and privacy awareness training continues to be a priority for AUSTRAC as they have introduced procedures to measure the level of staff understanding of their security and privacy responsibilities through a security and privacy questionnaire. There are also a number of safeguards and measures in place under legislation to protect official information held by AUSTRAC employees. These include:

- Section 25 of the FTR Act: AUSTRAC employees shall not, except for the purposes of the FTR Act, make a record of any information or divulge or communicate to any person any information obtained in the course of performing their duties under the FTR Act.
- Section 70 of the *Crimes Act 1914*: When applied to AUSTRAC, provides that an officer of AUSTRAC who publishes or communicates any fact or document which comes to their knowledge, and which is their duty not to disclose, shall be guilty of an offence.

- Section 10 of the *Public Service Act 1999*: When applied to AUSTRAC, requires that AUSTRAC employees must not make improper use of inside information or the employee's duties, status, power or authority, in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person.
- Section 2.1 of the *Public Service Regulations 1999*: When applied to AUSTRAC, requires that an AUSTRAC employee must not, except in the course of his or her duties as an APS employee or with the Director's express authority, give or disclose, directly or indirectly, to any person any information about public business or anything of which the employee has official knowledge.

179. Protecting the privacy and security of individuals whose details are contained within FTR information becomes more difficult and vulnerable to breaches once it is disseminated. With online access provided to 2,423 partner agency officers from 28 agencies and a growing number of exchange instruments with international counterpart FIUs, the potential for privacy breaches appears inevitable. To guard against this, AUSTRAC clearly addresses privacy and security within the Memorandum of Understanding (MOU) between AUSTRAC and the Partner Agency. The MOU refers to section 27 of the FTR Act which reads; "Under section 27 of the *Act*, a member of the staff of the Partner Agency, authorized by the Director to have online access to the AUSTRAC database, may not access, record, divulge or communicate such information except in the performance of the officer's duties. Under subsection 27(13) of the *Act*, a person who contravenes section 27 commits an offence punishable, upon conviction, by imprisonment for a period of up to 2 years." AUSTRAC maintains logs of all access to its data by AUSTRAC staff and by partner agency staff with online access. AUSTRAC also issues guidelines regarding how and when FTR information can be used and offers education programs to ensure that there is awareness of the privacy and security requirements amongst users of the information. To date there have been only minor incidents surrounding the protection of information and these resulted from carelessness.

### Annual Reports

180. Section 40B of the FTR Act requires the Director of AUSTRAC to prepare an Annual Report as soon as practicable after 30 June in each year, to be provided to the Minister for Justice and Customs and to be tabled in Parliament. The Annual Report contains information regarding financial transaction reporting statistics, staffing matters, domestic and international trends, agency highlights, future priorities and performance summaries. AUSTRAC also produces a biannual newsletter containing information on typologies and trends and other information relevant to AUSTRAC's stakeholders and the public.

### Egmont Group

181. AUSTRAC is a founding member of the Egmont Group and has been an active member since June 1995. AUSTRAC participates in the Egmont Committee and the Egmont Group's Outreach, Training, Operational, Information Technology and Legal Working Groups. In addition to attending the Annual Plenary Meeting of the Egmont Group, AUSTRAC participates in the Egmont Working Group meetings three times per year. In 2003 AUSTRAC successfully hosted the 11<sup>th</sup> Annual Plenary meetings of the Egmont Group in Sydney. AUSTRAC's Director is currently the co-vice Chair of the Egmont Committee, a sub-group of the heads of FIU, and was re-elected in 2004. The Director was also elected as the Chair of the Training Working Group in 2004.

182. AUSTRAC was involved in the preparation of both the "Statement of Purpose" and "Principles for Information Exchange between FIUs" and has had continued involvement with these documents as an Egmont member. AUSTRAC takes into account both documents in its functions and information exchange on a day-to-day basis.

### Statistics

183. AUSTRAC maintains comprehensive statistics on matters relevant to the effectiveness and efficiency of systems for combating money laundering and terrorist financing. These statistics include STRs received by the FIU, a breakdown of the type of financial institution, DNFBP, or other business or

person making the STR, and a breakdown of STR analysed and disseminated. (Statistics on STRs received by the FIU, including a breakdown of the type of financial institution, are displayed in the Section 3.7 of this report.) The FTR Act imposes a comprehensive reporting regime upon reporting entities to provide AUSTRAC with details of financial transactions for subsequent analysis and dissemination to AUSTRAC's partner agencies, including law enforcement, revenue, national security and social justice agencies.

184. The following table shows the number and types of reports received by AUSTRAC from January 2001 to December 2004.

Report Type	Jan – Dec 2001	Jan – Dec 2002	Jan – Dec 2003	Jan – Dec 2004
IFTI	6,657,643	7,147,025	8,015,812	9,227,590
SCTR	1,733,613	1,879,429	1,981,704	2,094,638
Casino and Betting Reports	54,685	52,330	53,464	57,923
Solicitor	207	269	299	260
SUSTR	7,546	8,489	9,715	12,343
ICTR	29,046	30,180	26,300	24,782
Mailed ICTR Report	86	71	375	397
<b>Total</b>	<b>8,482,826</b>	<b>9,117,793</b>	<b>10,087,669</b>	<b>11,417,933</b>

185. The quantity of financial transaction reports received by AUSTRAC continues to increase significantly. In 2004 more than 11 million financial transaction reports were received by AUSTRAC, an increase of over 13% from the previous year. Suspect transaction reports also increased 27% over this same time period. AUSTRAC retains all reportable data for at least 8 years. This currently includes in excess of 65 million reports and more than 1 billion bits of information. AUSTRAC receives 99.9% of the reports electronically, at the rate of up to 60,000 per day. Automated systems for the collection, maintenance, analysis, dissemination and direct on-line access for partner agencies make this a very effective and efficient program.

186. The following table shows the number of Suspicious Transactions Reports (SUSTRs) disseminated to AUSTRAC's Partner Agencies over the period January 2001 to December 2004.

Partner Agency	Jan – Dec 2001	Jan – Dec 2002	Jan – Dec 2003	Jan-Dec 2004
Australian Federal Police	903	939	1,305	2464
Australian Customs Service	818	724	948	928
Australian Crime Commission (formerly National Crime Authority) <sup>13</sup>	316	459	660	588
Australian Taxation Office	7,498	8,438	8,429	12,700
Australian Securities and Investments Commission	124	104	170	302
Other Australian Government	28	16	9	317
State Police	4,846	549	756	1459
Other State Law Enforcement	908	96	278	480
State Revenue Offices	41	52	39	30

*NB: A SUSTR may be disseminated to more than one partner agency*

187. The table below details detections by AUSTRAC's automated money laundering monitoring system, TargIT, relating to patterns of financial activity related to SUSTRs. Such financial patterns are monitored to identify individual suspect reports which are linked to other report types held by AUSTRAC. The networks consequently identified may be linked to multiple suspect reports from a variety of reporting entities.

<sup>13</sup> The National Crime Authority was abolished at the end of 2003, and replaced by the Australian Crime Commission in 2004.

188. AUSTRAC uses a classification system to set an analysis priority against each case. AUSTRAC also obtains extrinsic data from a variety of sources to add value to and assist the analytical process. As indicated in the table below, suspect networks may be identified on numerous occasions over the course of time. The table represents high priority classifications only. Other classifications of priority that are not represented in the table include matters that have been given a low or medium priority or provide insufficient or non-unique personal details from which to undertake effective analysis.

**TargIT automated monitoring detections of networks linked to suspect reports for the calendar years from 1 January 2001 to 31 December 2004.**

	Jan – Dec 2001	Jan – Dec 2002	Jan – Dec 2003	Jan – Dec 2004
Total matters detected	1,280	2,099	1,986	4,678
Networks analysed and recommended for dissemination	285	483	490	423

189. All SUSTRs received by AUSTRAC are manually evaluated to identify high priority and urgent matters. SUSTRs may be disseminated directly to partner agencies through the Transaction Report Analysis and Query system, by safe hand, facsimile or email. The majority of SUSTRs are disseminated to the ATO as a matter of course. Until 2002, each SUSTR was also evaluated by AUSTRAC to identify reports that may have been of interest to law enforcement or partner agencies other than the ATO. Where such an interest was identified, the SUSTR was also disseminated to that partner agency. During 2002, law enforcement partner agencies were provided with the ability to evaluate on-line each SUSTR and request specific reports directly from AUSTRAC.

190. AUSTRAC has received several hundred SUSTRs with suspected name matches to the DFAT/OFAC lists. These SUSTRs were disseminated to the relevant law enforcement for further investigation. After investigation, none of the names reported were found to be the actual persons whose names appear on the list.

191. The table below provides statistics on the number of individual suspect reports that were, upon analysis and evaluation, deemed to be urgent or of high value to partner agencies and were immediately disseminated. It should be noted that because of AUSTRAC's expansive database of information, (which contains more than 65 million reports or 1 billion bits of information), reliance on SUSTRs is only one small part of the value of the program.

**Individual suspect reports analysed and proactively disseminated to partner agencies in the calendar years from 1 January 2001 to 31 December 2004.**

	Jan-Dec 2001	Jan-Dec 2002	Jan-Dec 2003	Jan-Dec 2004
Proactive Dissemination of SUSTRs	594	605	1,100	1,976

192. Since the Second Round Mutual Evaluation of Australia, AUSTRAC has taken measures to improve the systems through which feedback is gathered from domestic partner agencies, both in terms of the number of investigations value added, and the value of tax assessments assisted, by AUSTRAC information. As per the MOU between AUSTRAC and the partner agencies, every quarter, cases involving the use of AUSTRAC information are to be reported to AUSTRAC through the formal feedback system agreed between AUSTRAC and the partner agencies that access and use FTR information. Such measures include reinforced MOU requirements, an online feedback screen for the convenience of partner agencies, reminders in all training and awareness sessions as to the importance of feedback and a specific independent study designed to identify and take action in the interests of improving feedback at all levels. The table below details the number of investigations identified by AUSTRAC partner agencies as value added and the value of Australian Tax Office (ATO) assessments *which were directly assisted by FTR information. Most of the FTR information used in these assessments was accessed and analysed by ATO staff.*

**Primary Output Statistics of AUSTRAC FTR Data usage by Partner Agencies**

Year	Partner Agencies Investigations value added by FTR information	ATO Assessments assisted by FTR information
1995 – 1996	Information not readily available	AUD 27M
1996 – 1997	Information not readily available	AUD 29M
1997 – 1998	200	AUD 47M
1998 – 1999	250	AUD 46M
1999 – 2000	628	AUD 44M
2000 – 2001	715	AUD 72M
2001 – 2002	1,892	AUD 33M
2002 – 2003	1,544	AUD 99M
2003 – 2004	1,743	AUD 75M
2004- 31 Dec 2004	1,109	AUD 29M
<b>TOTAL</b>	<b>8081</b>	<b>AUD 501M</b>

193. From mid-2002, with each matter disseminated by AUSTRAC to partner agencies, a simple survey was also forwarded, in order to increase the level of feedback received from partner agencies. The statistics in the table below relate to feedback from law enforcement to AUSTRAC from the proactive disseminations of SUSTRS in the table above. In many cases no feedback was provided by partner agencies, or the survey was not returned.

**Results of SUSTR feedback surveys attached to all SUSTRs disseminated by AUSTRAC proactively in the calendar years from 2002 to 31 December 2004**

Feedback Response	Jan – Dec 2002	Jan – Dec 2003	Jan – Dec 2004
Related to investigation	111	183	281
Used for intelligence	16	370	866
No interest to agency receiving SUSTR	24	124	178
Too early to determine interest	74	175	128
<b>Total</b>	<b>225</b>	<b>852</b>	<b>1453</b>

*NB: SUSTRS may be disseminated to more than one agency.*

### **Recommendation 30**

#### **Structure, funding, staff, technical and other resources for AUSTRAC**

194. The Director of AUSTRAC is appointed by the Attorney-General under section 36 of the FTR Act and its staff are employed under the *Public Service Act 1999 (PSA)*. The *PSA* establishes an apolitical public service that is efficient and effective in serving the Australian Government, the Parliament and the Australian public. AUSTRAC can also engage consultants under written agreements. The FTR Act and the *PSA* together define the power, functions and responsibilities of the Director of AUSTRAC.

195. As at the time of the onsite visit, AUSTRAC employed 154 total personnel including 127 public service staff, 26 contractors and 1 consultant. All appointment decisions are based on merit whereby the ‘best person for the job’ approach is adopted on all occasions and all candidates are assessed against essential selection criteria which require a minimum level of competency to complete the agreed tasks of each role. The 154 AUSTRAC personnel are assigned to the following priorities:

- **MONEY LAUNDERING TARGETING – 60**
  - Partner Liaison and Support – 25
  - Monitoring and Analysis – 19
  - International – 16
- **MONEY LAUNDERING DETERRENCE – 53**
  - Reporting and Compliance – 32
  - Corporate Services – 9
  - Strategic Coordination – 6
  - Privacy and Security – 6

- ANTI MONEY LAUNDERING REFORM – 8
- INFORMATION TECHNOLOGY – 26
- EXECUTIVE - 7

196. AUSTRAC is structured in such a way as to address and achieve its agreed objectives. It has a head office in Sydney as well as offices in Melbourne, Adelaide, Brisbane, Perth and Canberra. AUSTRAC has three main branches including, Money Laundering Deterrence, Money Laundering Targeting and Information Technology. A fourth branch, Anti Money Laundering Reform, has recently been developed to assist in the current review of AML/CFT measures in Australia.

197. The efforts of the Money Laundering Deterrence Branch are focused on liaising with those in the financial and gaming sectors to educate cash dealers, solicitors and the public on the financial transaction reporting provisions contained in the FTR Act and evaluating reporting systems. This Branch also works on enhancing the integrity of data they receive and liaison with various government departments and agencies to ensure that Australia's anti-money laundering regime, AUSTRAC and related legislation continue to be relevant, effective and meet international standards.

198. The Money Laundering Targeting Branch has three main roles which include the analysis and dissemination of financial transaction reports information to the 28 law enforcement, revenue, national security, and social justice agencies and the 37 overseas FIUs with which AUSTRAC has established information exchange agreements with. The international section also falls within this Branch and provides assistance in the international exchange of financial intelligence and technical assistance to counterpart FIUs.

199. AUSTRAC's Information Technology Branch delivers technological solutions to collect, analyse, store and disseminate financial transaction report data. These include:

- Providing solutions to reporting entities for the electronic delivery of FTR data;
- Creating and maintaining internal systems which assist AUSTRAC staff in extracting and analysing data and managing information;
- The provision of the TRAQ Enquiry System database for the storing and searching of FTR information by AUSTRAC staff; and
- Safeguarding data and ensuring high levels of IT security to protect AUSTRAC information, coupled with ongoing internal and external reviews and testing of IT security.

AUSTRAC appropriation (Government funding) from 1995-96 to 2007-08 is as follows:

Year	Amount
1995-96	AUD 9.895 million
1996-97	AUD 8.341m
1997-98	AUD 8.290m
1998-99	AUD 9.512m
1999-00	AUD 11.753m
2000-01	AUD 11.504m
2001-02	AUD 11.266m
2002-03	AUD 11.246m
2003-04	AUD 20.110m (includes AUD 2.528m for capital expenditure)
2004-05	AUD 20.805m
2005-06	AUD 20.907m
2006-07	AUD 21.292m
2007-08	AUD 21.722m

200. Additional funding was provided to AUSTRAC in the 2003-04 financial year for, *inter alia*, the provision of additional staff to be employed across AUSTRAC's core business areas to manage increased workloads and for additional operational work. Additional funding of AUD 10m over 4 years was



provided from 2004-05 to enable AUSTRAC to work with counterpart financial intelligence units in the South East Asian region to enhance their counter-terrorism financing activities.

#### Integrity Standards

201. All AUSTRAC employees are required to abide by mandatory Australian Public Service Values and Code of Conduct. Employees also agree to adhere to a specific set of 'AUSTRAC values' and the *Privacy Act*. As a condition of employment at AUSTRAC, all employees are required to undergo background security checks designed to determine whether employees are eligible for the granting of a full security clearance. These clearances are periodically reviewed to ensure employees can continue to access classified information. In addition to these background checks it is a requirement for all employees to sign privacy and secrecy statements both at the commencement of their tenure at AUSTRAC and at the time of a periodic assessment of their security clearance.

202. AUSTRAC also has in place a fraud control plan to minimise the risk of incidence of fraud through the development, implementation and review of a range of fraud prevention and detection strategies. To protect official information held by AUSTRAC, all staff are required to abide by internal privacy, physical, protective, information and IT security policies and procedures. Access to information is limited to those with appropriate clearance levels and who specifically require the information to perform their duties. All information is appropriately stored and secured through a variety of security measures including security containers, physical access control restrictions and IT access password restrictions

#### Training

203. AUSTRAC has in place a number of measures for ongoing evaluation and training of staff. This includes performance management, training, and development schemes to ensure that performance is monitored and that all staff seek to continually improve themselves through formal and informal development measures. All relevant AUSTRAC staff are provided with adequate training on the use of the financial intelligence systems and associated tools to perform their day-to-day tasks as part of an induction program at the commencement of employment and at regular intervals throughout the year. On-the-job-training is provided in the interpretation and application of the legislation applicable to AUSTRAC. Staff regularly attend law enforcement training courses as well as international conferences and training activities.

204. In addition to the above, AUSTRAC's reputation as a leading FIU has enabled AUSTRAC to play a leading role in technical assistance and training and expand its international role. From 2002 to 2004, AUSTRAC was engaged in a long term mentoring project in the Indonesian FIU, Pusat Pelaporan Dan Analisis Transaksi Keuangan (PPATK), with two AUSTRAC officers based in PPATK. In October 2004, AUSTRAC began a four year Counter Terrorism Technical Assistance and Training Program for the South East Asian Region, aimed at assisting the development of operational and IT capacity within 10 ASEAN nations. In November 2004, AUSTRAC began the Pacific Islands FIU Database Project, which will develop and install customized databases within seven Pacific Island FIUs. From early 2005, AUSTRAC will have one officer based within the Jakarta Centre for Law Enforcement Cooperation in Indonesia under a four year cooperative training initiative of the AFP. AUSTRAC has also taken over responsibility for Australia's involvement in the activities of the Asia Pacific Group on Money Laundering (APG).

#### ***Recommendation 32: Statistics gathered by AUSTRAC***

205. In addition to the statistics maintained by AUSTRAC, there is also regular reporting to government by law enforcement agencies and prosecutorial bodies in Australia relevant to the effectiveness and efficiency of systems for combating money laundering and terrorist financing. Competent authorities do not maintain formal statistics relating to STRs resulting in prosecution or convictions for ML, FT or an underlying predicate offence as authorities believe the reliance on SUSTRs is only one small part of the value of the ML/FT program.

### 2.5.2 Recommendations and Comments

206. AUSTRAC is in good organizational shape with respect to its ability to carry out its FIU functions. Although no fundamental changes appear to be required in this area, pressures will continue as the quantity of financial transaction reports received continues to increase significantly. In 2004, more than 11 million financial transaction reports were received by AUSTRAC, an increase of over 13% from the previous year. Suspect transaction reports also increased 27% over this time period. In order to meet these pressures and be more effective, AUSTRAC is encouraged to expand their team of financial analysts. This expansion will allow AUSTRAC to promote further integration of FTR information into their intelligence analysis and enhance their focus on strategic analysis in relation to money laundering and terrorist financing. AUSTRAC is also encouraged to seek direct access to additional law enforcement data sources as this non-financial data will also enhance its intelligence analysis capability.

207. AUSTRAC should continue to be diligent in emphasizing to partner agencies the need to protect the privacy of FTR information once it is disseminated to them. Section 27 of the FTR Act must continue to be stressed as well as the guidelines and education provided by AUSTRAC to ensure that partner agencies are vigilant of privacy and security requirements.

208. As per the MOUs between AUSTRAC and partner agencies, every quarter, cases involving the use of AUSTRAC information are to be reported to AUSTRAC through the formal feedback system agreed between AUSTRAC and the partner agencies that access and use FTR information. Presently, the feedback from partner agencies seems to be inconsistent, with agencies such as the Australia Crime Commission, the Australian Federal Police, Australian Customs Service, Australian Taxation Office and the NSW Crime Commission providing extensive feedback and others providing limited feedback. AUSTRAC should continue to seek and encourage regular feedback from partner agencies on their performance and on the benefits and results achieved by partner agencies through use of the FTR information. Feedback is essential to AUSTRAC as this will allow them to assess their effectiveness.

209. Cash dealers were very positive regarding the guidance provided by AUSTRAC about their obligations under the FTR Act and the regulations. Cash dealers receive regular guidance and advice from AUSTRAC either personally or via AUSTRAC Industry Guidelines and Information Circulars regarding various reporting and account opening obligations under the FTR Act and other developments relevant to reporting entities' obligations. One area concerning almost all cash dealers was the lack of feedback with respect to results (investigations, charges, seizures, etc.) relating to the financial transaction reports forwarded to AUSTRAC. Cash dealers did recognize that this type of information is sensitive but would appreciate any feedback possible. Many advised that feedback in this area would keep frontline staff motivated and alert with respect to suspicious transactions and that presently staff feel that financial transaction reports go into a "black hole". AUSTRAC does provide some feedback on results from FTR information provided by cash dealers via its Annual Report and its Newsletters. Nevertheless, it is recommended that AUSTRAC in consultation with partner agencies consider how to share information/results more effectively with reporting entities.

210. Section 56(5) of the APRA Act and APRA regulation number 5 allow APRA to share otherwise protected information with designated entities including AUSTRAC. Similarly, aside from financial transaction report information protected under section 27 of FTR Act, there is no impediment to AUSTRAC sharing information with APRA for the purposes of the FTR Act or the performance or exercise of the functions or power of the AUSTRAC director under that Act. In practice, however, there has been minimal sharing of information between AUSTRAC and APRA. It is recommended therefore that AUSTRAC and APRA negotiate a formal information sharing arrangement similar to those memorandums of understanding with other government agencies under which each organization is required to use its best endeavours to provide information which is likely to assist the other agency in carrying out its particular regulatory function.

### 2.5.3 Compliance with Recommendations 26, 30 & 32

	Rating	Summary of factors relevant to s.2.5 underlying overall rating
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<b>R.26</b>	<b>C</b>	
<b>R.30</b>	<b>LC<sup>14</sup></b>	Compliant for FIU components (Structure, funding, staff, resources, integrity standards, training for the functions of the FIU)
<b>R.32</b>	<b>LC<sup>15</sup></b>	Compliant for FIU components (Statistics on STRs received, including breakdown by FI type, STRs analysed and disseminated)

## **2.6 Law enforcement, prosecution and other competent authorities – the framework for the investigation and prosecution of offences, and for confiscation and freezing (R.27, 28, 30 and 32).**

### **2.6.1 Description and Analysis**

#### ***Recommendation 27***

211. The federal structure of Australia's system of government extends to law enforcement and prosecutorial authorities. At a national level the Australia Federal Police (AFP) enforces Commonwealth Criminal Law, and protects Commonwealth and national interests from crime in Australia and overseas. The AFP is also Australia's international law enforcement and policing representative, and the chief source of advice to the Australian Government on policing issues. Most ordinary criminal law is State and Territory law and each State and the Northern Territory has its own police force and prosecutorial body to enforce and prosecute local laws. Mechanisms, such as the Australian Crime Commission (ACC), exist for coordination on criminal matters of national concern that may be the responsibility of multiple agencies or extend beyond a single jurisdiction. The overlap between federal and State authorities does not appear to cause difficulties in practice.

212. The office of the Commonwealth Director of Public Prosecutions (CDPP) is designated to prosecute offences against Commonwealth law, including prosecution of Commonwealth money laundering offences and terrorism financing offences, and to recover proceeds of Commonwealth crime. The CDPP is also able to prosecute indictable offences against State law where the Director holds an authority to do so under the laws of that State. The CDPP is not an investigating agency; it can only prosecute and take recovery action when there has been an investigation by an investigating agency, such as the AFP. Prosecutions and other legal proceedings involving the CDPP are conducted in accordance with the prosecution policy of the Commonwealth.

213. Prosecution and law enforcement authorities in Australia both at a federal, State and Territory level have usual discretion common in many jurisdictions globally as to whether and when to commence legal proceeding allowing them to waive the arrest of suspected persons and/or the seizure of money for the purpose of identifying persons involved in ML/FT activities or for evidence gathering.

#### ***Additional Elements***

214. Although these measures fall under different legislation from one jurisdiction to another within Australia, each jurisdiction appears to have an adequate legal basis for the use of a wide range of special investigative techniques at its disposal, including controlled deliveries, undercover police officers, electronic interception and other relevant forms of surveillance and search powers. In general, these investigative techniques are used to target serious criminal offences that are predicate offences of money laundering such as drug trafficking.

<sup>14</sup> This is an overall rating for compliance with Recommendation 30, based on the assessments in sections 2.5, 2.6, and 3.10 of this report.

<sup>15</sup> This is an overall rating for compliance with Recommendation 32, based on the assessments in sections 2.5, 2.6, 3.13, 6.3, 6.4, and 6.5 of this report.

215. The AFP has the ability to utilise techniques including controlled operations and covert electronic surveillance in ML/FT investigations when certain circumstances are met. There is provision for the use of controlled operations in the investigation of Commonwealth offences under the *Crimes Act 1914*. In October 2001, new controlled operations provisions came into effect following legislative amendments to *Part IAB* of the *Crimes Act 1914* (Division 2 – general, sections 15H to 15X refer). This allows the controlled delivery of goods other than narcotics allowing authorities to ‘participate’ in otherwise illicit activities in order to further their money laundering investigations. Prior to this amendment, controlled operations could only be conducted in relation to illicit drug offences. With this amendment, the AFP can now conduct operations in relation to a wide range of serious Commonwealth offences including money laundering, people smuggling, fraud, and child pornography.

216. The use of listening devices and any data surveillance equipment by the AFP falls under the *Surveillance Devices Act 2004* and such equipment can be used when a warrant is issued by a judge or an Administrative Appeals Tribunal member. Where special circumstances of urgency exist such as terrorism, espionage or people smuggling, a senior executive officer of the AFP can issue an authorisation for the use of covert electronic surveillance and similar special investigative techniques. The use of telecommunications interception devices is regulated by the *Telecommunications (Interception) Act 1979*. The AFP has used these techniques in the investigation of ML and FT offences.

217. The ACC extensively uses a wide range of special investigative techniques in its investigation of money laundering (and tax fraud) and predicate offences. These include the use of search warrants, telephone intercepts, listening devices, surveillance, controlled operations, under-cover operatives and registered informants. Amongst other things, it also utilises its special, coercive powers under sections 28 and 29 of the *Australian Crime Commission Act 2002*. These powers include the power to summons a person to an examination to give evidence under oath, the power to demand the production of documents and the power to demand information from Commonwealth government departments and agencies. These special powers can only be used in an intelligence operation or investigation the ACC Board has specifically determined to be a ‘special intelligence operation’ or a ‘special investigation’.

218. As mentioned, State and Territory authorities also have various investigative tools at their disposal. For example, the New South Wales Police and New South Wales Crime Commission have similar powers to the AFP and ACC under the authority of the *Criminal Assets Recovery Act 1990*, the *Listening Devices Act 1984*, the *Search Warrants Act 1985*, the *Telecommunications (Interception) Act 1979*, the *Law Enforcement (Controlled Operations) Act 1988* and the *Law Enforcement and National Security (Assumed Identities) Act 1998*. The New South Wales Crime Commission in the 2003-2004 reporting year were issued 69 listening device warrants, 824 telecommunication (interception) warrants and had 12 controlled operations approved. In addition to the tools listed above, the New South Wales Crime Commission has been granted powers greater than normal policing powers under the *NSW Crime Commission Act 1985*. These powers include:

- the power to conduct hearings *in camera* at which witnesses may be compelled to give evidence and produce documents;
- the power to compel the production of documents and things relevant to an investigation by the Commission; and
- the power to apply for special search warrants.

#### Specialised investigative groups and co-operative investigations

219. In addition to the special investigative techniques referred to above, permanent and temporary groups have been established in Australia to focus on the investigation, seizure and confiscation of the proceeds of crime. The AFP has established Financial Investigation Teams (FIT) throughout Australia specialising in investigating the proceeds of crime. The teams are staffed by Federal Agents (authorised officers within the *Proceeds of Crime Act 2002* (POCA 2002)), investigative support staff and financial analysts. The FIT partner with the Criminal Asset Branches of the Commonwealth Director of Public

Prosecutions to rapidly secure funds reasonably suspected of being the proceeds of crime from Australian and foreign indictable offences.

220. The Commonwealth Government is providing supplementary funding to the Australian Crime Commission that will amount to approximately \$30 million over four years from 1 July 2003 to 30 June 2007 to boost the ACC's capacity to conduct Special Investigations into federally relevant tax fraud, money laundering and related criminal activity. This area of the ACC's work is code named Operation Midas and follows two similar projects (code named Operation Swordfish I and II) that were also separately funded by the Commonwealth Government and conducted successfully by the ACC's predecessor, the National Crime Authority, between 1997 and 2003. An important part of their role is focused on the investigation, restraining, seizure and confiscation of proceeds of crime. Midas, like the two Swordfish projects, is expected to be self funding in that amounts recovered under Commonwealth, State and Territory proceeds of crime and tax legislation are expected to exceed the cost of these projects. Both Swordfish projects exceeded cost recovery targets and Midas is on track to do the same over its four year term

221. The ACC's Midas Special Investigation teams include police investigators, forensic accountants, intelligence analysts and lawyers from the ACC, ACS, AFP, ASIC, ATO, State Police and AUSTRAC working together from ACC offices and from their home agencies throughout Australia. Criminal asset recovery, money laundering, taxation and FTR offences are also taken into account in other investigations and intelligence operations conducted by the ACC

222. Investigations referred to the New South Wales Crime Commission, with few exceptions, are conducted by teams comprising members of the NSW Police, Commission Staff and frequently staff of other agencies such as the ACC, AFP, ACS, ATO and AUSTRAC. The most effective investigative work undertaken by law enforcement agencies in money laundering matters has involved the confiscation of assets under civil-based legislation. The Commission has had the benefit of such legislation since 1990. During the last financial year the Commission using powers granted under the *Civil Assets Recovery Act*, confiscated in excess of AUD 18m in assets from criminals.

#### Review of AML/CFT methods and trends

223. The ACC routinely reviews money laundering methods, techniques and trends, with the resulting information, analyses and studies being appropriately and lawfully disseminated to other law enforcement agencies by means such as Criminal Intelligence Reports or Strategic Criminal Intelligence Assessments.

224. AUSTRAC coordinates the Australian agencies' input to the Asia Pacific Group on Money Laundering's (APG) typology report on money laundering and financing of terrorism. This process includes the review of ML/FT methods, trends and techniques. AUSTRAC is also a member of the APG Typologies Working Group. AUSTRAC attends both the Typologies Workshops organised by the APG and FATF, contributing Australian experience where appropriate and assisting with APG and FATF projects. As an Egmont member, AUSTRAC participates in the Egmont Operational, Training, Legal, Outreach and IT working groups. AUSTRAC also attends the Egmont Strategic Analysis Workshop.

225. In addition to the normal exchange of information between agencies working with the New South Wales Crime Commission, information such as patterns and trends in the nature and scope of drug trafficking and other organized crimes (money laundering, financial fraud, identity crime, computer crime, terrorism, etc.) is formally disseminated to other law enforcement agencies and relevant bodies. During 2003/04, the Commission disseminated material on 160 occasions relating to a range of suspected criminal activities to other organizations.

#### **Recommendation 28**

##### Powers to compel production of, search, and seize and obtain financial records and files

226. In Australia, law enforcement authorities are able to compel the production of and obtain, bank account records, financial transaction records, customer identification records, and other records maintained by financial institutions and other entities or persons, through lawful process, as necessary, to conduct investigations of ML, FT, and other predicate offences.

227. At the Commonwealth level, the POCA 1987 and the POCA 2002 provide specific legislative powers for compelling the production of financial records to support criminal assets recovery action. Under section 202 of the POCA 2002 a magistrate may make an order requiring a person to produce one or more property-tracking documents to an authorized officer, or make one or more property-tracking documents available for inspection. Section 213 requires a financial institution upon written notice by an authorized officer to provide the officer any information or document determining whether an account is held by a person, whether a person is a signatory, balances, account details for a maximum of 6 months, details of related accounts and any transactions conducted by the financial institution on behalf of the specified person. Section 219 allows a judge of a court of a State or Territory to make an order that a financial institution provide information about transactions conducted during a particular period through an account held by a particular person.

228. A magistrate under section 225 of the POCA 2002 may issue a warrant to search premises if the magistrate is satisfied by information on oath that there are reasonable grounds for suspecting that there is at the premises, or will be in the next 72 hours, tainted property or evidential material. Ordinary search or frisk search of a person at or near the premises are allowed if authorities suspect the person has any tainted property or evidential material on their person. Search warrants can also be obtained via section 3E of the *Crimes Act 1914* to search persons and premises for evidence of offences. The majority of searches are conducted by general AFP investigators under the *Crimes Act 1914* when the documents sought are to be used as evidence of the offence in criminal matters. In 2003-2004 the AFP made extensive use of the new tools under the POCA 2002 issuing 1,492 notices to financial institutions under section 213, executing 39 search warrants under section 225 and receiving 138 production orders under section 202.

229. The Australian Crime Commission also utilises its special coercive powers under sections 28 and 29 of the *Australian Crime Commission Act 2002*. These powers include the power to summons a person to an examination to give evidence under oath, the power to demand the production of documents and the power to demand information from Commonwealth government departments and agencies. In 2003-2004 the ACC held 381 examinations under section 28 and issued 453 notices under section 29.

230. State authorities are also able to compel the production of and obtain, bank account records, financial transaction records, customer identification records, and other records maintained by financial institutions and other entities or persons, through lawful process, as necessary, to conduct investigations of ML, FT, and other predicate offences to support criminal assets recovery action. For example, section 33(1) of the *Criminal Assets Recovery Act 1990* provides authorized New South Wales authorities who have reasonable grounds for suspecting that a person has possession or control of property-tracking documents the ability to apply, *ex parte*, to the Supreme Court for an order against that person to produce such documents as are in the person's possession or control. Pursuant to sections 44 and 45 of the *CARA*, an authorized officer, may also apply to the Supreme Court for a warrant authorizing the search of premises for property-tracking documents. Section 48 of the *CARA* provides that an authorized officer may make application to the Supreme Court for a monitoring order. Such orders direct financial institutions to give financial information obtained by the institution about transactions conducted by a particular person with the institution.

231. An authorized NSW officer may apply, in certain circumstances, to an authorized justice for the issue of a warrant pursuant to section 38 of the *CAR Act*, to search premises for serious crime derived property, illegal acquired property, evidence of a serious crime related activity, evidence of illegal activity of a person reasonably suspected of having been engaged in serious crime related activities and property that is subject to a restraining order. Ordinary search or frisk search of a person at or near the premises are allowed if authorities suspect the person has any evidential material on their person. Search warrants can also be obtained via the *Search Warrants Act 1985*.

232. As mentioned, the New South Wales Crime Commission has been granted powers greater than normal policing powers under the *NSW Crime Commission Act 1985*. These powers include:

- the power to conduct hearings *in camera* at which witnesses may be compelled to give evidence and produce documents;
- the power to compel the production of documents and things relevant to an investigation by the Commission; and
- the power to apply for special search warrants.

233. In addition to these special powers, financial institutions under section 51 of the CAR Act, may give information to the NSW Crime Commission if the financial institution has reasonable grounds for believing that information it has about a transaction with the institution; (a) might be relevant to an investigation of a serious criminal activity or the making of a confiscation order, or (b) might otherwise be of assistance in the enforcement of this Act or the regulations.

234. Under the FTR Act, AUSTRAC and specified partner agencies are authorized to obtain, from reporting parties additional information to properly undertake its functions. The FTR Act allows AUSTRAC and specified partner agencies to request further information from a cash dealer in relation to a Suspect Transaction Report previously submitted by that cash dealer. This ensures that further information relevant to a transaction, such as primary documents or additional information not originally included in the initial SUSTR, can be obtained. Section 16 (4) of the *Financial Transaction Reports Act* states:

“Where a cash dealer communicates information to the Director under subsection (1) or (1A), the cash dealer shall, if requested to do so by:

- (d) the Director;
- (e) a relevant authority; or
- (f) an investigating officer who is carrying out an investigation arising from, or relating to the matters referred to in, the information contained in the report;

give such further information as is specified in the request to the extent to which the cash dealer has that information.”

235. Section 3E of the *Taxation Administration Act 1953* provides the Commissioner of Taxation with a discretion to disclose taxation information to an authorized law enforcement agency officer (extensive list which includes the AFP, ACC, all State and Territory Police, and State Commissions) or to an authorized Royal Commission Officer. Such disclosure is conditional on the Commissioner being satisfied that the information is relevant to establishing whether a serious offence has been or is being committed or the making, or proposed or possible making, of a proceeds of crime order. This ability to access tax information is extremely critical as it allows law enforcement to conduct a complete financial analysis, including FTR information, of potential money laundering activities.

#### Obtaining witness statements

236. The AFP and other law enforcement agencies can obtain witness statements in any matter when a witness is prepared to provide a statement but do not have general power to compel a witness to answer questions or provide a statement. There are only a few situations where a police officer can compel a witness to answer questions, although agencies like the ACC and the NSW Crime Commission have special powers to summons people for examination. A witness statement is not admissible as evidence in criminal proceedings in Australia except in some limited situations where a witness has died or is not available to give evidence. In most jurisdictions there are procedures under which a witness statement can be tendered at a preliminary committal hearing, provided it was taken in accordance with formal requirements set out under State legislation. However, even then it is still normally necessary for the prosecution to call the witness to give evidence at the actual trial.

237. The AFP also can utilise the provisions of the Foreign Evidence Act 1994 and the *Mutual Assistance in Criminal Matters Act 1987* when obtaining statements for other jurisdictions or attempting to use statements obtained in foreign countries within the Australian legal system.

***Recommendation 30: Structure, funding, staff, technical and other resources of LE and prosecution agencies***

238. Law enforcement agencies, prosecution agencies and other competent authorities across Australia such as the AFP, ACC, the CDPP, NSW Police and the NSW Crime Commission are well funded and structured organisations that are tasked with a broad range of AML/CFT investigation, intelligence and prosecution responsibilities. These authorities also appear to operate with sufficient operational independence and autonomy ensuring freedom from undue influence and interference.

**The Australian Federal Police (AFP)**

239. The AFP is the primary law enforcement agency for the investigation of ML and FT offences in Australia at the Commonwealth level. In order to achieve this, the AFP utilises the following legislation: Financial Transaction Reports Act 1988, the POCA 1987, the POCA 2002 (in effect as of January 2003); and the Commonwealth Criminal Code (revised Division 400—ML offences—in effect as of January 2003).

240. The AFP is a diverse law enforcement organization comprising of 4,800 staff. The agency's 2004–05 operating budget of AUD 910.646m represents an increase of recent funding levels in recognition of the significant amount of international counter-terrorism and transnational crime investigations, regional assistance, law enforcement support and capacity building the agency has undertaken in recent years. This has included the enhancement of its offshore counter-terrorism response and investigative capability as well as long-term commitments to the Regional Assistance Mission to Solomon Islands and the establishment of the Joint Centre for Law Enforcement Cooperation in Jakarta. The AFP also has an international network currently comprised of 63 sworn/unsworn AFP members located in 30 offices in 25 countries.

241. While the AFP has the primary law enforcement responsibility for investigating criminal offences against Commonwealth laws, the number of such offences identified or reported far exceeds its investigational capacity. The AFP must therefore ensure its limited resources are directed to the matters of highest priority and the decision to accept or reject matters for investigation is guided by a precept known as the Case Categorization and Prioritisation Model (CCPM). The CCPM is used to provide a transparent, objective and consistent basis for evaluating and comparing AFP operational activities. CCPM considers major elements including, incident type, importance of matter to client and AFP, and the resources required by the AFP to undertake the matter.

242. In addition, a dedicated Financial Crimes Unit has been established and Financial Investigative Teams (FIT) consisting of 44 members with primary responsibility for asset identification/restraint and forfeiture under to POCA 2002. The FIT provide mentoring and advice to other operational AFP officers both domestically and internationally during the course of their financial investigations. The FIT is also staffed by members, who monitor, assess and add value to information received from AUSTRAC regarding SUSTR, and other AUSTRAC related information. 2003-2004 marked the first full year of operation for the POCA 2002 which resulted in the AFP restraining AUD 77.3 million in assets, recovering AUD 4 million, and penalty value of orders of AUD 1.8 million. In 2002-2003 the AFP restrained AUD 21.8 million in assets, recovered AUD 13.5 million, with penalty value of orders of AUD 2.3 million. It should be noted that a direct correlation should not necessarily be drawn between restrained and recovered figures in any one period, as cases can typically extend over several financial years. The AFP advised that it expects the recovery figures to climb proportionate to the additional assets being restrained

243. In April 2003, the AFP established a Counter Terrorism Division to undertake intelligence-led investigations to prevent and disrupt terrorist acts. Eleven Joint Counter Terrorism Teams (JCTT),



comprising 83 investigators from the AFP and State and Territory police, are now in place throughout Australia. The JCTT's consist of a combination of investigators, investigational support officers and analysts. Several investigators attached to the JCTTs also have skills and experience in the conduct of financial investigations. JCTTs are supported by the FIT and significant intelligence assets. The resources available are flexible and determined to meet the operational demand and priorities. AFP JCTTs are conducting a number of investigations specifically into suspected terrorist financing in Australia. The AFP also works closely with overseas counterparts in the investigation of terrorist financing, in particular the United States Federal Bureau of Investigation on matters relating to terrorist financing structures in South East Asia.

244. Like other countries, Australia is concerned at the potential for high technology crime. To assist in addressing the anticipated increase in e-crime, the AFP operates the Australian High Tech Crime Centre (AHTCC). This Centre aims to provide a national coordinated approach to combating serious, complex and multi-jurisdictional high tech crimes, especially those beyond the capability of single jurisdictions; and to assist in improving the capacity of all jurisdictions to deal with high tech crime.

#### Australian Crime Commission (ACC)

245. The ACC commenced operations on 1 January 2003 with the primary goal to reduce the incidence and impact of serious and organized criminal activity by: improving criminal intelligence collection and analysis; setting clear National Criminal Intelligence Priorities; and conducting intelligence-led investigations into federally relevant criminal activity, encompassing investigative and intelligence taskforces approved by the ACC Board.

246. The ACC has six offices nationally, with its headquarters located in Canberra. As at June 30, 2004, the ACC employed 518 staff, including 128 seconded staff officers from various law enforcement and government agencies and 390 Australia Public Service staff. The total appropriation for the ACC in the 2004–05 Budget is AUD 68.024m. The ACC has allowed AUD 6.9m over four years to enhance their technical capacity.

247. The ACC Board is comprised of, the ACC CEO, the Commissioner of the AFP (Chair), Secretary of the Commonwealth Attorney-General's Department, CEO of the Australian Customs Service (Customs), Chairperson of ASIC, Director-General of the Australian Security Intelligence Organisation (ASIO), and the Commissioners of each of the State and Territory Police Forces.

248. Where the ACC Board makes a Determination in writing that the ACC should conduct a 'Special Investigation' or 'Special Intelligence Operation' into 'matters relating to federally relevant criminal activity' the ACC can use coercive powers available to it under the ACC Act, subject (in effect) to supervision by an ACC Examiner. These powers enable the ACC to require witnesses to appear before an ACC Examiner and answer questions in relation to Special Investigations and Special Intelligence Operations. They also enable the ACC to require the production of documents and other things by witnesses, other people and companies in relation to Special Investigations and Special Intelligence Operations.

249. When determining whether an ACC investigation or intelligence operation should be designated as a Special Investigation or Special Intelligence Operation, the ACC Board is required to consider whether methods other than the use of ACC coercive powers have been effective in collecting criminal information and intelligence (in the case of intelligence operations) and whether ordinary police methods of investigation have been effective (in the case of investigations). Consequently these powers are designed to enable the ACC to strengthen criminal intelligence gathering and law enforcement efforts of other Commonwealth, State and Territory law enforcement and regulatory agencies against nationally significant organised crime.

250. Operation Midas (also referred to in paragraph 212) is one of the ACC's Special Investigations and targets major tax fraud, money laundering and related offences including offences against the FTR Act. A key component of Midas is its Financial Intelligence and Assessment Team (FIAT). FIAT is Midas's

target identification and development arm and also plays an important role in identifying and disseminating financial intelligence to other Commonwealth, State and Territory law enforcement agencies. FIAT makes extensive use of AUSTRAC's money laundering targeting software (known as 'TargIT') to identify suspect patterns of financial transactions contained within AUSTRAC's extensive database of reported transactions.

#### Commonwealth Director of Public Prosecutions (CDPP)

251. The CDPP is adequately funded, resourced and is a professional and independent prosecution agency with offices strategically located throughout Australia. The CDPP has 490 employees of which 270 are prosecutors and a total appropriation in the 2004–2005 Budget of AUD 75.212m. The main cases prosecuted by the CDPP involve drug importation, offences against the *Corporations Act*, fraud on the Commonwealth (including tax fraud, medifraud and social security fraud), terrorism offences and people smuggling. CPDP also prosecutes money laundering; however, the vast majority of cases brought under the money laundering legislation have been in the context of violations of the FTR Act (see section 2.1). To date there have been no terrorist financing prosecutions.

252. Under the POCA 2002, the CDPP is responsible for both the conviction-based and civil-based regime. The CDPP received an increase in its budget of AUD 2.9m annually to manage the increased workload resulting from the civil-based regime.

#### State and Territory Authorities

253. State and Territories also have enforcement agencies, prosecutorial authorities and legislative provisions to deal with the investigation, seizure/restraint/forfeiture of proceeds and the prosecution of offenders for money laundering offences. For example, in New South Wales, money laundering offences are contained in the Confiscation of *Proceeds of Crime Act 1989* (NSW) and money laundering investigations are conducted by the New South Wales Police and the New South Wales Crime Commission. The New South Wales Director of Public Prosecutions consisting of 400 prosecutors State wide is responsible for prosecutions and confiscations under the Act.

254. The NSW Police is Australia's oldest and largest police organization. As of June 2004, NSW Police had 18,921 employees, of whom 15,009 were police officers and 3,912 administrative employees. NSW Police was funded in 2003-2004 at a net cost of AUD 1.85 billion. The State is divided into 80 Local Area Commands and the Commands in turn are over-sighted by five regional offices. An Assets Confiscation Unit of 5 members (currently 3) was established to administer the Criminal Assets Recovery Act 1990. This unit targets drug dealers and the proceeds of serious crime related activity along with money laundering investigations. Since the establishment of the financial investigation capacity in March 2003, the volume of work has significantly increased.

255. The New South Wales Crime Commission was established in January 1996 and has an annual budget of approximately AUD 11m. As at June 2004, the number of permanent staff employed by the Commission was 115 members consisting of analysts and financial investigators. The principal functions of the Commission are to investigate matters relating to relevant criminal activity (includes money laundering), assemble admissible evidence for submission to the Director of Public Prosecutions, review police enquiries, furnish reports relating to illegal drug trafficking and organized crime, disseminate investigative, technological and analytical expertise, and make applications for the restraint and confiscation of property under the Criminal Assets Recovery Act. To perform its function of investigating serious organized crime, the Commission has been given powers that are greater than normal policing powers. In 2003-04 the Commission obtained forfeiture orders having an approximate total value of AUD 10,015,578.

#### Integrity Standards

256. Australian Government law enforcement and prosecution agencies maintain high standards of professionalism and confidentiality. All federal government officials are required to meet standards of

conduct set out in the *Public Service Code of Conduct* and are subject to the *Crimes Act 1914*, the *Public Service Act 1999* and the *Public Service Regulations 1999*. Section 10 of the *Public Service Act 1999* requires that Australian Government employees must not make improper use of inside information or the employee's duties, status, power or authority, in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person.

257. The professional standards of the various policing bodies throughout Australia are set out in their enabling legislation. These standards are robust, for example, at the Federal level, the Australian Federal Police are subject to provisions of the *Australian Federal Police Act 1979*, the *Australian Federal Police (Discipline) Regulations 1979*, the *Australian Federal Police Regulations 1979*, and the *Complaints (Australian Federal Police) Act 1981*.

258. As legal professionals, prosecutors in Australia are bound by their professional standards as legal practitioners. They are also subject to the various frameworks and guidelines established for federal, State and Territory offices of public prosecutions such as the Prosecution Policy for the Commonwealth.

### Training

259. Many Australian government officers are trained on AML/CFT identification and analysis. Although most law enforcement agencies in Australia have adequate training, they tend to rely on the AFP for relevant ML and FT training. Prosecution agencies keep current through continuing legal education and joint training with the AFP. Agencies such as the AFP, ACC and AUSTRAC provide training and instruction both internally to their own agencies and also to other federal or State government bodies and international counterparts.

260. For example, the AFP conducts training through its Financial Investigations Training Program for AFP members, other Australian Government organisations and international law enforcement agencies. The workshop develops the skills of investigators in generating and collating financial data concerning the assets, liabilities, income, expenditure and suspicious financial transactions for a person, entity or group of interest. It assists in the detection of financing of criminal activity, receipt of the proceeds of crime, money laundering offences or the re-investment of funds from illicit sources for further criminal offences. The data can be used to identify, trace and ultimately confiscate the proceeds of crime (or property used to commit certain crimes) or to quantify in dollars the impact the crime has produced e.g. a serious, complex fraud.

261. The AFP also provides Advanced CT Investigations Training to members attached to the JCTTs. This program includes instruction on terrorist financing, relevant financial legislation and investigation methodologies. The AFP is also working closely with partners offshore to develop regional capacity in the conduct of investigations into the financing of terrorism. Initiatives include:

- the establishment of the Jakarta Centre for Law Enforcement Cooperation (a capacity building facility for the investigation of terrorism and other transnational crime);
- the delivery of targeted investigations training to key personnel identified with partner agencies; and
- the development and funding of Transnational Crime Coordination Centres across South East Asia and the Pacific.

### *Additional Elements*

262. The AFP, together with the CDDP, have provided some information sessions to members of the Administrative Appeals Tribunal whose members conduct examinations under the POCA 2002. Other informal information sessions have been provided to various courts in Australia. Prosecutors continue to provide guidance to the courts on a case-by-case basis through written submissions.

### ***Recommendation 32: Statistics on ML/FT investigations, prosecutions, and convictions***

263. At a Federal level competent authorities maintain annual statistics on money laundering investigations, prosecutions, and convictions. The AFP case management system PROMIS comprehensively records statistics in relation to the number of cases and the amounts of property frozen, seized and confiscated relating to ML, FT, criminal proceeds and the number of persons or entities and the amounts of property frozen pursuant to or under U.N. Resolutions relating to terrorist financing. According the 2003-2004 AFP Annual Report, the AFP opened 333 criminal investigations for money laundering and violations of the FTR Act in 2003-2004; 400 investigations were opened from 2002-2003. Although it is unclear which of these refer only to money laundering charges (Division 400 of the *Criminal Code Act*) rather than violations of the FTR Act, these cases resulted in 13 prosecutions being commenced in 2003-2004 for money laundering (Division 400) violations. Five of these were based on investigations of predicate narcotics offences, and eight were commenced strictly as money laundering investigations without a predicate offence. There were likely more investigations based on Division 400 violations, but since these had not yet resulted in prosecutions being initiated in 2003-2004, these statistics were not available. The above cases were generally investigated by the AFP's general operation teams.

264. The CDPP maintains a database that records the details of prosecutions conducted by the CDPP. It also maintains a database which records the details of actions by the Criminal Assets Branches. (Details and analysis of money laundering prosecutions is included in section 2.1 of this report.)

265. At the State and Territory level, statistical data varies. Specific statistics on cases of money laundering or suspected money laundering are either not readily available or the offence of money laundering is grouped with offences such as possession of stolen goods and possession of money from the sale of illicit drugs.

## **2.6.2 Recommendations and Comments**

266. Authorities in Australia have an adequate legal basis for the use of a wide range of investigative techniques including controlled deliveries, undercover operations, interceptions and other forms of surveillance that balance the need for law enforcement with the need to protect civil rights. Law enforcement are also able to compel production of bank account records, customer identification records, and other records maintained by financial institutions and other persons through lawful process, as necessary, to conduct investigations of ML, FT and predicate offences.

267. Although there have been some significant money laundering-related investigations in the past in Australia, in practice, investigators do not appear to take a proactive approach towards the investigation of money laundering. Focus has been mainly on asset seizures as it pertains to offence related property or proceeds of crime available as a result of predicate offence investigations such as drug trafficking. Prosecutions of the offence of ML have been rare. This has been attributed to the fact that in most cases ML is a subsidiary crime and prosecutorial authorities are able to get what they feel to be an appropriate sentence and confiscation of proceeds based on the predicate offence.

268. While Australian authorities are to be commended for their active approach to combating profit generating crime in general, the investigative and prosecutorial authorities need to focus more on investigating and prosecuting ML and not just predicate offences. Federal authorities advise that there has been an attitudinal change with this respect as recently an increasing number of ML cases under Division 400 of the Commonwealth Criminal Code have been forwarded to them by law enforcement. These cases are either before the courts or presently being assessed. Australian authorities are encouraged to continue to make this a priority. In order to focus more attention on money laundering, the ACC has proposed a national money laundering task force that would operate in every State and combine elements of the ACC, regional police, and the Australian Taxation Office (ATO).

269. Concrete results in terms of money laundering convictions are an important element to demonstrate the effectiveness of the various reporting and other measures imposed. There is also a need for Australian authorities to keep clearer statistics for investigations and prosecutions of the ML offence at the commonwealth level. There is also a need for Australian authorities to ensure adequate statistics are

maintained with respect to money laundering (investigations, prosecutions, convictions, etc.) at the State/territory level. Collaboration between jurisdictions is required in order to help facilitate future evaluations of the anti-money laundering and combating the financing of terrorism regime of Australia. Australia should consider establishing an AML working group with State, Territory and federal representatives from government to regularly discuss issues of common interest such as statistic gathering and develop approaches for dealing with emerging issues.

### 2.6.3 Compliance with Recommendation 27, 28, 30 & 32

	Rating	Summary of factors relevant to s.2.6 underlying overall rating
<b>R.27</b>	<b>LC</b>	Legal measures appear comprehensive but are not fully effective—investigators generally do not investigate and refer ML as a separate charge at either the Commonwealth or the State/Territory level.
<b>R.28</b>	<b>C</b>	
<b>R.30</b>	<b>LC</b>	(Compliant for LE and prosecution components.)
<b>R.32</b>	<b>LC</b>	There are not clear statistic on ML/FT investigations (for offences under Division 400) at the Commonwealth level. There are not adequate statistics on ML/FT investigations at the State/territory level.

## 2.7 Cross Border Declaration or Disclosure (SR.IX and R.32)

### 2.7.1 Description and analysis

#### *Special Recommendation IX*

#### Declaration system for physical cross-border movements of currency

270. Section 15 of the FTR Act provides that an International Currency Transfer Report (ICTR) must be completed where currency in an amount exceeding the prescribed threshold of AUD10,000 in value (or its foreign currency equivalent) is transferred into or out of Australia. Currency is defined as “the coin and paper money of Australia or of a foreign country that is designated as legal tender and circulates as, and is customarily used and accepted as, a medium of exchange in the country of issue.”<sup>16</sup> This interpretation does not include the reporting of bearer negotiable instruments. Section 15 of the FTR Act covers, *inter alia*, the transfer of currency by a passenger on an aircraft or ship; the receipt of currency transferred to a person from outside Australia; the consignment of currency to another person for carriage to a place outside Australia; or the consignment of the currency through the post to a place outside Australia. Section 15 and Schedule 3 of the FTR Act prescribe the reportable details to be included in ICT reports, including the amount of currency, the identification of the bearer, and the time and place at which ICT reports are to be made.

271. The declaration system for passengers on an aircraft or ship required by the FTR Act has been in operation since 1990. The original threshold amount of AUD 5,000 (or its foreign currency equivalent) was increased to AUD 10,000 in May 1997. Passengers departing from, and arriving in, Australia must complete either an out-going or in-coming passenger card, which includes a question relating to the transfer of currency. If a passenger is carrying currency equal to or greater than AUD 10,000 is being transferred, an ICTR must be completed and handed to a customs officer on entry to or departing Australia. Reports of currency transfers in the form of completed ICTRs are batched by Customs and forwarded to AUSTRAC. At AUSTRAC the reports are optically scanned into a computerised database

<sup>16</sup> “Currency” definition under Section 3 of the FTR Act.

that can be accessed by authorised law enforcement personnel for AML/CFT purposes. This information is retained by AUSTRAC for a period of 8 years.

272. Where persons fail to declare or make false declarations with regard to the reporting obligations of section 15 of the FTR Act, offence provisions under sections 15(6) and [29](#) (3), (4) and (5) of the Act provide penalties including imprisonment for up to 5 years or the imposition of an appropriate fine instead of, or in addition to a term of imprisonment.

273. The provisions are comprehensive with respect to cash movements; however, there is no corresponding system for declaration/disclosure of bearer negotiable instruments. There are therefore no sanctions available for false declaration/disclosures relating to bearer negotiable instruments.

#### Authority to obtain further information and restrain currency or bearer negotiable instruments

274. Details of instances in which false declarations have been made or undeclared currency detected is retained in a variety of Customs and AFP databases for prosecution action or intelligence purposes. Customs performs intelligence-driven and random targeting of passengers to ensure that ICTRs have been lodged, and, where necessary, that the reported details are correct. In 2002, Customs and the AFP agreed that Customs officers who (in the course of investigating offences against Customs administered legislation) have obtained evidence of a breach of either section 29 or section 31 of the FTR Act should prepare a brief of evidence in relation to that matter for prosecution by the DPP. A breach of section 29 of the FTR Act refers to the offence of making a statement or presenting a false or misleading document that results in a report that is false or misleading.

275. AFP officers working at Customs points have the ability, under section 3W of the *Crimes Act 1914*, to conduct an arrest without warrant where they have a reasonable belief that a person has committed or is committing an offence, including dealing in the proceeds of crime or terrorist financing (sections 400.3 - 400.9, 102.6 and 103.1 of the *Criminal Code Act 1995*, respectively). Under section 3ZF of the *Crimes Act 1914* law enforcement officer also has the ability to search and seize evidential material in relation to such offences.

276. Customs officers have powers provided by section 186 of the Customs Act 1901 to examine and search goods “subject to Customs control.” Customs officers also have specific powers under sections 33 and 33A of the FTR Act to question, search, seize and arrest without warrant persons who have failed to report or declare currency as required under section 15. In practice these powers are exercised solely by the AFP under a Memorandum of Understanding (MOU). Movement of those goods (including passengers’ baggage) is necessarily restricted while the examination is completed. However, there is not a corresponding ability to stop or restrain bearer negotiable instruments in relation to a false declaration or disclosure, since such a disclosure/declaration is not required under the law.

277. Customs uses intelligence-based risk assessments to select passengers for examination and has access to a range of passenger information that is used to assist in the identification of passengers who may present a risk to border security prior to their arrival in Australia. The pre-arrival analysis of information assists Customs to further assess potentially high-risk passengers on their arrival in Australia.

#### Domestic and international co-operation

278. Co-ordination between Australia’s Customs and Immigration authorities has been long established in Australia. Australian Customs officers perform a combined function, undertaking Customs checks, as well as checks on behalf of the Department of Immigration and Indigenous and Multicultural Affairs (DIMIA) at all ports of entry into Australia. Australian Federal Police (AFP) and the Australian Customs Service (Customs) officers also co-ordinate their efforts in monitoring cross border activity.

279. The Australian Customs Service has entered into formal agreements and memoranda of understanding with a number of overseas Customs agencies, including those of China, Japan, Indonesia, Thailand, New Zealand, Canada, France and Papua New Guinea. Australian Customs has also recently

increased the number of its overseas posts to six. In addition to its previously existing posts in Tokyo, Brussels, Bangkok, and Washington, DC, Customs officers are now based in Jakarta and Beijing..

Sanctions for persons physically transporting currency or bearer negotiable instruments related to money laundering or terrorist financing

280. Division 400 of the *Criminal Code Act 1995* provides a range of penalties that may be applied to persons who deal with (including possession of) proceeds of crime that includes money or other property derived from the commission of any indictable offence. These provisions also criminalise the possession of money or property when there is a risk that it could become the instrument of a crime. This would cover terrorist financing offences, to the extent that terrorist financing is criminalised under Australian law. Penalties include imprisonment for up to 25 years.

Confiscation relating to cross-border movement of currency or bearer negotiable instruments

281. The POCA 2002 provides powers of confiscation and forfeiture in relation to indictable offences, which includes offences under the FTR Act for breach of cross-border cash reporting requirements. Where the source of the currency is suspected of being related to terrorist financing, confiscation can be sought under section 19 of POCA.

Unusual cross-border movement of gold, precious metals or precious stones reported to Customs Service or other competent authorities of the originating country

282. Customs is able to share information relating to other non-financial goods. The sharing of information is regulated by Customs legislation such as section 16 of the Customs Administration Act 1985 which sets out the terms for the sharing of information with both domestic agencies and foreign countries - sections 16(3) - (3D) refer. Other mechanisms have been developed to monitor and regulate the movement of high value property. For example, “conflict diamonds” (primarily rough uncut diamonds used to finance the activities of rebel movements intended to undermine or overthrow legitimate governments) are subject to controls enacted under clause 4MA of the *Customs (Prohibited Imports) Regulations 1956* and clause 9AA of the *Customs (Prohibited Exports) Regulations 1958*. These provisions implement the controls known as the Kimberley Process Certification Scheme (KPCS) for rough diamonds. As Customs is responsible for a breach of these regulations, relevant information may be passed to a range of overseas authorities. Where there is no ongoing agreement with the relevant country for sharing Customs information, Customs will initiate a one-off agreement to allow the relevant information to be passed on. While these legal provisions appear adequate, there has been no occasion or foreign request to apply these measures.

***Additional Elements***

283. Any information recorded by Customs is subject to strict control by virtue of section 16 of the *Customs Administration Act 1985*. The circumstances in which information gathered by Customs may be used or passed to other authorities is very limited, and carefully monitored.

**2.7.2 Recommendations and Comments**

284. Australia has a comprehensive system for reporting cross-border movements of currency above AUD 10,000 to AUSTRAC. These reports are stored in AUSTRAC’s database, and this information is available to domestic authorities and foreign FIUs. Nevertheless, the requirements do not extend to bearer negotiable instruments; the Australian legislation should be amended to include incoming and outgoing cross-border transportations of bearer negotiable instruments.

**2.7.3 Compliance with Special Recommendation IX and Recommendation 32**

	Rating	Summary of factors underlying rating
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<b>SR.IX</b>	<b>PC</b>	<ul style="list-style-type: none"> <li>• Australia has a comprehensive system for reporting cross-border movements of currency above AUD 10,000 to AUSTRAC; however, there is no corresponding system for declaration/disclosure of bearer negotiable instruments and therefore: <ul style="list-style-type: none"> <li>○ No sanctions for false declaration/disclosure relating to bearer negotiable instruments;</li> <li>○ No ability to stop or restrain bearer negotiable instruments in relation to a false declaration or disclosure.</li> </ul> </li> </ul>
<b>R.32</b>	<b>LC</b>	(Australia keeps adequate statistics on physical cross-border movements of currency.)



### 3. PREVENTIVE MEASURES - FINANCIAL INSTITUTIONS

#### *General*

285. The anti-money laundering measures applicable to the Australian financial system are contained in the *Financial Transactions Reports Act 1988* (FTR Act). Obligations under the FTR Act are primarily limited to “cash dealers”, a term covering particular reporting entities and activities identified as vulnerable to money laundering activity. The reporting scope of the FTR Act goes beyond a strict definition of the financial sector, and includes solicitors, gold and bullion sellers, gambling houses, casinos, and bookmakers, as reporting entities. The persons and entities referred to in the definition of “cash dealers” in section 3 of the FTR Act, include:

- a financial institution;
- a financial corporation;
- an insurer or insurance intermediary;
- a financial services licensee dealing in securities or derivatives;
- a Registrar or deputy registrar of a registry;
- a trustee or manager of a unit trust;
- a person who carries on a business of issuing, selling or redeeming travellers cheques, money orders or similar instruments;
- a person who is a bullion seller;
- a person (other than a financial institution or real estate agent acting in the ordinary course of real estate business) who carries on a business of :
  - (i) collecting currency and holding currency collected on behalf of other persons;
  - (ii) exchanging one currency for another, or converting currency into prescribed commercial instruments, on behalf of other persons;
  - (iii) remitting or transferring currency or prescribed commercial instruments, or making electronic funds transfers, into or out of Australia on behalf of other persons or arranging for such remittance or transfer;
  - (iv) preparing payrolls on behalf of other persons in whole or in part from currency collected;
  - (v) delivering currency (including payrolls);
- a person (other than a financial institution or real estate agent acting in the ordinary course of real estate business) who carries on a business in Australia of:
  - (i) on behalf of other persons, arranging for funds to be made available outside Australia to those persons or others;
  - (ii) on behalf of other persons outside Australia, making funds available, or arranging for funds to be made available, in Australia to those persons or others;
- a person who carries on a business of operating a gambling house or casino;
- a bookmaker including a totalisator agency board and any other person who operates a totalisator betting service.

286. While this covers a broad range of financial institutions in Australia, the FTR Act does not yet cover the full range of financial institutions as defined in the FATF Recommendations. For example, it does not cover all financial leasing companies, issuers of travellers' cheques, and debit and credit card schemes. Securitisation firms, electronic payment system providers, and managed investment schemes would have obligations if they had a financial services licence covering the dealing in securities or derivatives. As a result, although in some cases they will be regulated by the prudential supervisor APRA and/or the financial market integrity and consumer protection regulator ASIC, certain institutions are not covered for AML/CFT purposes. In addition, particular obligations, such as reporting and record-keeping, might vary between types of cash dealers as described below

287. All cash dealers are required to report to AUSTRAC any suspect transactions (SUSTR), significant cash transactions (of AUD10,000 or more) (SCTR), all international funds transfer instructions into and out of Australia (IFTI); transfers of physical currency equal to or greater than AUD10,000 into or out of Australia (ICTR); to ensure that the identification procedures for accounts are undertaken, and to hold client identity, account and signatory information. The FTR Act customer identification provisions require reporting entities to verify the identity of their customers where they conduct certain financial transactions or where the customer is able to act on or operate an “account” facility. Certain cash dealers termed “financial institutions” under the FTR Act are required to retain records of client account information and financial transaction documents. Cash dealers are obliged to retain the account and signatory information obtained for a period of 7 years after the account has been closed. Under section 15A of the FTR Act, solicitors are required to report significant cash transactions (of AUD 10,000 or more) entered into by or on behalf of a solicitor, in the course of practicing as a solicitor. The solicitor is not obliged to retain documents or records pertaining to a significant cash transaction reports.

### **3.1 Risk of money laundering or terrorist financing**

288. Australia’s legislative framework does not distinguish between financial institutions or specify AML/CFT obligations for financial institutions on the basis of risk. Nevertheless, the Australian government indicated that it has developed its existing AML/CFT system in light of international and local law enforcement experience with a view to developing requirements that do not place undue burdens on the business and customers. Obligations under the FTR Act are limited to “cash dealers”, a term covering particular entities and activities identified as vulnerable to money laundering activity. The identification and assessment of risk also informs regulatory enforcement policy. The ACC in particular is responsible for developing criminal intelligence and routinely researches professional activities and industry sectors that are vulnerable to criminal exploitation including for the purpose of money laundering. AUSTRAC’s compliance program uses risk management strategies to identify reporting entities most in need of improving their reporting performance. As part of this approach, AUSTRAC devotes resources to the identification and education of reporting entities and the subsequent monitoring of information reported to AUSTRAC.

### **3.2 Customer due diligence, including enhanced or reduced measures (R.5 to 8)**

#### **3.2.1 Description and Analysis**

##### ***Recommendation 5***

##### **Anonymous and numbered accounts**

289. The opening and operation of anonymous and false name “accounts” is specifically prohibited under sections 18 and 24 of the FTR Act. Importantly, the FTR Act specifically provides a criminal offence for these activities. Reporting entities are also required to obtain verification of individuals involved in cash transactions equal to AUD 10,000 or more. Therefore, anonymous or numbered accounts are not permitted in Australia.

##### **Account opening**

290. The current legislation imposes a complex and indirect obligation for the identification and verification of the identity of customers. The starting point is that identification and verification is only required for business relationships with financial institutions that lead to the opening of an “account” as defined in section 3 of the FTR Act. An “account” is defined in section 3 of the FTR Act as any facility or arrangement by which a cash dealer:

- (a) accepts deposits of currency;
- (b) allows withdrawals of currency;

- (c) pays cheques or payment orders drawn on the cash dealer by, or collects cheques or payment orders on behalf of, a person other than the cash dealer;

and includes any facility or arrangement for a safe deposit box or for any other form of safe deposit, but does not include an arrangement for a loan that sets out the amounts and times of advances and repayments, being amounts and times from which the borrower and lender may not depart during the term of the loan.

291. The obligation to identify the customer (when an account has been opened) and to verify the customer's identity then requires an interlinking of a significant number of provisions in the FTR Act and Regulations.

- section 18 (timing of identification and consequences of non-identification);
- section 20 (keeping account and signatory information);
- section 3 (definitions of account and signatory information);
- section 20A (definition of identification record);
- section 21 (definition of identification reference);
- regulations 3 to 10B (acceptable verification procedures).

292. The starting point is that under section 18(1)(a)(iii) and (iv) of the FTR Act the CDD requirements for opening accounts apply only when the account exceeds the monetary thresholds outlined in the section; i.e., the credit balance exceeds AUD 1,000 or the aggregate of amounts credited exceeds AUD 2,000 within a 30-day period. Once the threshold is reached, the cash dealer must identify and verify the identity of the customer (normally the *signatory*) and keep records of that process. In terms of the legislation it is therefore possible for no customer identification to occur at account opening stage, and for an account to operate indefinitely until such time as the thresholds are triggered.

293. This provision, while intended to prevent the financial exclusion of poorer sections of the community, is not in line with the standards and in any event is impractical. For reasons of cost and efficiency most cash dealers use the 100-point check (described below) to identify customers at the establishment of the business relationship, that is, when the "account" is opened, rather than waiting for the threshold to be met. The application of the low threshold provisions of section 18(1)(a) of the FTR Act appears to be both an unnecessary regulatory burden as well as creating potential loopholes for criminals and terrorists.

294. When the threshold is reached there is no positive direct obligation requiring cash dealers to identify customers. However, s.18 states that the account is blocked if the necessary signatory and account information has not been obtained by the end of the day on which the threshold is reached. It is then an offence (both for the account holder and the cash dealer) to allow a withdrawal from the account (though not a deposit). The penalty is up to 2 years imprisonment. The cash dealer must also have made reasonable efforts to obtain the account and signatory information before the threshold is reached or it will commit an offence. Once the information is obtained then section 20 requires the maintenance of the information in a way that it can be audited.

295. There are therefore significant limitations on the CDD requirements when establishing business relationships. Certain low-value accounts can operate without any identification requirements. As indicated above, the FTR Act does not yet cover the full range of financial institutions as defined in the FATF Recommendations. Obligations for *cash dealers* to identify and verify customers (whether individuals or incorporated bodies) are limited to opening or operating "*account*" facilities with the *cash dealers*, as defined by section 3 of the FTR Act, and therefore does not cover the full range of situations where "business relationships" are established. "Account" is defined as "any facility or arrangement by which a cash dealer does any of the following: (a) accepts deposits of currency; (b) allows withdrawals of currency; (c) pays cheques or payment orders drawn on the cash dealer by, or other than the cash dealer; (c) or collects cheques or payment orders on behalf of, a person; and includes any facility or arrangement for a safety deposit box or for any other form of safe deposit, but does not include an arrangement for a

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

296. Thus, CDD obligations would not apply in situations where a business relationship is established but no “account” created, such as for insurance contracts, financial institutions (such as internet-based or e-money institutions) where activity is not based on acceptance or provision of “currency” but rather other funds, and cases where relationships are limited to conducted wire transfers or other non-currency based transactions. Certain loans are also not covered by the account definition.

#### Occasional transactions

297. Where a “cash dealer” is party to a transaction involving a cash component of AUD 10,000 or more, section 7 and Schedule 1, Part A para.4(a) – (d) of the FTR Act require reports of such transactions to include identification details of each person conducting the transaction. Para 4(f) of the FTR Act requires details of the method used to verify the identity of the customer to be recorded and reported. Schedule 1, Part A5 (a) – (c) of the FTR Act requires the identification of any person on whose behalf the transaction was conducted (i.e. beneficiary), their address and their occupation or principal business activity. However, these requirements do not cover non-cash transactions over the threshold. Moreover it is not clear what the prescribed verification procedures are, though it is assumed they are the same as for account opening. There are thus identification requirements for single or occasional cash transactions, including where the transaction is carried out in a single operation or in several operations that appear to be linked, above the applicable designated threshold (AUD 10,000) as required in Recommendation 5, but not for other occasional transactions of USD/EUR 15,000 or more.

298. Where reporting entities conduct *international funds transfer instructions* (IFTIs) on behalf of customers, regardless of threshold, they are required to report these transactions to AUSTRAC. Reporting entities are required to include originator information with reports made under section 17B of the FTR Act and Regulation 11AA. Required information includes: senders name, recipient’s name, date, amount, account number, beneficiary customer’s name, bank and account number. For IFTIs the FTR Act requires identification but no verification of the customer, although the Australian authorities indicated that financial institutions voluntarily verify the identity of customers as a matter of sound commercial practice. Furthermore, there are no requirements for the identification and verification of customers making use of domestic wire transfers within Australia.

299. In terms of conducting CDD when doubts arise as to the veracity or adequacy of previously obtained customer identification data or other re-identification/verification requirements, section 18(2) of the FTR Act provides that where a “cash dealer” has not identified the customer, then it is required to block the operation of any such “account” until such time as it has obtained the necessary customer and account information. However, there is no requirement under the FTR Act that existing clients’ information be re-examined, in any circumstance. To the contrary, the Regulation 4(1)(i) of the FTR Act provides that existing customers of more than three years are deemed to have been adequately identified and that identity adequately verified. This grandfather provision should be repealed, and institutions required to re-examine existing clients taking into account risk and materiality as laid out in the Recommendation 5.

300. There is no specific obligation under the FTR Act requiring due diligence when there is a suspicion of money laundering or terrorist financing.

#### Method of verification

301. The obligation to verify identity is linked to the indirect requirement in s.18 for cash dealers to have account and signatory information. These require details such as the account number, names of the account holder, name of all signatories and an identification record for all signatories. Identification record is defined in s.20A to mean either:

- (a) an identification reference (all cash dealers may use this method) - an identification reference is a written reference from an acceptable referee under s.21 (see below); or
- (b) carrying out a prescribed verification procedure (only identifying cash dealers can use this method). An identifying cash dealer is a cash dealer that has been declared to be such by the Director of AUSTRAC upon an undertaking to comply with various requirements of the FTR Act and Regulations. Cash dealers can choose if they want to apply to become “identifying cash dealers”. Regulations 3-10 of the FTR Regulations set out prescribed verification procedures.
- (c) or a procedure approved by the Director of AUSTRAC.

302. The net effect of these provisions is that *Cash dealers* need to obtain account and signatory information either directly through a 100 Point check verification (Regulation 4 of the FTR Regulations), which is the primary verification method applied in Australia, or through an identification reference from a third party referee, under section [21](#) of the FTR Act<sup>17</sup>. For the purposes of opening or operating an “account”, cash dealers are required under sections [20A](#), [21](#), and [21A](#) of the FTR Act and Regulations [3-10B](#) to verify the identity of account holders and all signatories to the account. This can be done by any of three methods below:

- a) **The 100 point check method:** The 100 point check is the method most used by financial institutions to verify the identity of a signatory to an account. The 100-point check form is completed by the account provider, being the “cash dealer”. Signatories provide the account provider with 100 points of identification, which can be attained by a combination of original primary,<sup>18</sup> and/or secondary<sup>19</sup> identification documents<sup>20</sup>. Different documents are allocated different points values. It also incorporates a reference from an acceptable referee. The allocation of points and acceptable documents may vary between account providers, as the FTR Act sets only the minimum standard.
- b) **The Acceptable Referee method:** With this method a signatory must find an ‘acceptable referee’ who has personally known them for at least 12 months. The referee confirms the identity of the signatory by viewing the signatory’s primary and/or secondary identification, witnessing the signatory sign the s. 21 form and completing details on the form including how long they have known the signatory. There are 36 categories of Acceptable Referees. All categories are published in the Australian Government Gazette under the authority of the Minister for Justice and Customs. The list currently includes: employees of financial institutions and insurance businesses, notaries, accountants, federal police officers, licensed doctors, nurses, dentists, and pharmacists; managers of a post office, a teacher or principal at a primary or secondary school, and elders in the Aboriginal community.
- c) **Any other alternative method:** The Director of AUSTRAC under section 20A of FTR Act may approve an alternative method of signatory verification for individual cash dealers. 75 alternative methods have been approved, 4 have been rejected and 9 have been revoked.

303. Regulation 4 of the FTR Regulations sets out the points allocated for each of the various categories of documents or independent checks which may be used to verify the identity of a “signatory or party to a bullion transaction” (presumably this is intended to refer to signatories to all accounts and to any party to a

<sup>17</sup> See Annex XX for a detailed description of the 100 point check system and the list of acceptable referees.

<sup>18</sup> For example a Birth Certificate, Citizen Certificate or International Travel Document.

<sup>19</sup> For example an Australian Drivers licence, Australian Student Identification or Credit Card.

<sup>20</sup> Financial institutions are conscious of the threat to confidence in the Australian financial system posed by identity theft and fraud, and confirm customer identity where suspicions arise. The Australian Government, in cooperation with the States and Territories, has established a common national framework for proof of identity, and is working to boost intelligence links between the banking and finance sector and law enforcement agencies. This work is being supplemented by work undertaken by the private sector. The Australian Bankers' Association has established a Fraud Taskforce (2003) and an Online Authentication Taskforce (2004) tasked, among other things, with preparing industry standards aimed at combating identity fraud.

bullion transaction), and which need to total 100 points of identification. The documents listed include a primary class of Government issued documents including birth certificates, passports, drivers' licences, but also a range of other documents or records that may be used to verify the customer's details. A reporting entity or cash dealer, who has failed to obtain both account and signatory information, or who has failed to adequately verify the identity of the customer, must block that account. Failure to comply with the customer identification obligations is subject to criminal penalty provisions under sections 18(3), (4), (4A) and (6), 24(6), 29 (3) and (4) of the FTR Act.

304. These methods for verifying the customer's identification are not adequate. The "acceptable referee" method is not an adequate method to verify the identity of a customer, and should be substantially tightened or even removed except for exceptional cases where reliance on other identification methods is not possible. The emphasis needs to be placed on obtaining reliable identification documentation or data, with all financial institutions being subject to this obligation. It is anomalous that only cash dealers that have specially applied to AUSTRAC to become 'identifying cash dealers are allowed to rely on the 100 Point check method for customer verification. This effectively makes the Acceptable Referee Method the default procedure for customer verification available to all cash dealers under the FTR Act. While the requirement to have more than one document or method to check identity is generally sound, the 100-point check system of verification involves a number of documents of questionable reliability and needs to be strengthened by only placing reliance on identification documents or methods of proven acceptability. It also allows reliance on identification references, thus building in an inherent weakness.

#### Identify and verify the legal persons or legal arrangements

305. Under the FTR Act, the normal account and signatory information must be obtained for accounts held in the name of legal persons and arrangements. The only additional requirements under the FTR Act are to produce the certificate of incorporation (for a body corporate), a certificate of registration (for an account held in a business name), and for trusts that the holder of the account held in trust must state that fact, and provide the prescribed details of the trustees and beneficiaries of the trust. Signatories are also then identified.

306. There is also a derogation for cash dealers from the obligation to identify and verify the signatories to accounts of incorporated bodies under FTR Regulation 5. The signatory to an "account" held by a public authority or incorporated body may be considered identified and authorised to act on that "account" if the public authority or incorporated body's verifying officer provides the financial institution certification to the effect that the verifying officer has verified the signatory's identity and the signatory has been authorised to act on that "account". FTR Regulation 5 itself requires the "verifying officer" be identified and verified. The legal status of a customer may be clarified as part of the normal customer identification. "Incorporated body" does not include all legal person or companies. In particular, proprietary companies are only to be regarded as "incorporated bodies" if, for 2 years, they have held an account or have traded for continuously.

307. The FTR Act's "account information" definition (section 3c (iii – v)) requires limited information to be provided to the cash dealer by the holder of an account on opening an account for and by a body corporate, accounts held in a business name, or those held in trust. It does not include requirements to identify the directors or shareholders or provisions regulating the power to bind the entity. There do not seem to be any special verification requirements regarding accounts held in trust (though certain prescribed details must be obtained – see below). Moreover, FTR Regulation 5 allows a wide range of incorporated bodies to do their own identification and verification of signatories once the nominated verifying person has been checked by the cash dealer. When taken together, these obligations are very limited, and do not meet the requirements under the FATF Recommendations.

#### Identification and verification of beneficial owners

308. The FTR Act does not have comprehensive requirements to identify and verify beneficial owners. The FTR Act requirements for beneficiary verification are limited to (i) where that beneficiary is also the signatory to an account and (ii) the customer is a beneficiary of an account related to a trust ( FTR

Regulation 11A: account information in relation to trust accounts). The FTR Act's definition of "*account information*" in section 3 and Regulation 11A requires prescribed details to include information on the name and address of the trustee, the name of beneficiaries under the trust and classes of beneficiaries under the trust should they be identified by reference to class membership. Under section 7 of the FTR Act details of the parties to a significant cash transaction must be verified. This includes beneficial owners who will also need to be identified where they are a beneficial party to a large cash transaction under Schedule 1 Part A 5 (a) – (c) of the FTR Act. Schedule 1, Part A 5 (a) – (c) of the FTR Act requires the identification of any person on whose behalf the transaction was conducted (i.e. beneficiary): (a) the name of the person; (b) the address of the person; (c) the occupation of the person (or, where appropriate, the business or principal activity of the person). The beneficial ownership provisions are therefore inadequate with regard to verification requirements. They are limited in scope to merely identifying trust accounts, accounts in a business name or in name of a body corporate, and where the beneficiary is also the signatory to an account.

309. There is no obligation under the FTR Act placing a general duty on the cash dealer to identify and verify the details of the beneficial owner, in respect of all customers. Nor is there an obligation for financial institutions to determine whether the customer is acting on behalf of another person, and if so, take reasonable steps to verify the identity of that other person.

310. There are no requirements placed on cash dealers to identify and verify the beneficial ownership of companies or other legal persons. However, some information may be publicly accessible. ASIC maintains public registers in respect of all companies (*Corporations Act* section 118), including information on the company's share structure and members. In addition, every company (whether private or public) is required to maintain a share register in which the names and addresses of the holders of its shares are recorded (*Corporations Act* section 168). This must be kept at a prescribed location (section 172) and made available for inspection by anyone (section 173).

311. In addition, under Part 6C.1 of the *Corporations Act 2001* a substantial shareholder (in summary, a shareholder holding 5 per cent or more of voting power) of a listed public company or responsible entity of a listed managed investment scheme must disclose this interest to the company and the relevant market operator (for example, the ASX) within two business days after acquiring the interest. If a takeover bid for the company or scheme is on foot, this information must be provided by 9.30am the next trading day. This concept of 'interest' extends to associates who have the power to (or control of the power to) exercise the right to vote attached to the interest or dispose of the interest. Upon reaching the 5 per cent threshold, there is a continuing obligation to disclose any variations of 1 per cent or more within the same timeframe. If these provisions are contravened, the Court may make any order (including a remedial order) that it considers appropriate upon the application of ASIC, the company concerned, a member (or former member) of the company or scheme, the person from whom the interest was acquired or any person whose interests are affected by the contravention

#### Information on the purpose and intended nature of the business relationship

312. There are no obligations under the FTR Act that financial institutions be required to obtain information on the purpose and intended nature of the business relationship. However, there are some obligations for financial advisors to understand the nature of the client's affairs under consumer protection legislation. In the process of establishing a business relationship, financial service providers will assess the needs and intentions of a customer, so as to better provide the appropriate product or service. The objective of this consumer protection regulation is improving service delivery not verifying the identity of the financial services customer. For example, a license holder providing 'personal advice' to a retail client is required to have a reasonable basis for the advice provided, which involves making and documenting reasonable inquiries about the relevant personal circumstances of the retail client (*Corporations Act 2001* section 945A and section 946A). Licence holders must also retain records, such as those showing particulars of all acquisitions and disposals of financial products made by the licensee, the charges and credits arising from them, and the names of the person acquiring or disposing of the products.

#### Ongoing due diligence

313. There are no obligations under the FTR Act to conduct ongoing due diligence on the business relationship with the customer, although the suspicious transaction reporting obligation is predicated on a cash dealer's natural familiarity with the business activity of their customers. AUSTRAC suspicious transaction reporting guidelines to reporting entities (AUSTRAC Industry Guideline 1: paragraphs 39-40) notes that the role of "KYC" coincides with broader institutional prudential requirements. Guideline 1 further encourages (but does not compel) reporting entities to exercise "KYC" in order to be "aware of their customer's business activities" so as to better identify suspicious activity. AUSTRAC Guidelines, while helpful, do not create legally enforceable obligations. The Australian regulatory authorities take the view that a reporting entity's ongoing knowledge of their customers serves its commercial risk and fraud mitigation measures as well as its overall risk management program. It constitutes a commercial asset in terms of the reporting entity's ability to better service their clientele as well as a platform from which to better perform the ongoing scrutiny necessary to identify ID and credit fraud.

#### Keep documents, data, and information collected under the CDD process current

314. There are inadequate obligations under the FTR Act for financial Institutions to keep document, data, and information collected under the CDD process current or up to date. However, the development of customer profiles and broader client relationship management require reporting entities to maintain up to date account, address and income source details for routine billing, account statements or marketing correspondence. As the vast majority of banking interactions occur remotely, reporting entities also frequently use customer contact through internet and telephone banking as an opportunity to confirm or update relevant information.

#### **Risk**

315. There is no reference in Australian law or regulations permitting financial institutions to determine the extent of the CDD measures on a risk sensitive basis under the FTR Act. In general terms, customer verification should at a minimum meet the identification requirements set out by the FTR Act. However, AUSTRAC under Industry Guideline 1 advises that such procedures be conducted in terms of a cash dealer's broader credit fraud measures, customer acceptance policies and broader prudential and risk management frameworks.

316. The Australian system sets out a customer identification framework that applies to all customers and serves as the basis for broader risk management frameworks. The provisions of the FTR Act provide the basic required standard, with additional risk being an issue that the reporting entity may voluntarily address in terms of higher-level risk, fraud prevention and client acceptance policies. For example, some reporting entities' customer acceptance policies require that government issued photographic ID is sighted, in order to validate a customer's identification data and meet the requirements of their financial group's broader risk management framework. While this effectively means that customers may be required to meet a higher standard than that required by Regulation 4 of the FTR Regulations 1990, it remains a voluntary business practice.

#### Enhanced and reduced CDD measures

317. There are no obligations under the FTR Act for cash dealers to perform enhanced due diligence for higher risk categories of customer, business relationship or transaction, such as for non-resident customers, private banking, legal persons or arrangements, or companies that have nominee shareholders or shares in bearer form. As a result, where reporting entities assess that business activity or a customer profile may pose a higher than normal risk they, voluntarily but not legally require a higher standard of initial customer verification. Despite this, the lack of an obligation is a regulatory weakness and needs to be remedied. AUSTRAC Industry Guidelines and Information Circulars (which do not contain legally enforceable obligations) advise financial institutions of risks and encourage greater diligence with regard to correspondent banking, cheques and monetary instruments, trade with NCCT listed Territories, entities sanctioned under Reserve Bank powers and other countries of interest. AUSTRAC regularly advises



industry of emerging trends, transaction activity, and other typologies that may merit additional due diligence.

318. Reduced CDD measures for low risk customers are not widely applied as the Australian system starts off a low base. The FTR Act sets out minimum customer verification requirements. AUSTRAC advises industry that the need to adequately identify customers should be viewed in light of a reporting entity's broader risk management such as prudential, credit risk or ID fraud policies. Furthermore, the FTR Act provides that for low risk customers, such as low net volume customers, identification need not be performed unless such accounts trigger certain low value thresholds set out in section 18 of the FTR Act.

319. Reduced CDD measures for customers resident in another country are not applied under the FTR Act. Where reporting entities may need to identify customers resident in another country, identification procedures are provided by FTR Regulation 8 which allow reporting entities to delegate FTR Act styled identification procedures to an overseas associate or correspondent bank who have nominated an authorised verifying officer to complete the customer identification process. AUSTRAC provides advice to reporting entities regarding dealings with jurisdictions named on the FATF NCCT list. In keeping with their suspicious transaction obligations under section 16 FTR Act, reporting entities are advised to exercise extra scrutiny in monitoring transactions and business dealings involving NCCTs and report any unusual activity. (AUSTRAC Industry Guideline 1, para. 35-36 "Transactions with certain countries" and AUSTRAC Information Circular 39).

320. The legislation does not mention the possibility of simplified CCD measures whenever there is a suspicion of money laundering or terrorist financing or specific higher risk scenarios. The FTR Act provides a basic framework for the identification of customers. AUSTRAC's advice and guidance to industry emphasises that the legislative framework is a minimal requirement and that the commercial risk and fraud mitigation elements of an institution's risk management framework should inform the broader operation of its "Know-Your-Client" and customer acceptance policies and procedures. Should cash dealers have concerns regarding the potential risks presented by a customer or class of customers, they are encouraged to exercise a level of CDD consistent with their broader risk management framework, "KYC" standards and client acceptance policies. Notwithstanding AUSTRAC's approach, the concern remains that there is no obligation or requirement under the FTR Act or regulations requiring cash dealers exercise a level of enhanced CDD consistent with the perceived risk of the customer.

### ***Timing of verification***

321. There is no general requirement for cash dealers to verify the identity of the customer or beneficial owner before or during the course of establishing a business relationship. Rather, as indicated above, the FTR Act allows cash dealers to operate accounts without identifying the clients until the thresholds of AUD1,000 on a day or an aggregate of AUD2,000 within a month are met.

322. For accounts exceeding this threshold, if a reporting entity is unable to satisfactorily obtain account and signatory information, then it is obliged to meet the account blocking provisions under section 18(2) of the FTR Act. While there is an obligation to block the account, there is no obligation to consider filing a suspicious transaction report in these circumstances, though in practice financial institutions will often do so. There is no obligation to terminate the relationship. Sections 18(8) and 18(8A) provide that where an account is blocked for 12 months after the day the account is opened, the reporting entity must provide the Director of AUSTRAC with written notice within 14 days after the end of that period. A reporting entity who fails to provide the Director with written notice is liable to a fine.

323. Outside of the threshold scenario above, Australian's legislation does not contemplate permitting financial institutions to complete the verification of the identity of the customer and beneficial owner following the establishment of the business relationship (i.e., for non-face to face businesses or certain securities or life insurance transactions.)

324. As indicated above, there are no requirements for Australian financial institutions to apply CDD requirements to existing customers on the basis of materiality and risk or conduct due diligence on such existing relationships at appropriate times. Where a cash dealer is providing services to a previously unidentified existing customer, it may choose a number of options to rectify the lack of identification. The standard identification processes available under the Act and the Regulations may be used to verify the existing customer. If the existing customer is of sufficiently long standing then under the FTR Regulation 4(1)(i), customers of not less than 36 months may be taken by a financial institution to be identified for the purposes of the FTR Act.

#### ***Recommendation 6***

325. There are no specific legislative or other enforceable obligations regarding the identification and verification of politically exposed persons (PEPs) under the FTR Act or other regulations. However, the assessment team was informed that those cash dealers currently operating within the international market or with relationships with overseas counterparties have developed AML programs which include the routine list matching against commercially available PEP listings, risk assessment tools and authorisation requirements for higher risk transaction activity or business relationships.

#### ***Recommendation 7***

326. There are no legislative or other enforceable obligations for financial institutions that pertain to correspondent banking. Payable-through-accounts are not a facility provided by Australian banks. However where foreign banks allow their accounts to be used as a payable through account by customers for an Australian related transaction, AUSTRAC Industry Guideline 1, Addendum 4 sets out the need for vigilance in monitoring and reporting of suspicious activity. However, Industry Guidelines do not create enforceable obligations.

#### ***Recommendation 8***

327. There are no requirements for financial institutions to have policies in place or take such measures as needed to prevent the misuse of technological developments in ML/FT, or specific and effective CDD procedures that apply to non-face to face customers. As the Australian financial services industry is highly automated and technically advanced in terms of banking practice and customer management, this sector places an onus on being able to identify and mitigate emerging technological vulnerabilities. Such threats are often addressed through a combination of technical measures, customer education and co-ordination and liaison with relevant law enforcement and competent authorities. This co-operative method helps to ensure higher industry standards.

### **3.2.2 Recommendations and Comments**

328. Generally the CDD/KYC regime under the FTR Act is inadequate and fails to comply with the revised FATF requirements, and substantial amendments are required. The identification and verification methodology under the FTR Act needs to be substantially improved and strengthened. In general, the regime could be made simpler and contain a more direct obligation to identify and verify customers. Loans should not be excluded from CDD requirements. The definition of “cash dealer” or otherwise obliged reporting entities should be extended to include the full range of financial institutions as defined in the FATF recommendations, including financial leasing entities, friendly societies, electronic payment systems and other financial institutions as described in paragraph 286. Also, while there are due diligence requirements when establishing business relations, the effectiveness of the FTR Act provisions is limited by the definitions of “account” and “cash dealer”; it is recommended that the scope of “account” be extended to capture a wider range of products, services or business activity under the CDD account opening measures and other instances of establishing business relationships.

329. Australia should amend its legislation to remove the possibility of accounts operating below the threshold of AUD 1,000/ 2,000 without any verification requirements. In the cases where adequate CDD

data is not obtained, financial institutions should be required to consider filing a suspicious transaction report.

330. The Regulation 4(1)(i) of the FTR Act provides that existing customers of more than three years are deemed to have been adequately identified and that identity adequately verified. This grandfather provision should be repealed, and institutions required to re-examine existing clients taking into account risk and materiality as laid out in the Recommendation 5.

331. The acceptable referee method is not an adequate method to verify the identity of a customer and should be substantially tightened or even removed except for exceptional cases where reliance on other identification methods is not possible. The 100-point check involves a number of documents of questionable reliability and needs to be strengthened by only placing reliance on identification documents or methods of proven acceptability, which should exclude identification references, for example. Australia is currently investigating various issues relating to identification document security and integrity and verification of identification documents. This work will have implications for documents relevant to identification of customers.

332. The provision not requiring existing clients of over 36 months to be re-examined for identity and verification purposes should be repealed. Financial institutions should be required to apply CDD requirements to existing customers on the basis of materiality and risk and to conduct due diligence on such existing relationships at appropriate times.

333. For occasional customers, while Australia has a system to identify customers (but not beneficial owners) of occasional cash transactions above AUD 10,000, verification requirements should be clearer. Also, Australian legislation should be amended to require identification of those transactions that exceed the USD/EUR 15,000 which are not cash transactions. Australia needs to require financial institutions to identify occasional customers as contemplated in SRVII for domestic transfers, and in the cases where there is a suspicion of money laundering or terrorist financing.

334. Australia needs to amend its legislation to create a general obligation to identify and verify the details of the beneficial owner, in respect of all customers; and oblige financial institutions to determine whether the customer is acting on behalf of another person, and if so, take reasonable steps to verify the identity of that other person. For customers that are legal persons, financial institutions should be required to take reasonable measures to understand the ownership and control structure and determine who are the natural persons that ultimately own or control the customer. Financial institutions should also be required to gather information on the directors and the provisions regulating the power to bind the entity. The use of third parties to complete verification of signatories as currently contained in Regulation 5 should be tightened. Australia also needs to require financial institutions to: obtain information on the purpose and intended nature of the business relationship, conduct on-going due diligence of the business relationship, and keep CDD data up-to-date.

335. Australia should also adopt requirements for financial institutions to perform enhanced due diligence for higher risk categories of customers, business relationships, and transactions such as non-resident customers, private banking, legal persons or arrangements, and companies that have nominee shareholders or shares in bearer forms.

336. There are no specific AML legislative obligations regarding the identification and verification of PEPs under the FTR Act. There are no specific AML requirements for PEPs issued in respect of either international or domestic PEPs under FTR Act or any other law. Australia should adopt requirements in these areas including requiring financial institutions to: put in place appropriate risk management systems to determine whether a potential customer, a customer or the beneficial owner is a politically exposed person; obtain senior management approval for establishing business relationships with a PEP; to take reasonable measures to establish the source of wealth and the source of funds of customers and beneficial owners identified as PEPs.

337. Compliance with Recommendation 7 presently depends upon voluntary individual business practices of cash dealers. There is a need to legislate specifically for correspondent relationship obligations. For example, financial institutions should be required to: gather sufficient information about a respondent institution to understand fully the nature of the respondent's business, assess the respondent institution's AML/CFT controls, and ascertain that they are adequate and effective, obtain approval from senior management before establishing new correspondent relationships, and document the respective AML/CFT responsibilities of each institution. There is also a need for AUSTRAC to provide clarity on minimum expectations for correspondent banking relationships through specific industry guidelines.

338. Australian financial institutions should be required to have policies in place or take such measures as may be needed to prevent the misuse of technological developments in money laundering or terrorist financing schemes. Australia is non-compliant on the issue of applying adequate and effective measures for non-face to face customers. There are no identifiable or specific measures for managing the risks inherent in the referee verification method. In this context, the Acceptable Referee method of customer identification and verification is inadequate and should be reviewed. The FTR Act should be amended to provide specific, clear and effective CDD procedures that apply to non-face to face customers. Substantial legislative amendments applicable to non-face to face customers are therefore required under the FTR Act.

### 3.2.3 Compliance with Recommendations 5 to 8

	Rating	Summary of factors underlying rating
R.5	NC	<ul style="list-style-type: none"> <li>• CDD requirements are limited in scope to the obligations on <i>cash dealers</i>, which does not cover the full range of financial institutions.</li> <li>• There is a complex and only indirect obligation to identify and verify customer identity upon account opening;</li> <li>• Certain loans are excluded from customer identification requirements;</li> <li>• CDD obligations when establishing business relations are limited to the context of opening or operating "<i>account</i>" facilities with the <i>cash dealers</i>, and do not cover all situations of establishing business relationships.</li> <li>• No customer identification/verification is required at the account opening stage; rather accounts below the prescribed low value (AUD 1,000/2,000) can operate indefinitely without customer identification until such time as the thresholds are triggered. The application of the low threshold provisions appears to both an unnecessary regulatory burden as well as creating potential loopholes for criminals and terrorists.</li> <li>• It is not clear what prescribed verification procedures are when identifying customers conducting cash transactions of AUD 10,000 or more.</li> <li>• There are no identification requirements for other (non-cash) occasional transactions of USD/ EUR 15,000 or more.</li> <li>• For IFTIs the FTR Act requires identification but no verification of the customer. Furthermore, there are no requirements for the identification and verification of customers making use of domestic wire transfers within Australia.</li> <li>• There is no requirement that existing clients' information be re-examined on the basis of materiality and risk or to conduct due diligence on such existing relationships at appropriate times.</li> <li>• There is no specific obligation requiring CDD when there is a suspicion of money laundering or terrorist financing;</li> <li>• The methods of verifying the customer identification are inadequate. The acceptable referee method is not an adequate method to verify the identity of a customer; the 100-point check system of verification involves a number of documents of questionable reliability, such as the inclusion of identification references;</li> <li>• The FTR Act does not have comprehensive requirements to identify and</li> </ul>

		<p>verify beneficial owners. There is no obligation for financial institutions to determine whether the customer is acting on behalf of another person, and if so, take reasonable steps to verify the identity of that other person;</p> <ul style="list-style-type: none"> <li>• For customers that are corporate entities, there are no requirements to identify the directors or provisions regulating the power to bind the entity. Moreover, Regulation 5 allows a wide range of incorporated bodies to do their own identification and verification on signatories once the nominated person has been checked by the cash dealer.</li> <li>• There are no obligations that financial institutions be required to obtain information on the purpose and intended nature of the business relationship;</li> <li>• There are no obligations to conduct ongoing due diligence on the business relationship or conduct due diligence on such existing relationships at appropriate times;</li> <li>• There are inadequate obligations for financial institutions to keep document, data, and information collected under the CDD process current or up-to-date;</li> <li>• There are no obligations for cash dealers to perform enhanced due diligence for higher risk categories of customer, business relationship or transaction.</li> <li>• While there is an obligation to block the account in the cases of lack of identification (and above the AUD 1,000/2,000 thresholds), there is no obligation to consider filing a suspicious transaction report in these circumstances, although in practice financial institutions will often do so.</li> </ul>
<b>R.6</b>	<b>NC</b>	<ul style="list-style-type: none"> <li>• There are no legislative or other enforceable obligations regarding the identification and verification of PEPs.</li> </ul>
<b>R.7</b>	<b>NC</b>	<ul style="list-style-type: none"> <li>• There are no legislative or other enforceable obligations for financial institutions that pertain to correspondent banking or relationships.</li> </ul>
<b>R.8</b>	<b>NC</b>	<ul style="list-style-type: none"> <li>• There are no requirements for financial institutions to have policies in place or take such measures as needed to prevent the misuse of technological developments in ML/FT, or specific and effective CDD procedures that apply to non-face to face customers although voluntary co-operation helps to ensure higher industry standards</li> </ul>

### 3.3 Third parties and introduced business (R.9)

#### 3.3.1 Description and Analysis

##### *Recommendation 9*

339. Section [20A](#) of the FTR Act allows cash dealers to rely on identification conducted by a third party called an acceptable referee. Under section [21](#) of the FTR Act, “acceptable referees” perform third party customer identifications by providing an identification reference, which verifies the customer’s identity, to cash dealers. Section [21](#) of the FTR Act sets out the specific requirements for this process and which includes under subsection (1) the acceptable referee providing a written identification reference for a signatory to an account, signed by the referee and setting out the name to be used by the signatory in relation to the account and stating that:

- (a) the referee has known the signatory for the period specified in the reference;
- (b) during the whole of that period, or for so much of that period as is specified in the reference, the signatory has been commonly known by that name; and
- (c) the referee has examined:
  - (i) a specified primary identification document for the signatory in that name;

- (ii) a specified secondary identification document for the signatory in that name and a specified primary identification document for the signatory in a former name of the person; or
- (iii) only a specified secondary identification document for the signatory in that name.

340. Further relevant identification data is included within the information required of an identification reference as prescribed by section 21(2) of the FTR Act, such as:

- (a) the name, address and occupation of the referee and the basis on which the referee claims to be an acceptable referee;
- (b) if the reference states that the referee examined a primary identification document for the person in a name different from the name to be used by the person in relation to the account—the explanation that the person gave the referee for the difference in names;
- (c) if the reference states that the referee examined only a secondary identification document for the person—the explanation that the person gave the referee for the failure to produce a primary identification document; and
- (d) the required details of the identification document or documents examined by the referee.

341. By Ministerial declaration the acceptable referee must have an existing relationship with the customer of at least 12 months and must be from a gazetted list of acceptable referees comprising professions or individuals that may provide an identification reference. There are currently 36 categories of acceptable referee, including lawyers, police officers, notaries, and Justices of the Peace. The list also includes licensed doctors, dentists, pharmacists, and certain teachers.

342. The system allows a cash dealer's customer to find an acceptable referee to verify his/her identity, and then forward an identity reference to the reporting entity. Financial institutions are not required to satisfy themselves that the third party—i.e., the referee—is adequately regulated and supervised and has adequate CDD measures in place. However, while a cash dealer is permitted to use parties other than itself or its agents to perform customer verifications, the ultimate responsibility to ensure compliance with the requirements of the FTR Act lies with the cash dealer offering the relevant product or service.

343. Under the FTR Act, the use of foreign-based third party verifiers is limited to financial institutions with which the reporting entity conducts business. This will often be a foreign-based subsidiary of the reporting entity or a financial institution with which the reporting entity holds a correspondent banking relationship. This does not ensure that procedures are undertaken to a level compliant with FATF standards, although in practice they may also be.

344. Both regulated and unregulated professions perform third party verifications. Often a third party verifier will be another cash dealer acting as an agent on behalf of, or introducing business to another cash dealer. These entities are often regulated and covered under both financial services regulation and AML regulation. The FTR Act regime acknowledges that financial service providers often outsource aspects of their operations or functions to third party providers. The outsourced parties may or may not be Australian Financial Service Licence (AFSL) holders (such as securities brokers/dealers, fund managers, insurance brokers, etc.) in their own right; in the latter case, the outsourced party is essentially treated as an authorised representative of the AFSL holder where it is providing financial services.

### **3.3.2 Recommendations and Comments**

345. The third party verification of customer information is inadequate. While financial institutions relying on third parties are ultimately responsible for compliance with the FTR Act, the other provisions of Recommendation 9 are not required. For example, financial institutions should be required to: immediately obtain the identification data from referees; take adequate steps to satisfy themselves that copies of identification data and other relevant documentation relating to CDD requirements will be made available from the third party upon request without delay. The current list of acceptable referees is overly broad and includes many entities that are unregulated (for AML/CFT or any other purpose). Accordingly, financial institutions should be required to satisfy themselves that the third party is regulated and

supervised (in accordance with Recommendation 23, 24 and 29), and has measures in place to comply with, the CDD requirements set out in R.5 and R.10. Australia should adopt its legislation accordingly to make these requirements.

### 3.3.3 Compliance with Recommendation 9

	Rating	Summary of factors underlying rating
<b>R.9</b>	<b>NC</b>	<ul style="list-style-type: none"> <li>While financial institutions relying on third parties are ultimately responsible for compliance with the FTR Act, the other provisions of Recommendation 9 are not required.</li> <li>The current list of acceptable referees is overly broad and includes many entities that are unregulated (for AML/CFT or any other purpose.)</li> <li>Financial institutions relying on third parties are not required to: immediately obtain the identification data from referees; take adequate steps to satisfy themselves that copies of identification data and other relevant documentation relating to CDD requirements will be made available from the third party upon request without delay; and satisfy themselves that the third party is regulated and supervised (in accordance with Recommendation 23, 24 and 29), and has measures in place to comply with, the CDD requirements set out in R.5 and R.10.</li> </ul>

## 3.4 Financial institution secrecy or confidentiality (R.4)

### 3.4.1 Description and Analysis

#### *Recommendation 4*

346. The FTR Act imposes an obligation on reporting entities to report prescribed transactions i.e. large cash transactions, international wire transfers, suspect transactions and international currency transfers. The *Privacy Act 1988* provides an exemption to non-disclosure of personal information where the disclosure is "required or authorised by law". Therefore, the Privacy Act does not prohibit disclosure of personal information included in FTR reports to AUSTRAC.

347. While there does exist legislation designed to protect a client's personal information, the Privacy Act does not hinder the operation of the AML legislation. There is also the normal banker-client confidentiality under banking contracts, but this was not raised as a significant problem when complying with AML/CFT requirements.

348. There is no Australian 'banking secrecy' legislation that allows financial institutions to conduct activity or provide services that may not be reviewed by competent authorities.

349. The financial sector regulators, ASIC and APRA, also have broad-ranging powers to obtain information and documents about the financial institutions they regulate, and, in the case of APRA, registered entities from which it collects statistics. Information may also be acquired in relation to clients of regulated and registered entities, their members and related companies. APRA and ASIC are able to disclose information they collect to AUSTRAC and other competent authorities (including foreign counterpart agencies) where it will assist them to perform their functions or exercise their powers.

### 3.4.2 Recommendations and Comments

350. Australia is fully compliant with this Recommendation.

### 3.4.3 Compliance with Recommendation 4

	Rating	Summary of factors underlying rating
R.4	C	

## 3.5 Record keeping and wire transfer rules (R.10 and SR.VII)

### 3.5.1 Description and Analysis

#### *Recommendation 10*

##### Records on transactions, both domestic and international

351. Under sections 20, 23, 27C and 27D of the FTR Act, reporting entities have both direct and implied recordkeeping and record accessibility obligations. Certain cash dealers (“financial institutions” as defined under section 3 of the FTR Act) have specific record-keeping obligations contained in sections 40C – 40J of the FTR Act relating to amongst other things:

- (a) the opening, operating and closing of an account
- (b) domestic and international transfers
- (c) loan applications
- (d) records of financial transactions carried out by the financial institution.

352. The recordkeeping obligations under sections 40C – 40H of the FTR Act require broad recordkeeping of documents relating to the identity verification of customers, their operation of *accounts* and individual transaction activity of these accounts. Under section 40J(1)(b), a financial institution is guilty of an offence if it fails to retain a document necessary to preserve a record of the transaction. Records must be kept for at least 7 years after the day the account is closed or the transaction takes place. However, this is limited to “financial institutions” as defined in the FTR Act. Financial institutions are one category of “cash dealers,” (which includes only authorised deposit taking institutions, co-operative housing societies, “financial corporations” as defined in the Constitution, casinos, and totalisator agency boards). These obligations therefore do not apply to all “cash dealers”, which is already identified a category that does not cover the full range of financial institutions as defined in the FATF Recommendations. Therefore, for example, the FTR Act obligations would not include records of transactions from securities and insurance institutions, or foreign exchange dealers or money remitters, as they are either not financial institutions or do not hold “accounts” as defined under the Act.

353. There are no obligations under the FTR Act on reporting entities to retain records of financial transaction reports submitted to AUSTRAC, but they are required to retain transaction information related to the transaction reports submitted to AUSTRAC. Therefore, the FTR Act’s requirements for all cash dealers to report all international funds transfer instructions (IFTIs) to AUSTRAC implies that all cash dealers conducting such transactions would also maintain the information related to the transactional. In cases where no IFTI report is required by exemption from the Director under section 17B(4), the cash dealer/remitter not required to report must retain the prescribed report and details for a period of 7 years after the instruction.

##### Records of the identification data, account files and business correspondence

354. Under section 23 of the FTR Act, cash dealers are required to retain all information obtained in the course of obtaining account information or signatory information for 7 years after the account is closed. The provision does not specifically require that all account files and business correspondence be retained; however, such information would normally arise from customer interactions and instructions, and would therefore be retained.



## Records and information to be available to domestic competent authorities

355. Customer and transaction records that are kept are available on a timely basis to domestic competent authorities upon appropriate authority. Access and recoverability of account information and records of transaction data is covered by section 40R of the FTR Act for limited class of certain reporting entities. For all other reporting entities, section 23(5) FTR Act covers the requirement to maintain account records that are easily accessible. Part IVA of the FTR Act affords powers of inspection to AUSTRAC authorised officers under section 27C and 27D FTR Act to inspect records pertaining to identification information related to sections 20 and 8A, 24C and 24D, and records related to the cash dealers obligations under section 7 (significant cash transaction reports), section 16 (suspect transactions reports), section 17B (International funds transfer instructions), and records related to the obligations of the solicitor under section 15A (cash transaction reports by solicitors).

356. Other legislation, such as the *Crimes Act 1914*, provides access for law enforcement and search warrants and other warrants. Financial service providers are required by ASIC to retain detailed records on their clients' transactions. To the extent that entities providing wire transfer services are subject to ASIC's financial services legislation (e.g. as is likely to be the case when a credit card is used as a payment system to effect a money transfer), they are required to comply with these record-keeping requirements.

### ***Supplementary Information: Recommendation 10***

357. In addition to the FTR Act, requirements related to customer due diligence and record-keeping are imposed through other Australian regulations, although these are not targeted specifically at money laundering and financing of terrorism activities. In particular, under section 286 of the *Corporations Act 2001*, all companies, registered schemes and other disclosing entities (whether or not they are financial institutions) must keep for 7 years financial records that correctly record and explain their transactions and financial position and performance and would enable true and fair financial statements to be prepared and audited. These financial records should include: invoices, receipts, orders for the payment of money, bills of exchange, cheques, promissory notes and vouchers; documents of prime entry; and working papers and other documents needed to explain the preparation of the company's financial statements. In addition, Australia's financial services licensing regime, administered by ASIC, requires financial service providers to adhere to certain record-keeping requirements for consumer protection purposes. For example, a license holder providing 'personal advice' to a retail client is required to have a reasonable basis for the advice provided, which involves making and documenting reasonable inquiries about the relevant personal circumstances of the retail client (*Corporations Act* sections 945A). Licence holders must also retain records, such as those showing particulars of all acquisitions and disposals of financial products made by the licensee, the charges and credits arising from them, and the names of the person acquiring or disposing of the products.

358. Certain record-keeping requirements are also imposed through taxation legislation. For example, the ATO requires businesses to retain for five years the records required to substantiate and audit its 'self-assessed' income tax return. This may include: sales and purchase records (invoices, receipts, bank statements, etc); year-end records such as lists of debtors and creditors; records of all payments to employees; and records of taxation withheld. These records must comply with certain minimum standards. For example, tax invoices for amounts less than AUD1,000 must include the seller's name and Australian Business Number (ABN), the date of issue, the description of each thing supplied and the total price. Tax invoices for amounts more than AUD1,000 must also include the purchaser's name and ABN or address, and the quantity of each thing supplied. The vendor's and purchaser's ABN, company name and/or business name can be matched against registers held with the ATO, ASIC and/or the relevant State and Territory authorities, from which additional information on the business can be obtained. This may include information on the beneficial owner(s) of the business.

### ***Special Recommendation VII***

### Requirements to report all international funds transfer instructions (IFTIs) and recording of originator information

359. Australia has a mandatory system for reporting reports on all international funds transfer instructions to AUSTRAC. Under section 17B of the FTR Act the reporting obligations for international funds transfer instructions (IFTI) require cash dealers to include mandatory information in the reporting of cross border transfers. An IFTI is defined in section 3 of the FTR Act as “*an instruction for a transfer of funds that is transmitted into or out of Australia electronically or by telegraph, but does not include an instruction of a prescribed kind.*” A prescribed instruction refers to bank-to-bank settlements not generated by an external party i.e. a customer. FTR Regulation 2 (definitions covering, *inter alia*, location, ordering customer, etc.), and FTR Regulation 11AA outline the details that are required for an IFTI. Where an international funds transfer instruction is sent and reported to AUSTRAC, reporting entities are required to report the name and address or location of the originating customer. This will often include:

- the ordering customer’s name;
- the customer’s location (i.e. full business or residential address) and
- customer’s account number

360. Therefore, adequate information on the originator is generally recorded by the financial institution for all cross-border transfers. There are no minimum thresholds for wire transfers under the Australian system. All international funds transfer instructions, whether incoming or outbound, must be reported to AUSTRAC. However, there are no requirements for any information to be recorded for domestic transfers. There is no obligation to verify that the sender’s information is accurate and meaningful or to require that the account number be included.

361. Despite the comprehensive reporting system to AUSTRAC, there is no requirement that the originator information be included as part of the funds transfer instruction itself. It should be noted that in practice, AUSTRAC’s database would be a useful resource for obtaining originator information through foreign FIU requests.

362. Nor are there any obligations under the FTR Act for domestic wire transfers to either include the full originator information or include the originator’s account number/unique identifier provided that this can be used to retrieve full originator information within three business days. Australian authorities have indicated that, a matter of commercial practice, unique reference numbers are universally included in the wire transfer by Australian banks. These unique reference numbers are traceable back to the originator.

363. Occasional or non-routine international funds transfer instructions are sent as individual transfer messages. The very occasional nature of these transfers increases the risk of money laundering or terrorist financing, particularly with respect to batch transfers. However, there is no obligation under FTR Act ensuring that occasional transfers are not batched when reported.

### Requirements for intermediary financial institutions

364. Where an international funds transfer instruction is sent by the originating institution through intermediaries, those intermediary institutions are also taken to be acting on behalf of the originating institution’s customer and therefore have the same obligations as the originating institution in terms of the inclusion of originating customer information when reporting the wire transfer under section 17C of the FTR Act. There is no obligation that each intermediary financial institution in the payment chain be required to maintain all the required originator information with the accompanying wire transfer.

### Dealing with incoming transfers that do not include adequate originator information

365. There are no obligations under the FTR Act requiring risk-based procedures for identifying and handling wire transfers that are not accompanied by complete originator information. Australian authorities indicated that in practice, any lack of originator information is brought to the attention of

AUSTRAC through the reporting requirements for incoming international funds transfer instructions contained in section 17B of the FTR Act and Regulation 11AA of the FTR Regulations.

#### Monitoring for compliance with SRVII

366. As the measures to include the full originator information with wire transfer instructions generally does not apply, there are no corresponding monitoring for compliance with these provisions. AUSTRAC does monitor for compliance with the IFTI reporting requirements.

367. The sanctions available for complying with the reporting requirement include imprisonment or fines (section 28 of the FTR Act) and injunctive relief (section 32 of the FTR Act). Failure to comply with the reporting requirements of section 17B of the FTR Act is a criminal offence under section 28 of the FTR Act, punishable by imprisonment for up to 2 years or a fine.

### **3.5.2 Recommendations and Comments**

368. Australia needs to broaden the scope of record-keeping requirements to include all financial institutions as defined in the FATF Recommendations. The provisions could also be clarified to ensure that requirements apply to all account files and records of business correspondence.

369. Cash dealers are required to report all international funds transfer instructions to AUSTRAC, which maintains a comprehensive database that can be accessed and the originator information retrieved pursuant to requests for foreign FIUs. However, beyond the requirement for cash dealers to record pertinent originator information for international (but not domestic) wire transfers, there are no further obligations for cash dealers to comply with the other components of SR VII. Australia should adjust its legislation and implement measures to require that: financial institutions verify that the sender's information is accurate and meaningful and include the account number; full originator information, in addition to being sent to AUSTRAC, also be included in the wire transfer instruction itself, and that similar obligations also apply to domestic transfers; intermediary financial institutions maintain all the required originator information with the accompanying wire transfer; beneficiary financial institutions have risk-based procedures in place for dealing with incoming transfers that do not have adequate originator information; and that occasional transfers are not batched when reported. Australia should also implement measures to ensure compliance with the requirements of SRVII, including appropriate sanctions for non-compliance.

### **3.5.3 Compliance with Recommendation 10 and Special Recommendation VII**

	Rating	Summary of factors underlying rating
<b>R.10</b>	<b>PC</b>	<ul style="list-style-type: none"> <li>Transaction records must be kept for at least 7 years after the day the account is closed or the transaction takes place. However, this is limited to “financial institutions”—a smaller category of cash dealers—and in the context of accounts as defined in the FTR Act. The FTR Act requirements therefore do not include records of transactions from securities or insurance entities, foreign exchange dealers, or money remitters.</li> <li>The provisions for record keeping do not specifically require that all account files and business correspondence be retained; these provisions could be clarified.</li> </ul>
<b>SR.VII</b>	<b>NC</b>	<ul style="list-style-type: none"> <li>There is no obligation to verify that the sender's information is accurate and meaningful or to require that the account number be included.</li> <li>There are no requirements for domestic transfers to record originator information.</li> <li>Nor is there a requirement to include the originator information with the transfer instruction, either for international transfers or domestic wire. There is no obligation under FTR Act ensuring that occasional transfers are not batched when sent;</li> </ul>

		<ul style="list-style-type: none"> <li>• There is no obligation that each intermediary financial institution in the payment chain should be required to maintain all the required originator information with the accompanying wire transfer;</li> <li>• There are no obligations under the FTR Act requiring risk-based procedures for identifying and handling wire transfers that are not accompanied by complete originator information;</li> <li>• As the measures to include the full originator information with wire transfer instructions generally do not apply, there is no corresponding monitoring for compliance with these provisions.</li> </ul>
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### **Unusual and Suspicious Transactions**

## **3.6 Monitoring of transactions and relationships (R.11 and 21)**

### **3.6.1 Description and Analysis**

#### ***Recommendation 11***

370. There are no specific requirements for cash dealers to pay special attention to complex, unusual large transactions, or unusual patterns of transactions that have no apparent or visible economic or lawful purpose. Nor is there a requirement for cash dealers to examine, as far as possible the background and purpose of the transactions, set forth their findings in writing, and keep findings available for competent authorities. The requirements for cash dealers to pay special attention to complex, unusual large transactions, or unusual patterns of transactions that have no apparent or visible economic or lawful purpose flow indirectly from Australia's system for recording and reporting suspect transaction reports (SUSTRs). Section 16 of the FTR Act requires cash dealers (but not the full scope of financial institutions as required in the recommendations) to file a suspect transaction report (SUSTR) where the cash dealer has reasonable grounds to suspect a transaction:

- may be relevant to investigation of an evasion, or attempted evasion, of a taxation law;
- may be relevant to investigation of, or prosecution of a person for, an offence against a law of the Commonwealth or of a Territory;
- may be of assistance in the enforcement of the proceeds of crime acts or the regulations made under that Act;
- is preparatory to the commission of a financing of terrorism offence; or
- may be relevant to investigation of, or prosecution of a person for, a financing of terrorism offence.

371. The monitoring obligation is therefore only implied and indirect, and it does not cover the full range of monitoring situations of all complex, unusual large transactions or transactions with no visible economic purpose as stipulated in Recommendation 11.

372. AUSTRAC provides guidance to industry on SCTR, SUSTR and IFTI reporting, indicators of suspicious transactions, the FATF's NCCT list, account opening requirements, terrorist financing and a range of other issues via its Information Circulars and Guidelines. This information assists reporting entities to pay special attention to those jurisdictions considered to be problematic by the FATF. For example, AUSTRAC Industry Guideline 1 indicates several factors and areas about which cash dealers should be aware that could be considered in assessing whether or not a transaction is suspicious. These factors/areas include:

- the nature of, or unusual circumstances surrounding, the transaction;
- the known business background of the person conducting the transaction;
- regular or unusual transactions involving known narcotic source or transit countries;
- transactions with certain countries where the transaction is suspected of facilitating laundering of the proceeds of crime or tax evasion;

- unusual business dealings, particularly where significant amounts of cash are involved in circumstances that are difficult to explain. The cash dealer may in these circumstances suspect money laundering.

373. Addendum 4 to Guideline 1 alerts financial institutions to suspicious activity in relation to the risks associated with correspondent banking such as misuse of Nostro/Vostro accounts. While these guidelines are helpful, they are not legally enforceable and failure to comply with them cannot result in sanctions.

### ***Recommendation 21***

374. AUSTRAC published Information Circular 39 on the AUSTRAC website to inform members of the public and the 4500 reporting entities in Australia that provide financial transaction report information to AUSTRAC of the most current NCCTs list. However, Information Circulars are awareness tools and are not legally enforceable. It should be noted, however, that as cash dealers are required to report all international funds transfer instructions (IFTIs), AUSTRAC is able to monitor all electronic international monetary transactions, and pays particular attention to transactions involving countries on the NCCTs list.

### **Measures on advice about weaknesses in the AML/CFT systems of other countries**

375. Recommendation 21 requires that there be effective measures in place to ensure that financial institutions are advised of concerns about weaknesses in the AML/CFT systems of other countries. AUSTRAC Information Circulars alert reporting entities to the need to apply special attention to business relationships and transactions with persons, including companies and financial institutions, from countries identified on the NCCT list, in line with FATF Recommendation 21. AUSTRAC Industry Guidelines and Information Circulars are issued under the authority of the Director in terms of section 38(1)(e) of the FTR Act. While AUSTRAC has the authority under section 38(1)(e) of the FTR Act to indicate other countries as higher risk, AUSTRAC has made limited use of this provision. AUSTRAC Guideline 1 on suspect transactions refers to several countries and regions that cash dealers must pay particular attention to for unusual cash transactions.

### **Examination of transactions having no apparent economic or visible lawful purpose**

376. While there is no obligation requiring that the background and purpose of a transaction, which has no apparent economic or visible lawful purpose, should be examined; AUSTRAC information Circular 39 recommends that financial institutions comply with this element so as to determine whether such transactions require reporting under the FTR Act.

### **Apply appropriate counter-measures**

377. AUSTRAC regularly monitors the FATF NCCT list and other sources and issues guidelines advising financial institutions to give extra scrutiny to dealings with non-FATF compliant countries and Territories. In addition, other legislation prohibits transactions or dealings with listed entities. See also *Banking (Foreign Exchange) Regulations 1959* and *Charter of the United Nations Act 1945*, *Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002*, and *Iraq (Reconstruction and Repeal of Sanctions) Regulations 2003*. In addition to advising cash dealers to pay special attention to relevant transactions involving NCCTs, AUSTRAC Information Circulars also update cash dealers when FATF has recommended the application of additional counter-measures with particular jurisdictions. AUSTRAC also monitors wire transfers to and from NCCT jurisdictions and also monitors the numbers of Suspicious Transaction Reports (SUSTRs) received involving each of the NCCT listed jurisdictions. The FTR Act does not provide AUSTRAC with any authority to compel cash dealers to apply appropriate counter-measures, where a country continues not to apply or insufficiently applies the FATF Recommendations.

## **3.6.2 Recommendations and Comments**

378. The monitoring obligation is therefore only implied and indirect, and it does not cover the full range of monitoring situations as stipulated in Recommendation 11. Australia should adopt legally enforceable regulations or guidelines establishing an explicit obligation for all financial institutions to perform the elements required by Recommendation 11. Currently, AUSTRAC Guideline # 1 gives some guidance in this regard but it is not legally enforceable.

379. AUSTRAC Guidelines and Information Circulars assist cash dealers to identify high risk and NCCT countries and advise cash dealers on the need to scrutinise such transactions involving these countries in order to determine whether they should be reported as STRs according to the FTR Act. Nevertheless, the Guidelines and Information Circulars are not enforceable. Australia should consider adjusting its legislation to clarify obligations under Recommendation 21 in its Guidelines and Information Circulars and making these measures legally enforceable. Where counter-measures are required, AUSTRAC Industry Guidance provides such direction, and the powers of the RBA, under the Banking (Foreign Exchange) Regulations may be applied.

### 3.6.3 Compliance with Recommendations 11 & 21

	Rating	Summary of factors underlying rating
<b>R.11</b>	<b>PC</b>	<ul style="list-style-type: none"> <li>There are no specific requirements for cash dealers to pay special attention to complex, unusual large transactions, or unusual patterns of transactions that have no apparent or visible economic or lawful purpose or to examine, as far as possible the background and purpose of the transactions, set forth their findings in writing, and keep findings available for competent authorities; the monitoring obligation is only implied and indirect, and it does not cover the full range of monitoring situations as stipulated in Recommendation 11.</li> <li>AUSTRAC Guideline #1 provides some information to assist in this regard. However, Guidelines are not legally enforceable and do not cover the full scope of financial institutions.</li> </ul>
<b>R.21</b>	<b>PC</b>	<ul style="list-style-type: none"> <li>While AUSTRAC has the authority under section 38(1)(e) of the FTR Act to indicate other countries as higher risk, AUSTRAC has made limited use of this provision.</li> <li>There is no specific requirement for financial institutions to pay special attention to transactions involving countries that do not adequately apply the FATF recommendations in accordance with Recommendation 21. AUSTRAC Guidelines and Information Circulars provide additional information and advise cash dealers on the need to scrutinise such transactions to so as to determine whether they should be reported. However, these measures are not legally enforceable.</li> </ul>

## 3.7 Suspicious transaction reports and other reporting (R.13-14, 19, 25 and SR.IV)

### *Recommendation 13 and SR IV*

#### 3.7.1 Description and Analysis<sup>21</sup>

380. Section 16(1) FTR Act provides for the reporting of suspicious transactions for offences against a broad range of revenue, proceeds of crime and other legislation. A suspicious transaction report (SUSTR)

<sup>21</sup> The description of the system for reporting suspicious transactions in s.3.7 is integrally linked with the description of the FIU in s.2.5, and the two texts need to be complementary and not duplicative.

must be filed if the cash dealer has reasonable grounds to suspect a transaction “may be relevant to the investigation” of:

- (a) an evasion, or attempted evasion of taxation law,
- (b) an offence against any Commonwealth or Territorial law or
- (c) may assist the enforcement of the proceeds of crime legislation and related regulations.

381. All financial institutions captured under the *cash dealer* definition are subject to the obligations of the FTR Act and compliance monitoring by AUSTRAC. This includes the requirements under section [16](#) to report to AUSTRAC where the reporting entity has reasonable grounds to suspect that a transaction:

- may be relevant to investigation of an evasion, or attempted evasion, of a taxation law;
- may be relevant to investigation of, or prosecution of a person for, an offence against a law of the Commonwealth or of a Territory;
- may be of assistance in the enforcement of *the Proceeds of Crime Act 1987* or the regulations made under that Act;
- is preparatory to the commission of a financing of terrorism offence; or
- may be relevant to investigation of, or prosecution of a person for, a financing of terrorism offence.

382. Reporting entities can submit suspicious transaction reports to AUSTRAC via either its Electronic Data Delivery System (EDDSWeb) or via paper forms that are subsequently mailed or faxed to AUSTRAC. All suspect transaction and other financial intelligence reported by cash dealers is stored in a database that can be accessed by analysts from AUSTRAC and its partner agencies. For cash dealers to ensure effective compliance with this requirement, they must have the capacity/systems to monitor both transaction patterns and relationships to detect suspicious behaviour and or activity. Such systems also assist cash dealers to comply with the recommendation to give special attention to jurisdictions recognised as being non compliant by the FATF.

#### Attempted transactions

383. A suspect transaction is reportable if there is an attempted transaction and regardless of any amount being transacted. Section 3(7) of the FTR Act provides that for the purposes of suspect transaction reporting a transaction means “*a proposal for a transaction, or negotiations for a transaction, in the same way as it applies in relation to a completed transaction.*” Although section 16(1)(b)(i) of the FTR Act makes explicit reference to reporting suspicious transactions which may be relevant to the investigation of an evasion, or an attempted evasion, of a taxation law, the rest of section 16(1) covers the reporting of suspicious transactions in non-tax matters; therefore transactions should be reported regardless of whether they are thought to involve tax matters.

384. Banks lodge the majority of the SUSTRs received by AUSTRAC. The different types of cash dealers that submit SUSTRs are provided in the table below. It should be noted that cash dealers submit multiple SUSTRs on the same entities and also on associated entities. The automated database then links all reports (not just SUSTRs) by various attributes, such as name, address, account number, etc. AUSTRAC does not maintain statistics on multiple reports. However, AUSTRAC’s automated monitoring system, TargIT, identifies unusual financial activity. It has the technological capacity to identify unusual or suspicious networks of transactions and associated entities. TargIT is an important mechanism to proactively assist the law enforcement, revenue protection and national security endeavours of AUSTRAC’s partner agencies.

#### **SUSTRs received for the calendar years from 1 January 2001 to 31 December 2004 by Cash Dealer Type**

Cash Dealer Type	Jan - Dec 2001	Jan - Dec 2002	Jan - Dec 2003	Jan - Dec 2004
Bank (BA)	5,339	5,837	6,748	8,679

Bookmaker (BO)	-	2	1	-
Building Society (BS)	121	89	98	93
Bullion Dealer (BU)	27	-	2	2
Casino (CA)	838	1,149	1,294	1733
Credit Union (CU)	400	529	567	592
Futures Broker (FB)	2	-	2	-
Finance Corporation (FC)	74	88	170	409
Foreign Exchange (FX)	375	491	517	454
AUSTRAC as Coordinator (GP)	2	2	5	5
Insurance (IN)	23	28	21	20
Merchant Banks (MB)	2	-	4	-
Mortgage and Finance (MF)	40	13	9	6
Money Orders (MO)	52	38	77	38
Money Transmitters (MT)	114	90	94	166
Motor Vehicle Dealer (MV)	15	26	25	9
Sports Bookmakers (SB)	-	-	1	5
Securities Dealer (SD)	23	41	18	16
Totalisator agency boards (TA)	92	58	61	116
Travel Agents (TR)	2	2	-	-
Unit Trust (UT)	5	6	1	-
<b>Total</b>	<b>7546</b>	<b>8489</b>	<b>9715</b>	<b>12343</b>

385. The table below contains the transaction types of SUSTRs reported to AUSTRAC by reporting entities over a 4 year period from 1 January 2001 to 31 December 2004.

**Transactions types reported on SUSTRs by reporting entities in the calendar years  
from 1 January 2001 to 31 December 2004**

<b>Reported Transaction Types</b>	<b>Jan – Dec 2001</b>	<b>Jan-Dec 2002</b>	<b>Jan – Dec 2003</b>	<b>Jan-Dec 2004</b>
Blank	6,777	3,002	2,143	2,579
Account Deposit	309	1,976	2,790	3,056
Transfer from Australian Bank	1	5	15	66
Transfer to Australian Bank	4	26	25	282
Cashing of Bank Draft	-	14	17	20
Cash Withdrawal	188	1,101	1,479	2,005
Cashing of Cheque	40	70	96	173
Issue of Bank Cheque	29	157	142	150
Issue of Bank Draft	22	105	96	143
International Funds Transfer into Aust	12	120	136	304
International Funds Transfer out of Aust	62	628	835	1,012
Other Cash In	27	709	1,164	1236
Other Cash Out	40	276	442	966
Purchase of Foreign Currency	12	93	71	86
Purchase of Securities	-	1	2	3
Purchase of Travellers cheques	1	13	25	22
Sale of Foreign Currency	19	151	202	214
Sale of Securities	-	4	2	2
Sale of Travellers Cheques	3	38	33	24
<b>Total</b>	<b>7,546</b>	<b>8,489</b>	<b>9,715</b>	<b>12,343</b>

386. The number of STRs filed over the past several years and the range of entities reporting is positive and appears to be trending in the right direction. Numbers of reports have been steadily increasing for



several types of cash dealers, notably banks, credit unions, casinos, and finance corporations. However, it was not possible to check the uniformity of reporting within each sector as information on reporting by individual institutions could not be made available to the assessment team.

#### Transactions relating to the financing of terrorism

387. Cash dealers are also required to submit to AUSTRAC suspicious transaction reports about potential terrorist financing activity. The *Suppression of the Financing of Terrorism Act 2002* introduced section 16(1A) of the FTR Act which sets out the terms of suspicious transaction reporting regarding terrorist activities and the financing of terrorism. Under section 16(1A) of the FTR Act suspicious transaction reporting obligations apply to possible terrorist financing in the same way as they apply to other types of suspect activity. Section 16(1A) of the FTR Act requires the cash dealer to report a SUSTR where the cash dealer has reasonable grounds to suspect a transaction is preparatory to the commission of a terrorist financing offence or; may be relevant to the investigation of the investigation of a terrorist financing offence. AUSTRAC Information Circulars 22, 23 and 24 provide further guidance on terrorist financing.

388. While these requirements are generally broad, there are limitations related to the definition of “cash dealer” which does not apply to all financial institutions as defined in the FATF Recommendations. In addition, as the reporting obligation relates to the suspected terrorist financing offences, the evaluation team’s concern regarding the scope of the terrorist financing offence (as discussed in section 2.2) led the team also to be concerned that this could limit the reporting obligation.

#### **Recommendation 14**

389. The legislation provides for the full protection of cash dealers submitting suspect transaction reports. Section 17 of the FTR Act provides for the general protection for financial institutions and their employees in relation to the filing of reports of suspect transactions under sections 16(1) and (1A) of the FTR Act. An action, suit, or proceeding cannot be laid against the cash dealer or officer, employee or agent of the cash dealer in relation to this action, as section 16(5) of the FTR Act prohibits SUSTRs from being used in any legal proceeding<sup>22</sup>. This protection applies to all financial institutions and their employees who report suspicions in good faith to AUSTRAC; section 17 protects cash dealers reporting suspicious activity, but not knowingly involved, from being prosecuted under Division 400 of the Criminal Code. Cash dealers submitting SUSTRs also derive protection in that they cannot be considered to be breaching customer confidentiality when reporting suspect transactions. Section 16 (5A) and 16(5AA) of the FTR Act also prohibits cash dealers from disclosing that a SUSTR has been submitted to AUSTRAC.

390. Secrecy provisions in section 25 of the FTR Act provide that the names and personal details of staff of financial institutions that make a suspicious transaction report are kept confidential by AUSTRAC. Secrecy provisions in the FTR Act prohibit a person making a record of any relevant information and divulging or communicating to another person any information relating to a suspicious transaction report. This confidentiality is further endorsed by section 16(5D) which provides that the report, a copy of the report or a representation of the report is inadmissible in evidence in any legal proceeding. This protection includes the inadmissibility of any information relating to the formation or existence of a suspicious transaction report. Recommendation R14.3 is fully met.

391. Section 16(5A) of the FTR Act prohibits the reporter (whether a financial institution, their directors, officers or employees) from disclosing, or “tipping off” a customer that a suspicious transaction report has been provided to AUSTRAC. If any cash dealer gives further information, the dealer is also prohibited from disclosing that information and disclosing it to any other person where it could reasonably be inferred that the first-mentioned information has been given. A person who contravenes this section is guilty of an offence punishable by imprisonment for a maximum of 2 years under section 16(5B) of the FTR Act.

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<sup>22</sup> Other than for a prosecution for non-compliance with the FTR Act re failing to report suspicious transactions.

### ***Recommendation 19***

392. In addition to the requirement to report suspicious transactions through SUSTRs, AUSTRAC receives financial intelligence from reports regarding:

- significant cash transactions equal to or greater than AUD10,000 reported as significant cash transaction reports under section 7 (SCTRs);
- significant cash transactions by solicitors equal to or greater than AUD10,000 reported as significant cash transaction reports under section 15A (SCTRs by solicitors).

393. As with all the reports that AUSTRAC collects, reports of large cash transactions are stored on the AUSTRAC database and can be accessed by authorised staff within its 28 Partner Agencies. The number of online users per partner agency and the access levels available is governed by each MOU that AUSTRAC has with its 28 Partner Agencies. All MOUs with AUSTRAC's Partner Agencies contain a number of rules and conditions relating to the access to FTR information, including privacy, security, accountability and feedback provisions to which the Agency must agree to before access to information is granted. The MOU also requires Partner Agencies to maintain an auditable record. Authorised staff also have online access to transactions that specifically relate to the wholesale repatriation and expatriation of currency by financial institutions. These transactions, also known as International Note Flows, are reported as significant transaction reports (SCTRs).

394. Sections 25-27 of the FTR Act deal with secrecy and access to AUSTRAC information. Section 25 requires AUSTRAC staff to deal with information in accordance with the Act and only for the purposes of their duties under the Act. The maximum penalty for failure to act in compliance with these provisions under Section 25 is 2 years imprisonment. Section 26 sets out the special provisions in relation to reports of suspect transactions, and allows information to be communicated to a range of officials, such as the Commissioner of Taxation; the Commissioner of the AFP, the Chief Executive Officer of the ACC; or the Chief Executive Officer of Customs. Section 27 sets out the provisions for access to FTR information by authorised officials of domestic partner agencies. In accordance with AUSTRAC practice, a Memorandum of Understanding (MOU) is negotiated with domestic partner agencies, signed by the Head of the relevant agencies. Section 27AA allows ASIO to access FTR information. In addition, the secrecy provisions of the *Crimes Act 1914* apply to AUSTRAC staff. Section 70 of the Act prohibits Commonwealth officers from disclosing information acquired in the course of their work which they should not disclose. AUSTRAC also issues guidelines regarding how and when FTR information can be used. Education programs within AUSTRAC ensure that there is awareness of the privacy and security requirements amongst users of the information as well as AUSTRAC staff.

### ***Recommendation 25 (Criterion 25.2: feedback)***

395. AUSTRAC provides general feedback in the form of statistics on the number of disclosures, with appropriate breakdowns, and on the results of the disclosures; and some information on current techniques, methods and trends as typologies in some quarterly newsletters. AUSTRAC provides sanitised case examples in its Annual Report and newsletters and in its e-learning application on its website and presentations regularly made to cash dealers. AUSTRAC's partner agencies also provide feedback during the course of investigations. However, during assessment discussions the private sector generally indicated that it did not receive adequate feedback on STRs filed.

#### **3.7.2 Recommendations and Comments**

396. The provisions for suspicious transaction reporting are generally adequate, but there is a limitation of "cash dealer" definition which does not apply to all financial institutions as defined in the FATF Recommendations. Australia should therefore amend its FTR Act to apply to all financial institutions as defined in the FATF Recommendations.

397. There is a requirement to report transactions suspected of being related to a terrorist financing offence, but the evaluation team had concerns regarding the scope on the terrorist financing offence itself;

Australia should expand its definition of the FT offence (to include the provision/collection of funds for an individual terrorist and the collection of funds for a terrorist organisation) so as to ensure that transactions related to these activities is reportable.

398. Although AUSTRAC does provide some general and specific feedback on STRs received, AUSTRAC could provide more sanitised examples of actual money laundering cases and/or information on that decision or result of an STR filed.

### **3.7.3 Compliance with Recommendations 13, 14, 19, 25 (criteria 25.2), and Special Recommendation IV**

	<b>Rating</b>	<b>Summary of factors underlying rating</b>
<b>R.13</b>	<b>LC</b>	<ul style="list-style-type: none"> <li>• The provisions are generally adequate, but there is a limitation of “cash dealer” definition which does not apply to all financial institutions;</li> <li>• There is a requirement to report transactions suspected of being related to a terrorist financing offence; however the evaluation team’s concern regarding the scope of the terrorist financing offence (as discussed in section 2.2) led the team also to be concerned that this could limit the reporting obligation.</li> </ul>
<b>R.14</b>	<b>C</b>	
<b>R.19</b>	<b>C</b>	
<b>R.25</b>	<b>PC</b>	<ul style="list-style-type: none"> <li>• Although AUSTRAC provides some general and specific feedback on STRs, AUSTRAC could provide more sanitised examples of actual money laundering cases and/or information on that decision or result of an STR</li> <li>• During assessment discussions the private sector generally indicated that it did not receive adequate feedback on STRs filed.</li> </ul>
<b>SR.IV</b>	<b>LC</b>	<ul style="list-style-type: none"> <li>• The provisions are generally adequate, but there is a limitation of “cash dealer” definition which does not apply to all financial institutions;</li> <li>• As the reporting obligation relates to suspected terrorist financing offences, the evaluation team’s concern regarding the scope of the terrorist financing offence (as discussed in section 2.2) led the team also to be concerned that this could limit the reporting obligation.</li> </ul>

### **Internal controls and other measures**

## **3.8 Internal controls, compliance, audit and foreign branches (R.15 and 22)**

### **3.8.1 Description and Analysis**

#### ***Recommendation 15***

399. The requirement for cash dealers to have AML/CFT policies and internal controls is merely implicit within the FTR Act which obliges cash dealers to identify account signatories and to report potentially suspicious activity which may be linked to both money laundering and terrorist financing. Currently, a number of sectors have voluntarily have introduced AML/CFT policies and internal controls commensurate with their size and exposure to AML/CFT risk. These measures include staff training, suspicious transaction reporting procedures, customer risk assessment guidelines and internal audit mechanisms. These measures may be subject to the oversight of a compliance officer, if one is appointed for AML/CFT work, who then maintains contact with AUSTRAC.

400. The implicit nature of these internal control measures is a serious regulatory weakness and legislative or other amendments are required to oblige financial institutions to have in place institutionalised AML/CFT internal controls, policies and procedures. Although the FTR Act places

implicit obligations on certain aspects of internal controls, policies and procedures, it should be an express statutory obligation for all cash dealers under the FTR Act to ensure that the proposed controls, policies and procedures cover, *inter alia*, CDD obligations, record detection, the detection of unusual and suspicious transactions, and the reporting obligations.

401. Section 8A(2)(c) of the FTR Act requires certain *cash dealers* upon application for a declaration as an *identifying cash dealer*, to provide the Director of AUSTRAC with a written undertaking that the cash dealer will give the Director in respect of such periods as are determined by the Director, written reports on the applicants compliance with the FTR Act. In addition, the prospective *identifying cash dealer* undertakes in writing under Section 8A(2) of the FTR Act, the following:

- to carry out the verification procedures under paragraph 20A(1)(b), where that paragraph applies, and to take all reasonable steps to complete the procedures promptly in each case: Section 8A(2)(a);
- to report under section 16 in relation to information obtained by the applicant as a result of carrying out the procedures mentioned in paragraph (a): Section 8A(2)(b);
- to do such other things (if any) as are specified in the approved application form: Section 8A(2)(d).

402. Placing reliance on the written undertaking given in accordance with section 8A(2)(c) of the FTR Act, AUSTRAC requires all reporting entities to complete an Annual Compliance Report (ACR) at the beginning of each year. This report requires cash dealers to provide answers to over 50 questions including questions relating to their audit and compliance programs; account opening and maintenance information; information relating to SCTRs and SUSTRs; IFTIs; outsourced functions; business acquisitions, mergers, divestments; and industry association or membership information. For institutions to comply with these ACR requirements they need internal awareness of these requirements and have to undertake education programs to address any deficiency. Processes must also be developed to ensure timely action to meet these requirements. However, the ACR process under section 8A(2) of the FTR Act has limitations since it is based on undertakings given by a cash dealer, and the class of identifying cash dealer is not mandatory but voluntarily determined by the cash dealer themselves. Cash dealers can, without impunity, elect to opt out of the section 8A(2) obligations by not applying for the status of identifying cash dealer.

403. In practice, AUSTRAC advises cash dealers to develop effective suspicious transaction reporting systems, requires the implementation of policies and procedures, internal controls and appropriate staff training programs which are geared to ensure that staff are able to meet their reporting obligations and to protect their organisation against money laundering and terrorist financing. AUSTRAC's advice to industry on suspicious transaction reporting emphasises the importance of ongoing training programs (AUSTRAC Industry Guideline 1, paragraph 20). However, these Industry Guidelines are not legally enforceable.

404. In terms of specific requirements for AML programs, AUSTRAC advises as to what cash dealers should consider in terms of developing their broader prudential and risk management systems. This guidance, is provided by the Director of AUSTRAC in accordance with his power to issue guidelines to cash dealers about their obligations under the FTR Act and the regulations, under section 38 (1)(c) of the FTR Act.

405. The difficulty with this construction is that section 38(1) (c) is limited to the obligations of cash dealers, and cash dealers have no express obligations under the FTR Act and regulations to establish and maintain internal procedures, policies and controls to prevent ML and FT and to communicate these to their employees. This lacunae, which dampens the effectiveness of compliance measures within cash dealers, is further compounded by the absence of a statutory obligation in the FTR Act requiring cash dealers to develop appropriate compliance management arrangements, including the appointment of a money laundering reporting officer and compliance officer to oversee AML/CFT compliance.

406. The measures in place are not obligatory and to the extent that or where similar measures are present in a cash dealer they are not directed specifically at monitoring compliance with AML/CFT regulatory obligations. The requirement that financial institutions should be required to maintain an adequately resourced and independent audit function to test compliance (including sample testing) with these procedures, policies and controls, is not obligatory under the FTR Act.

407. APRA, as the prudential regulator, and ASIC, as the market integrity and consumer protection regulator, also impose broad requirements on the entities they regulate in relation to internal controls and compliance policies. For example, both ASIC and APRA require the entities that they regulate to have appropriate operational policies and procedures and audit practices in place to manage risks and comply with applicable regulation. The responsibility for ensuring such procedures are in place lies with directors and senior managers, although other officers, such as internal compliance officers, may also bear responsibility for such policies, depending on the structure of the regulated entity.

## **Recommendation 22**

408. Section 6 of the FTR Act provides that the FTR Act applies throughout the whole of Australia and also applies outside Australia. Australian authorities have indicated that foreign branches and subsidiaries of Australian banks are thus required to comply with the FTR Act outside Australia, to the extent that host country laws and regulations permit. Generally, however, Australian financial institutions and any subsidiaries or branches are subject to the laws of the jurisdiction in which they are incorporated. The Australian banks themselves indicated that they would first apply the local laws, and that in several cases local laws prohibited full implementation of the Australian standards due to local secrecy provisions.

409. There is no legal obligation or guidance requirement under the FTR Act that, where the minimum AML/CFT requirements of the home and host countries differ, branches and subsidiaries in host countries are required to apply the higher standard, to the extent that local (i.e. host country) laws and regulations permit. Equally, there is no requirement that financial institutions be required to inform their home country supervisor when a foreign branch or subsidiary is unable to observe appropriate AML/CFT measures because this is prohibited by local (i.e. host country) laws, regulations or other measures.

410. Australia relies upon sound commercial practice for internationally active Australian financial institutions to ensure that a basic standard of AML is maintained across the operations of both domestic and overseas-based branches and subsidiaries. The application of a standard group AML policy and procedure helps to ensure compliance not only with Australian requirements but also broader international standards as may be found in European or North American markets.

411. Australian authorities have indicated that Australian banks do not conduct a significant amount of business in countries that are non-compliant with the FATF recommendations. For example, at 30 June 2004 Australian banks' exposures to the (then) NCCT countries were as follows: Philippines- AUD0.5 billion; Indonesia - AUD0.4 billion; Nigeria – negligible; Myanmar – negligible; and Nauru – zero (Cook Islands was not separately identified). This compares with Australian banks' exposure to: New Zealand - AUD155 billion, UK - AUD93 billion, US - AUD24 billion; and total offshore - AUD334 billion.

### **3.8.2 Recommendations and Comments**

412. An express statutory obligation should be imposed for all cash dealers under the FTR Act to ensure that the proposed controls, policies and procedures cover, *inter alia*, CDD obligations, record detection, the detection of unusual and suspicious transactions, and the reporting obligations. The current implicit nature of the internal control measures is a serious regulatory weakness. Legislative amendments are required to oblige cash dealers to have in place institutionalised AML/CFT internal controls, policies and procedures commensurate with their size and exposure to AML/CFT risk. Such obligations should include requirements for financial institutions to: have a designated AML/CFT compliance officer at the management level; have an adequately resourced and independent audit function, establish ongoing employee training, put in place adequate screening procedures.

413. Australia should also adopt legal requirements for branches and subsidiaries to apply the higher AML/CFT standard, to the extent that the laws of the host country allows. In the event where a foreign branch or subsidiary is unable to observe appropriate AML/CFT measures because this is prohibited by local (i.e. host country) laws, regulations or other measures, those financial institutions should be required to inform Australian authorities. Financial institutions should also be required to pay particular attention that the principle is observed wherewith to branches and subsidiaries in countries which do not or insufficiently apply the FATF Recommendations.

### 3.8.3 Compliance with Recommendations 15 & 22

	Rating	Summary of factors underlying rating
<b>R.15</b>	<b>NC</b>	<ul style="list-style-type: none"> <li>• There are no explicit requirements to oblige financial institutions to have in place institutionalised AML/CFT internal controls, policies and procedures and to AML/CFT risk and to communicate these procedures to their employees. This is a serious regulatory weakness and legislative amendments are required.</li> <li>• The measures in place are not obligatory and to the extent that or where similar measures are present in a cash dealer they are not directed specifically at monitoring compliance with AML/CFT regulatory obligations</li> <li>• The Director of AUSRAC can issue guidelines to pursuant to obligations of cash dealers; however, Industry Guidelines are not legally enforceable.</li> <li>• There is also no statutory obligation in the FTR Act requiring cash dealers to develop appropriate compliance management arrangements, including the appointment of a money laundering reporting officer and compliance officer to oversee AML/CFT compliance.</li> <li>• It is not a requirement to maintain an adequately resourced and independent audit function to test compliance (including sample testing) within internal AML/CFT procedures, policies and controls.</li> <li>• There is no requirement for financial institutions to establish ongoing AML training or to put in place screening procedures to ensure high standards when hiring employees.</li> </ul>
<b>R.22</b>	<b>NC</b>	<ul style="list-style-type: none"> <li>• Although under Section 6 of the FTR Act extends application of the FTR Act outside Australia, Australian banks themselves indicated that they would first apply the local laws, and that in several cases local laws prohibited full implementation of the Australian standards due to local secrecy provisions.</li> <li>• There is no requirement that this principle be observed with respect to their branches and subsidiaries in countries which do not or insufficiently apply the FATF Recommendations.</li> <li>• There is no legal obligation or guidance requirement under the FTR Act directing in fulfilment of requirement that where the minimum AML/CFT requirements of the home and host countries differ, branches and subsidiaries in host countries should be required to apply the higher standard, to the extent that local (i.e. host country) laws and regulations permit.</li> <li>• There is no requirement that financial institutions inform their home country supervisor when a foreign branch or subsidiary is unable to observe appropriate AML/CFT measures because this is prohibited by local (i.e. host country) laws, regulations or other measures.</li> </ul>

## 3.9 Shell banks (R.18)

### 3.9.1 Description and Analysis

414. While there are no express statutory provisions preventing shell banks in domestic law, Australian authorities do not in practice allow the establishment or accept the continued operation of shell banks. Australia's banking authorisation process effectively precludes the establishment and operation of "shell banks" within the jurisdiction. Under section 9 of the *Banking Act 1959*, institutions must be authorised by APRA to carry on a banking business in Australia. Banking licences issued under section 9 of the *Banking Act 1959* and the APRA "Guidelines on Authorisation of deposit-taking institutions" (ADIs), sets out specific criteria to be met by all applicants, including mutually owned applicants and foreign banks seeking to establish branches or locally incorporated subsidiaries. In particular:

- *Capacity and commitment:* APRA will only authorise suitable applicants with the capacity and commitment to conduct banking business with integrity, prudence and competence on a continuing basis (paragraph 10).
- *Capital:* Applicants must demonstrate that they can meet APRA's minimum capital requirements (based on Bank of International Settlements standards) from commencement of their banking operations, and APRA may impose higher requirements on a case by case basis. Applicants proposing to operate as banks must have a minimum of UAD50 million in Tier 1 capital (paragraphs 12-14).
- *Structure:* Only a body corporate can carry on a banking business in Australia. This means that banking businesses are subject to ASIC's registration and requirements for body corporates under the *Corporations Act 2001*.
- *Ownership:* All substantial shareholders of an applicant are required to demonstrate to APRA that they are "fit and proper" in the sense of being well-established and financially sound entities of standing and substance. In the case of foreign bank applicants, this requirement applies both to the foreign bank itself and to the substantial shareholders of the foreign bank. APRA requires all substantial shareholders to be able to demonstrate that their involvement in the ADI will be a long-term commitment and that they will be able to contribute additional capital, if required (paragraph 17).
- *Management:* Directors and senior management of the proposed ADI must satisfy APRA that they are fit and proper to hold the relevant position. APRA may consult other regulators (domestic and overseas) regarding the suitability of personnel for the proposed ADI. Where necessary, applicants should provide APRA with the authority to seek details in this regard. APRA also requires that a minimum number of directors are totally independent of the management of the ADI (paragraphs 18-20).
- *Risk management and internal control systems:* Applicants must satisfy APRA that their risk management and internal control systems (i) are appropriate to the scale of the ADI's operations, (ii) adequately address issues such as credit, prudential and operational risk, (iii) entail sufficient reporting and controls for foreign operations (paragraph 21-23).
- *Information and accounting systems:* Applicants must satisfy APRA that their information and accounting systems are adequate for maintaining up-to-date records of all transactions and commitments (paragraphs 24-25).
- *External and internal audit arrangements:* Applicants must demonstrate to APRA that appropriate arrangements have been established with external auditors (paragraphs 26-27).
- *Supervision by home supervisor:* Foreign bank applicants must have received consent from their home supervisor for the establishment of a banking operation in Australia. Only applicants who are authorised banks in their home country and subject to adequate prudential supervision will be granted authorities to operate foreign ADIs.

415. APRA's authorisation processes for ADIs prevent banks that do not meet minimal capital adequacy, shareholder, risk management and corporate governance requirements from gaining a banking authority.

416. There is no prohibition on financial institutions to enter into, or continue, correspondent banking relationships with shell banks. Nor are financial institutions required to satisfy themselves that respondent

financial institutions in a foreign country do not permit their accounts to be used by shell banks. Australian authorities indicate that for Australia's internationally active financial institutions, sound commercial practice requires higher levels of diligence when entering correspondent relationships. Australian financial institutions exercise greater levels of due diligence when establishing relationships with foreign institutions.

### 3.9.2 Recommendations and Comments

417. There are no statutory provisions preventing shell banks in domestic law. Australian authorities do not, allow the establishment or accept the continued operation of shell banks. In addition, Australia's banking authorisation process effectively precludes the establishment and operation of "shell banks" within the jurisdiction.

418. Australia should prohibit financial institutions from entering into, or continuing, correspondent banking relationships with shell banks and require financial institutions to satisfy themselves that respondent financial institutions in a foreign country do not permit their accounts to be used by shell banks.

### 3.9.3 Compliance with Recommendation 18

	Rating	Summary of factors underlying rating
<b>R.18</b>	<b>PC</b>	<ul style="list-style-type: none"> <li>• Australia's banking authorisation process effectively precludes the establishment and operation of "shell banks" within the jurisdiction.</li> <li>• There is no prohibition on financial institutions from entering into, or continuing, correspondent banking relationships with shell banks.</li> <li>• Nor are financial institutions required to satisfy themselves that respondent financial institutions in a foreign country do not permit their accounts to be used by shell banks.</li> </ul>

## 3.10 The supervisory and oversight system - competent authorities and SROs; Role, functions, duties and powers (including sanctions) (R.23, 30, 29, 17, 32 & 25)

### Authorities/SROs roles and duties & Structure and Resources (R23, 30)

#### 3.10.1 Description and Analysis

##### **Recommendation 23**

419. AUSTRAC's regulatory role includes an ongoing monitoring program to ensure cash dealer compliance with the requirements of the FTR Act. This monitoring program allows for both on-site inspections and desktop monitoring, based largely around the reporting of financial intelligence to AUSTRAC and the quality, timing and volume elements of that intelligence. AUSTRAC also conducts industry examinations which consider the size of the sector, services offered, vulnerabilities to ML, partner agency interest and other relevant factors. AUSTRAC has access to the premises of a cash dealer and to inspect records and record keeping systems Part IVA of the FTR Act (sections 27A – 27E) provides for AUSTRAC's "Powers of inspection". These powers constitute the basis of AUSTRAC's ongoing monitoring and inspection program.

420. AUSTRAC's regulatory powers provide for compliance inspections to assess AML compliance with the reporting and CDD obligations of the FTR Act. Compliance inspections can be done through either joint studies or more formal audits. The scope of formal audits is limited to the reporting and CDD



requirements of the FTR Act while Joint Studies are a more cooperative program which will look at all aspects of a cash dealer's broader AML procedures including staff training and reporting processes.

421. Australia's financial system, more generally, is supervised by two financial sector supervisory agencies, ASIC and APRA. APRA is the prudential supervisor and regulator of the Australian financial services sector. Section 8 of the *Australian Prudential Regulatory Authority Act 1998* establishes APRA for the purpose of regulating bodies in the financial sector in accordance with other laws of the Commonwealth that provide for prudential regulation or for retirement income standards, and for developing the administrative practices and procedures to be applied in performing that regulatory role. In performing and exercising its functions and powers, APRA is required to balance the objectives of financial safety and efficiency, competition, contestability and competitive neutrality. APRA oversees banks, credit unions, building societies, general insurance and reinsurance companies, life insurance, friendly societies, and most members of the superannuation industry.

422. The *Australian Securities and Investments Commission Act 2001* establishes the Australian Securities and Investments Commission (ASIC) and empowers ASIC to enforce and regulate company and financial services laws in order to protect consumers, investors, shareholders and creditors. ASIC is primarily concerned with disclosure and conduct of Australian companies and financial service providers. ASIC is responsible for the administration of the Corporations Act as well as consumer protection in the financial system. ASIC regulates, among others, Australian companies, financial markets and organisations and professionals who provide financial services such as dealing in and advising on financial products such as investment products, superannuation, insurance and, deposit products. The *Australian Securities and Investments Commission Act 2001* requires ASIC to

- uphold the law uniformly, effectively and quickly;
- promote confident and informed participation by investors and consumers in the financial system;
- make information about companies and other bodies available to the public;
- improve the performance of the financial system and the entities within.

423. Under Australia's functional division of responsibilities, each authority focuses on its own areas of responsibility and enforcement of its relevant legislation. The evaluation team did not find the implementation of the AML/CFT supervisory system to be effective in terms of the standards required by the revised 40 Recommendations. The supervisory system would also be enhanced if the co-ordination on AML/CFT matters between all the relevant authorities were to be improved (See section 6.1). AUSTRAC is currently limited in the information it can share with the APRA. There is a need to foster greater formal cooperation amongst relevant financial sector supervisors and regulators on AML/CFT issues and operational developments going forward. This would assist AUSTRAC in achieving enhanced AML/CFT outcomes. It would also strengthen the need for a common compliance imperative on financial institutions to address consumer and credit fraud, prudential and operational risk and AML/CFT measures as complementary measures, as part of their broader risk management strategies.

### ***Recommendation 30***

424. Detailed comments for the resources of AUSTRAC as the FIU are provided under the FIU section of this report. This section now examines whether AUSTRAC as AML/CFT supervisor and regulator is adequately structured, funded, staffed, and provided with sufficient technical and other resources to fully and effectively perform its compliance and regulatory functions under the FTR Act.

425. AUSTRAC has a section of 32 professionals (out of an entire staff complement of 154) dedicated to its compliance and regulatory reporting functions under the FTR Act. The reporting and compliance section of AUSTRAC is responsible for deterring money laundering, serious crime and tax evasion, and in this role oversees compliance with the FTR Act. The reporting and compliance section of AUSTRAC works with cash dealers in the financial and gaming sectors to ensure they understand and comply with their obligations to report certain transactions to AUSTRAC and to identify their customers. This section has also focused its work on remittance dealers during the past year, which has paid dividends through a

significant increase in reporting volumes. The section also focuses on education, public awareness' and improving data quality of reports to AUSTRAC. During the last reportable year AUSTRAC refocused its inspection program and directed more resources to education with less emphasis on detailed inspection audits, conducting 147 educational visits during that year.

426. As Australia's national anti-money laundering regulator, AUSTRAC is required to ensure effective supervision and compliance with the FTR Act in respect of a vast range of financial, non-financial and gambling reporting entities. It therefore needs adequately skilled supervisory and compliance staff in an acceptable numerical proportion of staff to reporting entities to effectively fulfil this mandate.

427. The assessment team has significant concerns regarding the adequacy of resources required to fully perform AUSTRAC's supervisory functions, as required under the revised Recommendations. For AUSTRAC to be an effective AML/CFT regulator under the current FATF standards, special emphasis needs to be placed on substantially increasing staffing levels in the Reporting and Compliance section, providing for a dedicated budget for targeted audit inspections to further enhance the compliance culture amongst cash dealers, and concomitant funding arrangements to drive the desired compliance and financial reporting outcomes. AUSTRAC also needs to ensure that these staff are adequately skilled in financial supervision and inspection issues. Consideration needs to be given for a mechanism of inspection cost recovery in deserving instances, under the FTR Act. These concerns are echoed in the comments of the TFG International Report, October 2003.

428. While the AUSTRAC financial budget has steadily increased over the years, further dedicated financial resources must be directed toward the Reporting and Compliance section in the Money Laundering Deterrence Division (which division has a AUD 5.8m budget out of a total appropriation of AUD 20.805m for financial year 2004/05), to increase staff numbers, to train existing staff and to embark on a targeted compliance drive amongst cash dealers through actual audit inspections in increased numbers. AUSTRAC had 154 total staff as at March 2005, of which only 20 percent, 32 persons (which in turn was 60 percent of the Money Laundering Deterrence Division comprising 53 persons) are AML supervisory and compliance staff. If one excludes 26 IT contractors, the operational AUSTRAC staff total becomes 121 persons.

429. Notwithstanding the existence of technological aids and AUSTRAC systems, this number of supervisory and compliance staff appears limited given the varied extent and numbers of the existing reporting entities under the FTR Act. The need to increase AML supervisory and compliance staff is made more pressing by the proposed draft amendment Bill that would introduce more reporting entities under the FTR Act compliance regime.

430. The staff of AUSTRAC currently maintains high professional standards, including standards concerning confidentiality, is of high integrity and is generally appropriately skilled. While this criterion is generally met, there is a distinct need for an enhancement of supervisory skills and training pertaining to the conduct of on site inspections and enforcement related activities.

431. AUSTRAC currently undertakes relevant training of new staff to adequately train them on AUSTRAC compliance and supervisory procedures for combating ML and FT, so as to enable to contribute to the work of AUSTRAC within a short amount of time.

#### **Authorities' Powers and Sanctions – R. 29 & 17**

##### ***Recommendation 29***

432. AUSTRAC's regulatory role includes an on-going monitoring program to ensure cash dealer compliance with the requirements of the FTR Act. This monitoring program allows for both on site inspections and desktop monitoring, based largely around the reporting of financial intelligence to AUSTRAC and the quality, timing and volume elements of that intelligence. AUSTRAC also conducts industry examinations that consider the size of the sector, services offered, vulnerabilities to money laundering, partner agency interest and other relevant factors. AUSTRAC's on-site inspection powers are

covered by section 27C of the FTR Act. AUSTRAC's regulatory responsibilities also include the identification and education of reporting entities, monitoring of the quality of financial intelligence reported to AUSTRAC, including compliance inspections, and rectification of any non compliance detected through the monitoring and inspection program.

433. Part IVA of the FTR Act (sections 27A – 27E) provides AUSTRAC's "powers of inspection". These powers constitute the basis of AUSTRAC's ongoing monitoring and inspection program. Section 27C powers of inspection are limited to certain prescribed measures. As there is an absence of the requirements for AML/CFT programs and internal rules, the generally accepted standard inspection powers and procedures such as checking the institutions' policies and procedures are also not required by the FTR Act. As part of its regulatory compliance program, AUSTRAC conducts compliance inspections to assess AML compliance with the reporting and identification obligations of the FTR Act, though the emphasis seems to be oriented towards the reporting obligations.

434. As previously mentioned, compliance inspections are presently done through either joint studies or more formal audits. AUSTRAC currently focuses on educational visits rather than formal inspection audits. Formal inspections are rarely conducted. However, educational visits include inspections of records to ascertain whether an entity is a cash dealer, and if so, whether they have reporting obligations and whether they are complying with them.

435. Section 27E of the FTR Act allows AUSTRAC to access business premises provided that written notice is given to the relevant cash dealer, solicitor, solicitor corporation or partnership of solicitors. This access is not predicated on the need for a court order. Sections 27C and 27D allow AUSTRAC to inspect the premises of a reporting entity and solicitor including inspecting records and reports kept by the reporting entity or solicitor.

436. The powers of enforcement and sanctions are limited to criminal sanctions. There is a need to remedy this deficiency and institute a comprehensive administrative penalty regime under which administrative penalties can be imposed on regulated entities and persons who are materially non-compliant in respect of all of their AML/CFT obligations

437. APRA, as the prudential regulator, and ASIC, as the market integrity and consumer protection regulator, have extensive monitoring, investigation and enforcement powers that are supported by a wide range of civil, criminal and administrative sanctions. These powers include authority to conduct inspections and request the production of documents. However, APRA and ASIC exercise their powers in the performance of their statutory mandates and functions, which are not specifically aimed at AML/CFT.

## ***Recommendation 17***

### **Effective, proportionate and dissuasive criminal, civil or administrative sanctions**

438. The penalty regime in the FTR Act provides for criminal sanctions or civil injunction power under section 32 (Part V), where AUSTRAC may also seek to restrain unlawful conduct by application to Court for injunction relief under section 32 of the FTR Act. However, statistics reveal that this power is used by AUSTRAC in limited circumstances. Criminal sanctions are also available in the Criminal Code or the *Crimes Act 1914*. The lack of administrative sanctions means in practice that formal sanctions are generally not applied. However, Australia notes that agreed remedial action with the cash dealer, while not a formal sanction, successfully encourages improvements.

439. The regulatory sanctions available in the broader Australian financial supervisory and regulatory environment include criminal, civil and administrative mechanisms. APRA and ASIC have wide-ranging powers to remedy breaches of their relevant legislation. Sanctions that exist for APRA, as the prudential regulator, and ASIC, as the market integrity and consumer protection regulator, would not normally apply for AML/CFT failings, although Australian authorities indicate that these powers could apply in some cases, if the failing is relevant to the other regulatory objectives and functions of APRA or ASIC.

### Designated authorities and sanctions for financial institutions, directors and senior management

440. The CDPP is responsible for prosecuting offences under the FTR Act and the Commonwealth Criminal Code. Part 2.5 of the *Criminal Code Act 1995* addresses corporate responsibility, including intention, knowledge or recklessness at a board or high managerial level. The sanctions available to APRA and ASIC extend to directors and senior managers, as well as actuaries and auditors involved in the administration of the entity.

441. Section 34 of the FTR Act also provides that to establish the state of mind of a body corporate cash dealer, it is sufficient to show that a director, employee or agent of the body corporate, acting within the scope of his or her actual or apparent authority, had that state of mind. Section 12GH of the ASIC Act 2001 makes a similar provision.

### Power to impose disciplinary and financial sanctions and the power to withdraw, restrict or suspend the financial institution's license

442. The powers of APRA and ASIC include powers to compel an entity to take specific actions to address risks and shortcomings and issue directions to remove an institution's management. ASIC can also ban and disqualify persons, including banning from acting as a director or from managing a corporation. APRA and ASIC also have powers to suspend or revoke licences and/or authorisation to operate a financial sector entity or provide a financial service in circumstances where there has been a breach of the relevant legislation. Licence revocation would generally be considered only after other measures have been exhausted.

443. Australian authorities indicated that these powers may apply where there is non-compliance with the FTR Act to the extent that the breach creates risks or breaches that are relevant to APRA's and ASIC's legislation. However, it was unclear how these would be applied in practice, as there are no express powers to remove management or revoke a license for a breach of AML/CFT requirements. No sanctions have yet been applied by APRA or ASIC for AML/CFT failings.

444. Australia provided statistics on the number of criminal charges that were brought (both summary and indictment) for violations of the FTR Act.

Act		2000-2001	2001-2002	2002-2003	2003-2004	2004-2005*	Total
Financial Transaction Reports Act 1988	summary	167	117	122	161	68	635
	indictment	40	53	31	33	10	167

\*from 1 July 2004—25 May 2005

445. The following table provides information on the number of defendants where the charges were proven, acquitted, discontinued or other under various sections of the Financial Transactions Reports Act for the period 1 January 2000 to 7 March 2005:

Defendants	s.15(1)	s.24	s.28	s.29	s.31	Total
Proven	477	146	2	8	39	672
Acquitted	9	2	0	0	0	11
Discontinued	5	3	1	0	1	10
Other	1	8	0	0	4	13
Total	492	159	3	8	44	706

Section 15(1) FTR transfer of \$10,000 in or out of Australia without filling in form;

Section 24 FTR opening bank account in a false name;

Section 28 FTR cash dealer failing to provide information;

Section 29 FTR cash dealer providing false information;

Section 31 FTR conducting transactions so as to avoid reporting requirements.

446. The following sentences were applied:

- 99 received a sentence involving imprisonment. Of these 99:

- 77 received a sentence including imprisonment for a period of up to or including 2 years;
- 21 received a sentence including imprisonment for a period of more than 2 years up to or including 5 years;
- 1 received a sentence of greater than 5 years; and
- 28 were released forthwith and received a recognizance release order on condition that they be of good behaviour for a specified period;
- 156 received bonds under section 19B of the *Crimes Act 1914*;
- 21 received bonds under section 20(1)(a) of the *Crimes Act 1914*;
- 57 received bonds under section 20(1)(b) of the *Crimes Act 1914* and
- 37 received a community service order.

447. However, in terms of regulatory failings by cash dealers, the only relevant offences are those under sections 28 and 29, for which there have been 10 convictions. This indicates that AUSTRAC has not had to use its criminal sanctions very frequently against cash dealers, and that the failings were due to non-compliance with reporting obligations, not failings in relation to CDD or record-keeping.

**Market Entry/ Control (R. 23)**  
**(Criteria 23.3, 23.5, 23.7)**

448. AUSTRAC, APRA and ASIC each have a distinct role to play in regulating entry to the Australian financial system, commensurate with their respective objective and responsibilities

449. *The Corporations Act 2001* imposes minimum standards on the behaviour of officers and employees of corporations. Part 2D.6 of the *Corporations Act 2001* lists circumstances under which persons will be automatically disqualified from managing a corporation. Section 206B sets out the circumstances when a company director is automatically disqualified from continuing to act in their position. These include where the person is convicted on indictment of an offence in relation to decisions that affect the business of a corporation or its financial standing; an offence involving a contravention of the *Corporations Act* punishable by imprisonment for 12 months or more; an offence involving dishonesty punishable by more than 3 months imprisonment; conviction for an offence against the law of a foreign country punishable by more than 12 months imprisonment; and being an undischarged bankrupt. Additionally, there are provisions where a court or ASIC have the power to disqualify a person.

450. *The Corporations Act 2001*, Part 7.6, Division 4 requires providers of financial services and products to be licensed by ASIC, to meet minimum requirements in terms of competency, good fame and character and to meet certain disclosure requirements in relation to products and services provided to retail investors. These regulations are targeted at investor protection objectives and are distinct from statutory requirements implemented by APRA as the prudential regulator.

451. Entities generally must be authorised or licensed by APRA in order to carry out a banking, general insurance, life insurance or superannuation business in Australia. Various minimum standards are imposed on industry participants that must be met before APRA can issue an authorisation or grant a licence. These requirements include a requirement for directors and senior management of the financial entity to satisfy APRA that they are fit and proper to hold their respective positions. APRA may refuse to licence or authorise the financial entity if these requirements are not met. APRA's licensing and authorisation requirements for ADIs, general insurers, life insurers and superannuation require applicants to provide detailed information concerning the ownership and control of the entity concerned, including in relation to shareholdings (for ADIs, general insurers, life insurers who are required to satisfy the shareholding limits imposed by the FSSA).

452. APRA's regulatory policy implements a range of legislative requirements in respect of regulated financial institutions. The Banking Act 1959 gives APRA powers in respect of directors and senior managers of authorised ADIs and authorised non-operating holding companies (NOHC's) of ADIs as well as auditors of ADIs. Disqualified persons commit an offence if they act as a director or senior manager for an ADI or authorised NOHC. APRA can remove a director or senior manager of an ADI or authorised

NOHC if satisfied that the person is a disqualified person, or does not meet one or more of the criteria for fitness and propriety as set out in the APRA Prudential Standards.

453. APRA may also disqualify a person if the person is not a fit and proper person to be, or to act as, a director or senior manager of an ADI or authorised NOHC. Whereas removal of a person means that person cannot act in the position from which they have been removed, disqualification has the effect of prohibiting the person concerned from acting as a director or senior manager for any ADI or NOHC.

454. Remittance dealers (whether formal or informal) and currency exchange services (bureaux de change) are not required to be registered or licensed as a financial services providers under Australian law, but are subject to the obligations of the FTR Act and the regulatory supervision of AUSTRAC.

455. Overall, the majority of entities falling within the definition of “financial institutions” under the FATF methodology are required to be licensed or registered by one or more of APRA, ASIC and AUSTRAC. However, a small number of financial institutions (such as a subset of lease financing entities or issuers of travellers' cheques) are not currently required to be licensed or registered under Australian legislation.

**Ongoing supervision and monitoring (R. 23)**  
(Criteria 23.4, 23.6, 23.7)

456. AUSTRAC’s regulatory role includes an on-going monitoring program to ensure cash dealer compliance with the requirements of the FTR Act. The program includes initial on-site education visits, Joint Studies, and more formal compliance audits. Joint Studies are a more co-operative program that will look at all aspects of a cash dealer’s broader AML procedures including staff training and reporting processes and includes a rectification period to address any non-compliance detected. The purpose of this rectification period is to allow the cash dealer to resolve these issues prior to AUSTRAC requiring formal enforcement. AUSTRAC’s formal audit inspections are limited in scope to the reporting and CDD requirements of the FTR Act and to assessing AML compliance with the reporting and CDD obligations of the FTR Act. AUSTRAC also conducts industry examinations that consider the size of the sector, services offered, vulnerabilities to ML, partner agency interest and other relevant factors. Over the last 5 years AUSTRAC has completed 126 educational visits, 25 Joint Study programs and 225 compliance inspection audits as depicted in the tables below.

**Number of Audit, Education, Joint Studies and Audit and Education Visits  
in the calendar years from 1 Jan 2000 to 31 Dec 2004**

Year	Jan-Dec 2000	Jan-Dec 2001	Jan-Dec 2002	Jan-Dec 2003	Jan-Dec 2004	Total
Number of Compliance Inspection Audits	75	27	90	30	3	225
Number of Education Visits	0	0	0	0	126*	126
Number of Joint Studies Visits	17	6	2	0	0	25

\* Note: Education visits commenced in January 2004.

**Breakdown of the types of entities subject to on-site compliance audits is as follows:**

	2000	2001	2002	2003	2004	Total
Banks	7			2		9
Foreign Exchange	4		10			14
Travel Agency	2	1				3
Money Transmitters/Alternative Remittance Dealers	31	26	19	31	1	108
Mortgage & Finance	1		3			4

Securities Dealers	1					1
Solicitors			58			58
Bullion Dealers	29		1			30
<b>Total</b>	<b>75</b>	<b>27</b>	<b>91</b>	<b>33</b>	<b>1</b>	<b>227</b>

**Breakdown of the categories of cash dealers that received educational visits in 2004:**

Breakdown of Categories of Cash Dealers subjected to Education Visits	
Category of Cash Dealer	Number of Visits
Money Remitter	85
Credit Unions	11
Casino	6
Bullion Dealer	1
Banks	6
Motor Vehicle Dealers	5
Foreign Exchange	4
Totalisator Agency Boards	2
Travel Agencies	2
Mortgage and Finance	2
Finance Corporation	1
Sports Bookmaker	1
<b>TOTAL</b>	<b>126</b>

**Breakdown of the categories of cash dealers that received joint studies from 2000-2004:**

AUSTRAC Joint Studies						
	2000	2001	2002	2003	2004	Total
Banks	3	4	0	0	0	7
Totalisator Agency	2	0	1	0	0	3
Finance Corporation	1	1	0	0	0	2
Building Society	3	0	1	0	0	4
Casino	8	0	0	0	0	8
Credit Union	0	0	1	0	0	1
<b>TOTAL</b>	<b>17</b>	<b>5</b>	<b>3</b>	<b>0</b>	<b>0</b>	<b>25</b>

457. The table below outlines the number of requests made by AUSTRAC reporting entities and members of the general public to the AUSTRAC Reporting and Compliance Section Help Desk in the period from 1 January 2004 to 31 December 2004.

**Number of Requests to AUSTRAC Reporting and Compliance Section Help Desk  
in the calendar years from 1 Jan 2000 to 31 Dec 2004**

Year	Jan-Dec 2000	Jan-Dec 2001	Jan-Dec 2002	Jan-Dec 2003	Jan-Dec 2004
Number of Help Desk Calls	3789	6122	7737	5571*	5659

\*Note: Help Desk Automation commenced 3 July 2003.

458. AUSTRAC's on-site supervision activities do not cover the full range of compliance tools available to it under the FTR Act. The statistics confirm that the focus of AUSTRAC's on-going supervision is currently limited to educational visits. Education visits comprise nearly all (126 out of 130) of AUSTRAC's on-site activities in 2004. Most of these (86 out of 126) have focused on remittance dealers. It is of concern that the number of formal compliance inspection audits has been very low across the range of supervised entities. The only compliance inspection audit conducted in 2004 was for a remittance dealer. AUSTRAC has conducted only two compliance inspection audits of banks in the last four years and only six education visits to banks in 2004. Banks and money remittance dealers are the only financial

institutions to receive any compliance inspection audits in the last two years, and the securities/investment and insurance sectors have had only one visit in five years. Overall, the compliance regime must be seen as weak.

459. More generally, it appears to be a policy decision to conduct education visits rather than compliance inspection audits. These visits have helped identify cash dealers (especially alternative remittance dealers), educate them on FTR Act obligations, and can result in agreed remedial action. The main focus of identifying these entities and bringing them into the reporting regime appears to reflect AUSTRAC's current limited regulatory role under the FTR Act.

### ***Recommendation 32: statistics on efficiency of AML/CFT system***

460. AUSTRAC maintains adequate statistics regarding its on-site compliance activities, including education visits, Joint Studies, and compliance audits.

### **Guidelines (R.25)**

#### ***Criterion 25.1: Guidelines for financial institutions other than on STRs***

461. AUSTRAC has issued several Guidelines and Information Circulars which provide some guidance on CDD issues including: Information Circulars 4, 6, 8, 11, 25, 29, 30, 32, and 41, and Guidelines 3 and 7. Nevertheless, most of the presently issued guidance is heavily focussed on suspicious transaction and other reporting, but inadequate in regard to general detailed CDD guidance, with particular reference to the identification and verification of clients, internal controls and record keeping.

462. AUSTRAC is required under section 38(1) (e) of the FTR Act to issue guidelines and to provide advice to assist reporting entities in meeting their obligations under the FTR Act. AUSTRAC has two primary mechanisms to ensure reporting entities are properly aware of their AML/CFT responsibilities: industry consultative forums and its circulars and guidelines. The AUSTRAC driven consultative forums, which include major reporting entities, industry bodies, AUSTRAC and law enforcement representatives are:

- The Proof of Identity Steering Committee, which is chaired by AUSTRAC, is a cooperative effort by government and the financial sector to address issues relating to proof of identity; and
- The Privacy Consultative Committee to ensure that stakeholders within the privacy and civil liberties sector have the ability to either raise issues or contribute to other existing issues.

463. AUSTRAC has issued a range of Industry Guidelines and Information Circulars (available via AUSTRAC's website), under its guidance powers in terms of section 38(1) (e) of the FTR Act. AUSTRAC's circulars and guidelines address a range of issues. Several information circulars deal with general issues (one for account signatory requirements, one for cash management trusts, one for insurance bonds); several are specific issue updates and many forward advisory information from the FATF (such as updating the FATF's list of NCCTs) and other relevant organisations such as the United Nations. Several deal with suspicious transaction reporting. AUSTRAC has issued seven Guidelines—some of which have several addendums—which deal almost entirely with suspicious and large cash reporting obligations.

464. Furthermore, AUSTRAC's industry education program and the AUSTRAC Help Desk facility allow financial institutions and other businesses and professions, such as solicitors, bullion sellers and casinos, to receive guidance and clarify their obligations under the FTR Act. AUSTRAC has also developed an AML E-Learning application to assist industry understanding of their specific obligations within Australia and the issues connected to the broader AML environment. This application is an extension of its current regulatory education program and will soon be made available to all stakeholders via the AUSTRAC website.

### **3.10.2 Recommendations and Comments**



465. The evaluation team did not find the implementation of the AML/CFT supervisory system to be effective in terms of the standards required by the revised 40 Recommendations. The supervisory system would also be enhanced if co-ordination on AML/CFT matters between all the relevant authorities were to be improved. AUSTRAC is currently limited in the information it can share with the APRA. There is a need to foster greater formal co-operation amongst relevant financial sector supervisors and regulators on AML/CFT issues and operational developments going forward. This would assist AUSTRAC in achieving enhanced AML/CFT outcomes. It would also strengthen the need for a common compliance imperative on financial institutions to address consumer and credit fraud, prudential and operational risk and AML/CFT measures as complementary measures, as part of their broader risk management strategies.

466. AUSTRAC's focus on conducting education visits—with virtually no compliance inspections—appears to reflect its limited role as an AML/CFT regulator. The Australian government needs to develop an on-going and comprehensive system of on-site AML/CFT compliance inspections across the full range of financial institutions.

467. Currently, the only AML/CFT sanctions are criminal sanctions and a civil injunction power. The lack of intermediate sanctions, such as administrative sanctions, means in practice that formal sanctions are generally not applied. However, Australia notes that agreed remedial action with the cash dealer, while not a formal sanction, successfully encourages improvements. There is a need to introduce an administrative penalty regime under which administrative penalties can be imposed on regulated entities and persons who are materially non-compliant in respect of their obligations under the FTR Act. This will provide a more graduated set of powers.

468. For legal clarity and certainty it should also be provided that a failure or wilful disregard of FTR obligations would constitute a ground for declaring a director, manager or employee of a cash dealer to be in breach of fit and proper norms, with the resultant consequences. Inspections powers in the FTR Act should also be amended to expressly include such generally accepted standard inspection powers such as checking policies and procedures, sample testing, or the investigation of any other issue required by the FTR Act.

469. There should also be a provision clarifying that offences by a cash dealer in specific contravention of Australia's AML/CFT legislation can result in the cancellation of a licence or revocation of authorisation held by that person or body corporate cash dealer.

470. For AUSTRAC to be an effective AML/CFT regulator under the current FATF standards, substantial dedicated financial resources must be directed toward the Reporting and Compliance section to substantially increase staff numbers, to train existing staff and to embark on a targeted compliance drive amongst cash dealers through actual audit inspections in increased numbers. Supervisory skills and training pertaining to the conduct of on-site inspections and enforcement-related activities should be enhanced. The need to increase AML/CFT supervisory and compliance resources is made more pressing by the proposed draft amendment Bill that would introduce more reporting entities under the FTR Act compliance regime.

471. AUSTRAC has spent considerable effort to locate alternative remittance dealers and bring them into the reporting regime as required by the FTR Act. Nevertheless, there is not a general requirement to register or license all alternative or formal remittance dealers, or bureaux de change. Australia needs to extend licensing or registration requirements to the remaining financial institutions not covered by current arrangements.

472. The presently issued guidance is heavily focused on suspicious transaction and other reporting, but limited in regard to general detailed CDD guidance, with particular reference to the identification and verification of clients, internal controls and record keeping. AUSTRAC should issue further guidance on the other AML/CFT preventative measures once new legislation has been introduced to remedy these concerns.

### 3.10.3. Compliance with Recommendations 23, 30, 29, 17, 32, and 25

	Rating	Summary of factors relevant to s.3.10 underlying overall rating
<b>R.17</b>	<b>PC</b>	<ul style="list-style-type: none"> <li>• Sanctions for AUSTRAC are criminal sanctions and an injunction power under section 32 of the FTR, although the latter has been used in limited circumstances. The lack of intermediate sanctions, such as administrative sanctions, means in practice that formal sanctions are generally not applied. However, Australia notes that agreed remedial action with the cash dealer, while not a formal sanction, successfully encourages improvements.</li> <li>• APRA and ASIC have powers to apply sanctions, including revoking an entity's licence, in circumstances where there is a breach of the relevant legislation. Powers extend to directors and senior managers; ASIC can also ban and disqualify persons, including banning from acting as a director or from managing a corporation; however, it was unclear how these could be applied in practice, as there are no express powers to remove management or revoke a license in breach of AML/CFT requirements. No sanctions have yet been applied by APRA or ASIC for AML/CFT failings.</li> <li>• AUSTRAC does not have corresponding powers to revoke the licence of cash dealers or to disqualify persons from being a manager, director, or employee due to serious non-compliance with FTR Act.</li> </ul>
<b>R.23</b>	<b>PC</b>	<ul style="list-style-type: none"> <li>• The evaluation team did not find the implementation of the AML/CFT supervisory system to be effective in terms of the standards required by the revised 40 Recommendations. The supervisory system would also be enhanced if co-ordination between all the relevant authorities were to be improved. AUSTRAC is currently limited in the information it can share with the APRA.</li> <li>• AUSTRAC's on-site supervision activities do not cover the full range of compliance tools available to it under the FTR Act. The statistics confirm that the focus of AUSTRAC's on-going supervision is currently limited to educational visits.</li> <li>• It is of concern that the number of the formal compliance inspection audits has been very low across the range of supervised entities: the only compliance inspection audit conducted in 2004 was for a remittance dealer. AUSTRAC has conducted only two compliance inspection audits of banks in the last four years; banks and money remittance dealers are the only financial institutions to receive any compliance inspection audits in the last two years, and the securities/investment and insurance sectors have had only one visit in five years.</li> <li>• More generally, it appears to be a policy decision to conduct education visits rather than compliance inspection audits. The main focus of identifying these entities and bringing them into the reporting regime appears to reflect AUSTRAC's limited role as an AML/CFT regulator. However, education visits can result in agreed remedial action by the cash dealer.</li> <li>• There is not a general requirement that all remittance dealers (whether formal or informal), and bureaux de change, lease financing companies, finance companies and issuers of travellers cheques, be licensed or registered.</li> </ul>
<b>R.25</b>	<b>PC</b>	<ul style="list-style-type: none"> <li>• In terms of reporting guidelines and basic STR guidelines, measures are adequate. However, issues not expressly covered in the FTR Act are not covered in other guidelines-i.e, internal controls, CDD. Most of the presently issued guidance is heavily focussed on suspect transaction reporting, but inadequate in regard to general detailed CDD guidance, with particular reference to the identification and verification of clients, internal</li> </ul>

		controls and record keeping.
<b>R.29</b>	<b>PC</b>	<ul style="list-style-type: none"> <li>• Due to the absence of the requirements for AML/CFT programs and internal rules, the generally accepted standard inspection powers and procedures, such as checking the institutions policies and procedures are not required by the FTR Act.</li> <li>• AUSTRAC has powers to conduct compliance inspections to assess AML compliance with the reporting and identification obligations of the FTR Act. However, formal compliance inspections are rarely conducted. Australia notes, however, that educational visits include inspections of records to ascertain whether an entity is a cash dealer, and if so, whether they have reporting obligations and whether they are complying with them.</li> <li>• APRA and ASIC have extensive monitoring, investigation and enforcement powers that are supported by a wide range of civil, criminal and administrative sanctions; however they are not specifically aimed at AML/CFT.</li> <li>• AUSTRAC's powers of enforcement and AML/CFT sanctions exist but are limited to criminal sanctions and hence rarely applied; there is a need to institute a regime of administrative penalties.</li> </ul>
<b>R.30</b>	<b>LC</b>	<ul style="list-style-type: none"> <li>• Notwithstanding the existence of technological aids and AUSTRAC systems, the number of supervisory and compliance staff appears limited given the varied extent and numbers of the existing reporting entities under the FTR Act.</li> <li>• Additional resources are required by AUSTRAC to enable it to effectively fulfil its role as AML/CFT regulator under the revised FATF standards. As Australia considers expanding the scope and detail of AML/CFT requirements, the need for sufficient resources will be critical.</li> <li>• There remains a need for an enhancement of supervisory skills and training pertaining to the conduct of on-site inspections and enforcement related activities.</li> </ul>
<b>R.32</b>	<b>LC</b>	<ul style="list-style-type: none"> <li>• AUSTRAC maintains adequate statistics on on-site compliance inspections conducted for AML/CFT.</li> </ul>

### 3.11 Money or value transfer services (SR.VI)

#### 3.11.1 Description and Analysis (summary)

##### Competent authorities to register/license and maintain list of MVT service operators

473. Some MVT service operators are licensed under the Australian Financial Services License (AFSL) requirements under of the *Corporations Act 2001*; however, this does not cover all remittance businesses and there is currently no general obligation that such entities be licensed or registered. Australia has indicated it is considering a more workable and simpler licensing / registration system designed to prevent alternative remittance dealers from going underground. MVT service operators are subject to the AML/CFT requirements in the FTR Act, and AUSTRAC has made progress in identifying and bringing alternative remittance dealers into the compliance regime. AUSTRAC undertook 85 educational visits to various money remittance dealers during 2004 essentially to advise them of their reporting obligations under the FTR Act. AUSTRAC maintains a current list of the names and addresses of MVT service operators of the operators it has identified.

##### MVT service operators subject to AML/CFT requirements

474. Both alternative remittance dealers and formal money value transfer (MVT) service operators, such as Western Union, in Australia are reporting entities covered by the cash dealer definition and subject to the full range of reporting and record keeping obligations under the FTR Act. They are also thus subject to the same limitations of scope of the FTR Act. Accordingly, they are obliged to report suspicious transactions and all international funds transfers, as well as any large cash transactions above AUD 10,000. In these cases, the MVT service operator would need to identify the direct customer so as to file the corresponding report. MVT operators that hold customer accounts would also be obliged to identify their account customers as defined by the FTR Act. While the IFTI report sends comprehensive information to AUSTRAC, there is no requirement for adequate identifying information to be sent with the transfer itself as per SR VII. Nor are there requirements regarding occasional transactions (other than cash) above USD/EUR 15,000. MVT service operators are not required to maintain a current list of its agents which must be made available to AUSTRAC or another competent authority.

#### Systems to ensure compliance

475. AUSTRAC conducts ongoing priority work with alternative remittance services. AUSTRAC monitors compliance of alternative remittance dealers with the FTR Act through the monitoring of international funds transfer flows detected through compliance reporting of the remittance dealers as well as that of third party reporting entities (i.e., banks) who are routinely utilised by remittance dealers to both send and receive funds and settlements. In practice, when known alternative remittance dealers in Australia wish to transfer of funds overseas, they batch the outgoing transactions and largely utilise the regulated banks (ADIs) to affect such transfers, and then settle transactions with actual dispersals of currency to the foreign recipients in another jurisdiction.

476. AUSTRAC has focused on identifying remittance dealers, ensuring that they are aware their reporting requirements, and importantly to assist them to commence reporting as “reporting entities” under the FTR Act. The approach has included working closely with the dealers to assist them to effectively report to AUSTRAC electronically. AUSTRAC’s Compliance and Reporting section has identified the major alternative remittance services operating in Australia as well as their networks of agents and business intermediaries.

477. This has also formed the basis of an extensive program of education visits focused on the alternative remittance sector in 2004 and has often proven useful in supporting the investigations of national security and State and Federal law enforcement agencies. Remittance dealers often operate within communities who do not speak English as their first language and to reach them AUSTRAC has conducted a multilingual advertising campaign. When inspection visits are arranged, translations of AUSTRAC’s Information Circulars are provided in the various languages of the dealers. The campaign has been successful, with numerous entities identified, visited and now reporting.

478. While these education visits have been helpful for identifying and bringing MVT service operators into the reporting regime, AUSTRAC has not used its on-site inspection powers to ensure compliance in 2004, although it did so in previous years.

#### Sanctions

479. As cash dealers under the definition in the FTR Act, MVT service operators are subject to the same sanctions as other financial institutions. The penalty regime in the FTR Act provides for some criminal sanctions or civil injunction power under section 32 (Part V) of the FTR Act; however neither of these powers is generally used. Australia should consider adding a system of administrative sanctions which could be applied in cases of non-compliance.

#### *Additional elements*

Whether the measures set out in the Best Practices Paper for SR.VI have been implemented.

480. Australia has considered the SR VI Best Practices paper and development of an appropriate policy for effective licensing and operational regulation of informal MVT services that reflects their small business scale and lack of sophistication. The Best Practices paper encourages countries to make formal remittances and transfers through their regulated financial sector more competitively attractive than informal or alternative remittance channels. This is already the case in Australia. In Australia, continuing use of informal MVT services is centred in communities who wish to send money back to relatives in countries with high cost or poorly developed financial services infrastructure. In practice when known alternative remittance dealers in Australia wish to transfer of funds overseas, they batch the outgoing transactions and largely utilise the regulated banks (ADIs) to affect such transfers, and then settle transactions with actual dispersals of currency to the foreign recipients in another jurisdiction.

481. AUSTRAC does not supervise the flow of alternative remittance and MVT transactions within the borders of Australia under the FTR Act. While MVT service operators are cash dealers under the act, AUSTRAC's monitoring would only apply in cases where they have filed an IFTI, SUSTR, or significant cash transaction.

### 3.11.2 Recommendations and Comments

482. Australia should require all MVT service operators to be licensed or registered. However, AUSTRAC does maintain a comprehensive list of such service providers that AUSTRAC has identified and their details. Although MVT service operators are subject to FTR Act obligations, these obligations are currently do not cover the full scope of the current FATF recommendations. Australia should therefore revise the FTR Act accordingly and subject MVT service operators to comprehensive AML/CFT requirements (the full scope of Recommendations 4-11, 13-15, 21-23, and SR VII). Australia should also require MVT service operators to maintain a current list of their agents and make these available to AUSTRAC.

483. While AUSTRAC has invested considerable to effort to locate and educate MVT operators so as to bring them into the reporting regime, AUSTRAC or another competent authority needs to go beyond education visits and fully supervise these entities, including full on-site inspections.

### 3.11.3 Compliance with Special Recommendation VI

	Rating	Summary of factors underlying rating
SR.VI	PC	<ul style="list-style-type: none"> <li>• There is not a general requirement that all r MVT service operators be licensed or registered; it has identified. Australia is considering a more workable and simpler licensing / registration system is being designed to prevent these dealers from going underground. AUSTRAC maintains a list and details of those operators that it has identified.</li> <li>• MVT services operators are “cash dealers” under the FTR Act and therefore subject to its reporting provisions for suspicious transactions, international transactions, and large cash transactions, where identification would take place. They are also thus subject to the same limitations of the scope of the FTR Act.</li> <li>• While education visits to remittance dealers have been helpful for identifying and bringing MVT service operators into the reporting regime, AUSTRAC has not adequately used its on-site inspection powers to ensure compliance.</li> <li>• MVT service operators are not required to maintain a current list of its agents which must be made available to AUSTRAC or another competent authority.</li> </ul>

## **4. PREVENTIVE MEASURES – DESIGNATED NON-FINANCIAL BUSINESSES AND PROFESSIONS**

### **4.1 Customer due diligence and record-keeping (R.12)**

*(applying R.5, 6, 8-11, and 17)*

#### **4.1.1 Description and Analysis**

Applying Recommendations 5, 6, and 8-9

484. All Designated Non-Financial Businesses and Professions (DNFBPs) are currently operative in Australia which include casinos, real estate firms and agents, gold bullion sellers and other dealers in other precious metals & stones, solicitors and barristers, accountants, and trust & company service providers.

485. In terms of Section 18 of FTR Act, the requirement of identifying and verifying the identity of the customer is limited to “Cash Dealers”. Similarly, in terms of Section 23 of FTR Act, the record retention requirement in respect of identification & verification is also intended for ‘Cash Dealer’. Accordingly, apart from casinos and bullion sellers, other DNFBPs do not come under the definition of ‘Cash Dealer’ and are not required to identify or verify the identity of their customers, nor retain the identification & verification documents or comply with other FATF requirements. Under FTR Regulation 2A, the identification and verification procedures that apply to account signatories also apply to the parties of bullion transactions that are significant cash transactions—i.e., cash transactions of at least AUD 10,000 (approximately USD 7,500). Casinos are also “cash dealers” and therefore subject to the FTR Act’s customer identification requirements, although these requirements generally pertain to the opening of an account or conducting significant cash transaction. This would not cover identification for customers conducting all financial transactions above USD/EUR 3,000 as defined in Recommendation 12. Generally, the provisions for casinos and bullion sellers lack effectiveness due to inherent problems in the process of identification & verification as discussed in Section 3 of the report. Solicitors have limited customer identification obligations under section 15A of the FTR Act, whereby they are required to identify the person conducting ‘Significant Cash Transactions’ (those with a threshold of AUD 10,000 in cash). While trustees and managers of unit trusts, as financial institutions, are covered as reporting entities under section 3(g) of the FTR Act, Trust & Company Service Providers (TCSPs) generally do not fall within this definition. The *Corporations Act 2001* imposes ‘know your client’ obligation on AFSL holders (*Corporations Act* section 945A(1)), however, this obligation is not directed towards customer due diligence from an AML/CFT perspective.

486. With regard to the other parameters of CDD viz., identification of beneficial ownership, seeking the purpose & intended nature of business relationship, carrying out ongoing CDD, and risk based CDD mechanism for higher-risk customers especially PEPs, requisite measures have not been put in place in line with FATF’s recommendation 5 & 6. There are no measures implementing Recommendations 8 and 9 requiring any DNFBPs to have adequate measures in place to deal with new technologies, non-face to face customers, or adequate measures for third parties and introducers.

487. Internet Casinos are prohibited in Australia except for one in Alice Springs which is licensed and regulated by the Northern Territory Government. The Northern Territory’s Racing and Gaming Authority directly monitors this Internet Casino. The Authority has investigated every component of the Internet Casino including security, software installation, internal controls and financial systems. No aspects of the operating system can be altered without the approval of this Authority. The *Interactive Gambling Act 2001* (IGA) targets the providers of interactive gambling services, not their potential or actual customers. The IGA makes it an offence to provide an interactive gambling service to a customer physically present in Australia. Interactive gambling services include those that are often described as ‘online casinos’ and usually involve using the Internet to play games like roulette, poker, online ‘pokies’ and blackjack. The IGA also makes it an offence to provide such services to people in a ‘designated country’. No foreign countries have been designated under this provision to date. If interactive gambling service providers can

show they have exercised reasonable diligence in ensuring that Australian customers are prevented from using their service, they will have a defence against the offence provision.

#### Applying Recommendation 10

488. Under section 23 of the FTR Act, Cash Dealers are required to retain customer identification documents for seven years following collection. Part VIA of the FTR Act imposes document retention provisions on financial institutions (as defined in section 3 ) with respect to customer generated financial transaction documents. While the provisions in Part VIA are restricted to the context “financial institutions”—a category narrower than cash dealer—casinos are included in the definition of financial institution in the FTR Act. Nevertheless, the record-keeping requirements are generally limited to the context of “accounts” and therefore would not generally include most financial transactions exceeding USD/EUR 3,000 in a casino such as purchases of chips, wire transfers or currency exchanges. Section 24D of the FTR Act also obliges bullion dealers to retain documents containing the identifying information obtained on customers conducting transactions of at least AUD 10,000. The FTR Act does not contain record-keeping requirements for other DNFBPs.

489. Requirements related to record-keeping are also imposed through Australian regulation other than the FTR Act, includes company legislation, financial services licensing regime, and taxation legislation. Under sections 286 and 988A of the *Corporations Act 2001*, all companies, registered schemes, financial service licensees and other disclosing entities (regardless of whether or not they are financial institutions) must keep for seven years written financial records that correctly record and explain the entity’s transactions and financial position and performance and which enable true and fair financial statements to be prepared and audited. Similarly, all (tax-affected) businesses must abide by the ATO’s requirements of retaining for five years the records required to substantiate and audit the business’ tax submissions, such as invoices showing certain details including the seller’s name and ABN and details of the items supplied and, for amounts more than \$1,000, the purchaser’s name and ABN or address. Where DNFBPs such as accountants and lawyers (who also make up the bulk of company and trust service providers in Australia) engage in the provision of financial services, as defined under the *Corporations Act*, they are subject to ASIC’s financial services licensing regime.

#### Applying Recommendation 11

490. As Casinos and Bullion Sellers are defined as “cash dealers,” they are obligated to report suspicious transactions. However, as described in Section 3.6 of this report, there are no specific obligations for cash dealers to monitor all complex, unusual large transactions, transactions with no visible economic purposes, to further examine these situations and to set out these findings in writing. The FTR Act does not create any specific obligations on the part of DNFBPs to pay special attention to complex and unusual transactions, which have no apparent economic or visible lawful purpose.

#### Applying Recommendation 17

491. As. In the cases where casinos and bullion dealers have FTR Act obligations for CDD and record keeping, FTR Act sanctions would apply in cases of non-compliance. However, as with other cash dealers, the sanction regime is limited in there are only criminal sanctions available, and therefore they are not generally applied. More generally, DNFBPs are not adequately covered for CDD, record-keeping, and transaction monitoring purposes, there are no corresponding sanctions available for non-compliance with these necessary AML/CFT requirements.

### **4.1.2 Recommendations and Comments**

492. DNFBPs may become instrumental in supporting money laundering or terrorist financing activities due to lack of CDD and record-keeping requirements. Australia should bring in legislative changes to ensure that all DNFBPs have adequate CDD and record-keeping, and transaction monitoring obligations in the situations required by Recommendation 12. Appropriate sanctions should be adopted for non-compliance, including a regime of administrative sanctions.

### 4.1.3 Compliance with Recommendation 12

	Rating	Summary of factors relevant to s.4.1 underlying overall rating
<b>R.12</b>	<b>NC</b>	<ul style="list-style-type: none"> <li>Under the present legal regime, most DNFBPs operating in Australia do not have mandatory CDD, record keeping and other obligations as required under the FATF Recommendations 5, 6, 8, 9, and 10.</li> <li>There are no specific requirements for most of the DNFBPs to pay special attention to the complex &amp; unusual transactions (applying R.11).</li> </ul>

## 4.2 Suspicious transaction reporting (R.16) (applying R.13 to 15, 17 & 21)

### 4.2.1 Description and Analysis

#### Applying Recommendations 13, 14 & 17

493. As set out in paragraph 380, section 16 of the FTR Act requires “Cash Dealers” to report suspicious transaction to AUSTRAC. Only Casinos and Bullion Sellers are cash dealers and thus required to report suspicious transaction to AUSTRAC. DNFBPs that are not covered under the definition of Cash Dealer, for not reporting the suspicious transactions. However, those DNFBPs that come under the definition of Cash Dealer may be criminally liable under sections 16(5A), (5AA), (5B) and 28(1)(a), if they fail to report a suspicious transaction or found to be involved in tipping off their customers. Section 17 of the FTR Act protects the Cash Dealer for reporting suspicious transaction to AUSTRAC.

494. During the last four years, the suspicious transactions reported by various types of DNFBPs and other Businesses & Professions are as follows:

#### **SUSTRs received for the calendar years from 1 January 2001 to 31 December 2004**

Type of DNFBP and Other Businesses & Professions	Jan - Dec 2001	Jan - Dec 2002	Jan - Dec 2003	Jan - Dec 2004
Bookmaker (BO)	-	2	1	-
Bullion Dealer (BU)	27	-	2	2
Casino (CA)	838	1,149	1,294	1733
Motor Vehicle Dealer (MV)	15	26	25	9
Sports Bookmakers (SB)	-	-	1	5
Tab (TA)	92	58	61	116
Travel Agents (TR)	2	2	-	-

495. As evident from the reported SUSTRs in respect of DNFBPs and other Businesses & Professions, most of SUSTRs are being reported from Casinos while the number of SUSTRs from other DNFBPs are almost negligible owing to the fact that they are not legally required to make such reports. It is also noteworthy that Totalisator agency boards (TABs) and motor vehicle dealers have been reporting suspicious transactions; statistics for casinos and TABs show their increasing attention to identifying and reporting suspicious transactions.

#### Applying Recommendation 15

496. At present, there is no specific requirement for DNFBPs to develop internal policies, procedures and controls, including compliance management arrangements in respect of AML/CFT. Commercial practice for DNFBPs like Casinos and Accountants has led to some sort of monitoring mechanism as part



of business' broader risk management framework, however, specific policies, procedures and controls in respect of AML/CFT need to be put in place to combat money laundering and terrorist financing.

497. There are no general requirements in the FTR Act for cash dealers to include AML compliance programs and internal controls. However, AUSTRAC generally encourages Cash Dealers to include AML compliance and internal risk management processes and controls within their internal audit programs.

498. ASIC also has a role in ensuring that institutions and businesses providing financial services as defined under the *Corporations Act* have, among other things, appropriate operational procedures, audit practices, and screening procedures for hiring of employees. Depending on the particular factual circumstances, this may apply to DNFBPs such as lawyers, accountants and trust companies that manage client money, securities or other assets (e.g. by dealing in such property) or manage bank, savings or securities accounts, where they are required to obtain an AFSL. In addition, where a DNFBP is structured as a corporation, it will be subject to ASIC's corporate regulation regime (regardless of the services it provides). These measures are not, however, specifically directed towards controlling money laundering and terrorist financing.

#### Applying Recommendation 21

499. Under Section 38(1)(e), AUSTRAC has the authority to advise about other countries that are higher risk, but AUSTRAC has made very limited use of this provision. AUSTRAC has issued Information Circular 39 which alerts the Cash Dealers to apply special attention to business relationships and transactions with persons, including companies and financial institutions, from countries identified on the NCCT list. However, such types of Information Circulars are not legally enforceable. Where transactions from higher risk countries have no apparent economic or visible lawful purpose, it is not required for DNFBPs to examine the purposes and background of such transactions as far as possible or make their written findings available to assist competent authorities. Where a country continues not to apply or insufficiently applies the FATF Recommendations, there are no provisions that would DNFBPs to apply appropriate counter-measures.

500. AUSTRAC monitors wire transfers to and from NCCT jurisdictions. AUSTRAC monitors and maintains statistics on monies transferred between Australia and each of the NCCT listed jurisdictions, via the International Funds Transfer Instructions (IFTIs) received from Cash Dealers and international currency transfer reports (ICTRs). AUSTRAC also monitors the numbers of Suspicious Transaction Reports (SUSTRs) received from Cash Dealers involving each of the NCCT listed jurisdictions.

501. Owing to the absence of specific AML/CFT compliance management arrangements in certain DNFBPs, ongoing employee training programs, internal controls and audit functions within DNFBPs are not being designed to combat money laundering and terrorist financing. AUSTRAC also does not have the authority to provide guidance to most DNFBPs, thereby further exposing these entities to risk of money laundering and terrorist financing.

#### **4.2.2 Recommendations and Comments**

502. The scope of FTR Act needs to be enhanced so as to bring all types of DNFBPs under the STR regime. A regime of administrative sanctions should also be considered for DNFBPs for non-compliance with reporting obligations.

503. Australia should compel DNFBPs to pay special attention to transaction involving certain countries, make their findings available in writing, and apply appropriate counter-measures. Information Circulars issued for DNFBPs in this area would need to be transformed into legally enforceable circulars.

504. All DNFBPs should be required to establish and maintain internal procedures, policies and controls to prevent ML and FT, and to communicate these to their employees. These procedures, policies and controls should cover, inter alia, CDD, record retention, the detection of unusual and suspicious

transactions and the reporting obligation. DNFBPs should be required to maintain an independent audit function to test compliance with the AML/CFT procedures, policies and controls. DNFBPs should be required to establish ongoing employee training to ensure that employees are kept informed of new developments, including information on current ML and FT techniques, methods and trends; and that there is a clear explanation of all aspects of AML/CFT laws and obligations, and in particular, requirements concerning CDD and suspicious transaction reporting.

#### 4.2.3 Compliance with Recommendation 16

	Rating	Summary of factors relevant to s.4.3 underlying overall rating
<b>R.16</b>	<b>NC</b>	<ul style="list-style-type: none"> <li>• Most DNFBPs are not legally required to report suspicious transactions to AUSTRAC.</li> <li>• DNFBPs are not required to develop internal policies, procedures, internal controls, ongoing employee training and compliance in respect of AML/CFT.</li> <li>• There are sanctions in relation to non-reporting of STRs, to the extent that Casinos and bullion dealers are required to report STRs. However, the FTR Act contains criminal sanctions only, and the lack of administrative sanctions shows that in practice sanctions are rarely applied.</li> <li>• There are not adequate, enforceable measures for DNFBPs to pay special attention to transaction involving certain countries, make their findings available in writing, or apply appropriate counter-measures.</li> </ul>

### 4.3 Regulation, Supervision, and monitoring (R.17, 24-25)

#### 4.3.1 Description and Analysis

505. In the AML/CFT framework, AUSTRAC has the regulatory and supervisory responsibilities for the Cash Dealers. AUSTRAC's regulatory role includes an ongoing monitoring program to ensure Cash Dealer compliance with the requirements of the FTR Act. (See Section 3.10 of this report). However, these programs do not apply to most DNFBPs. AUSTRAC's on-site inspection powers are covered by section 27C, 27D, 27E which allow AUSTRAC to assess and inspect the business premises of a Cash Dealer, solicitor, solicitor corporation or partnership of solicitors including inspection of records and reports, provided that prior written notice is given to them. As part of its regulatory program, AUSTRAC also conducts educational visits concerning AML compliance with reporting and identification obligations under the FTR Act. However, the number of such visits to DNFBPs were very minimal during the last five years—only seven DNFBPs were covered (six Casinos in 2004 and one Bullion Dealer in 2004). In addition, 59 compliance audits were conducted in last five years (58 Solicitors in 2002 and 1 Bullion Dealer in 2002). There is no regular program of inspections of the DNFBPs that are currently covered by the FTR Act.

506. Casinos, bullion sellers and to some extent solicitors are covered by the FTR Act and are monitored by AUSTRAC to a limited extent for the purposes of AML/CFT compliance. However, most of the DNFBPs are not covered under the FTR Act. Consequently, most of the DNFBPs lack effective regulatory and supervisory systems for monitoring to ensure compliance with AML/CFT requirements. It is desirable to consider what other oversight mechanisms exist.

507. **Casino Operators, Gambling Houses and other Gaming Service Providers** are licensed through State or Territory legislation and are supervised by the relevant State or Territory casino control authorities or gaming departments. These pieces of legislation also provide criteria for determining the suitability of the applicant casino licensees in terms of various sections to prevent criminals or their

associates from holding significant interests in Casinos. Various State and Territory legislation providing for the licensing of casinos include:

State/territory and legislation	Licensing requirements	Suitability requirements for applicants
<i>Casino Control Act 1992 (NSW)</i>	section 18	section 11
<i>Casino Control Act 1991 (Vic)</i>	section 13	sections 10,11
<i>Casino Control Act 1982 (Qld)</i>	section 18	section 20
<i>Casino Act 1997 (SA)</i>	section 5	section 21
<i>Casino Control Act 1984 (WA)</i>	section 21	sections 19A, 19B
<i>Gaming Control Act 1993 (Tas)</i>	section 13	section 23
<i>Casino Control Act 1988 (ACT)</i>	section 45	section 3A, 3B
<i>Gaming Control Act (NT)</i>	section 18	section 17

508. **Real estate agents** are subject to State and Territory legislation that regulate the industry, for example the Property, Stock and Business Agents Act 2002 (NSW) and the Estate Agents Act 1980 (VIC). However, there is no monitoring or oversight for AML/CFT purposes. The Real Estate Institute of Australia (REIA) is the national professional association for the real estate industry in Australia. REIA provides advice to the Federal Government, Opposition, media, and the public on a range of issues affecting the property market. The REIA has eight members, comprised of *the State and Territory Institutes Real Estate Institutes* (REIs), and through them approximately 6,500 real estate firms and licensed agents (about 70 per cent of the industry nationally) are collectively represented. Neither REIA nor the State and Territory REIs are self-regulatory organisations.

509. **Dealers in precious metals and stones** are not subject to any AML/CFT monitoring or oversight, except for bullion sellers, which are subject to the FTR Act provisions and AUSTRAC's compliance.

510. **Accountants and Auditors.** Australia's three main accounting organisations, the Institute of Chartered Accountants in Australia (ICAA), Certified Practising Accountants Australia (CPAA), and the National Institute of Accountants (NIA), have prescribed mandatory ethical and professional standards for their members in their capacity of self-regulatory organizations. All members of CPAA Australia are required to comply with a Code of Professional Conduct and undertake continuing professional development. CPAA has internal disciplinary procedures to handle complaints about members. All members of the ICAA are required to comply with a Code of Professional Conduct and complete continuing professional education. The ICAA has internal disciplinary procedures to handle complaints about members. However, these bodies do not have any specific AML role. In addition, Accounting standards are set by the Australian Accounting Standards Board whose work is overseen by the Financial Reporting Council, appointed by the Treasurer. Accountants are also directly subject to ASIC's financial services licencing, conduct and disclosure regime when they are required by Chapter 7 of the *Corporations Act 2001* to hold an Australian financial services licence.

511. **Legal professionals, solicitors, and barristers** are regulated at the State and Territory level. For example, admission of a solicitor/barrister and the issuance of a practicing certificate is a State/territory issue. However, Commonwealth, State and Territory Attorneys-General recently endorsed comprehensive model provisions (the National Legal Profession Model Bill) to harmonise the regulation of the legal profession across Australia. The Bill provides for nationally consistent regulation of the admission, practice and discipline of lawyers. To be admitted to the Australian legal profession, the Supreme Court or the certifying body must be satisfied that the person is (i) eligible for admission to the legal profession and (ii) a fit and proper person to be admitted to the legal profession. After admission, a person may apply to the appropriate State or Territory authority for a practising certificate, which constitutes the lawyer's licence to practice. The authority will consider whether the person is a fit and proper person to hold a practising certificate.

512. The powers to sanction for breach of AML/CFT measures are provided in FTR Act which entails criminal sanctions or an injunction power under Part V of FTR Act. (See Section 3.10 above). However, the Act does not extend to most DNFBPs. Secondly, there are no administrative sanctions for breach of AML/CFT requirements. The lack of administrative sanctions coupled with an absence of criminal prosecutions of DNFBPs suggests that sanctions are generally not applied for breaches of AML/CFT requirements.

513. AUSTRAC is required under section 38(1) (e) of the FTR Act to issue guidelines and advice to assist Cash Dealers in meeting their obligations under the FTR Act. This includes AUSTRAC Industry Guidelines and Information Circulars (available via AUSTRAC's website). However, most DNFBPs are not covered under the act and DNFBPs are therefore not kept informed of the new developments, including information on current money laundering and terrorist financing techniques, methods and trends. AUSTRAC has issued a specific guidelines for several DNFBPs: significant cash transaction reporting by TABs, totalisators and bookmakers, and sports betting agencies (Guideline 2A and 2D); suspicious transaction reporting by casinos (Guideline 5), significant cash transaction reporting by solicitors (Guideline 6), and FTR Act obligations for bullion sellers (Guideline 7).

514. The Accounting industry also issued AML guidelines in February 1995; however the various accounting associations are not considered as SROs. Rather, they operate as trade associations and cannot take action against members for breach of laws.

#### **4.3.2 Recommendations and Comments**

515. Australia should introduce administrative sanctions for breaches of AML/CFT requirements by all DNFBPs, once they are made subject to the FTR Act or other AML/CFT requirements. The scope and coverage of reporting entities should be enhanced to include DNFBPs enabling AUSTRAC or SROs to regulate and supervise such entities from AML/CFT perspective. Competent authorities such as AUSTRAC or SROs should also establish guidelines that would cover the full range of DNFBPs and assist them to implement and comply with their respective AML/CFT requirements.

#### **4.5.3 Compliance with Recommendations 24 & 25 (criteria 25.1, DNFBP)**

	<b>Rating</b>	<b>Summary of factors relevant to s.4.5 underlying overall rating</b>
<b>R.24</b>	<b>PC</b>	<ul style="list-style-type: none"> <li>Casinos are largely compliant except for concerns regarding the scope of AML/CFT requirements and the effectiveness of the supervisory regime.</li> <li>Casinos, bullion sellers and to some extent solicitors are covered by the FTR Act and are monitored by AUSTRAC to a limited extent for the purposes of AML/CFT compliance. However, most of the DNFBPs are not covered under the FTR Act. Consequently, most of the DNFBPs lack effective regulatory and supervisory systems for monitoring to ensure compliance with AML/CFT requirements.</li> <li>Criminal sanctions that exist in the FTR Act do not extend to most DNFBPs. Secondly, there are no administrative sanctions for breach of AML/CFT requirements. The lack of administrative sanctions coupled with an absence of criminal prosecutions of DNFBPs suggests that sanctions are generally not applied for breaches of AML/CFT requirements.</li> </ul>
<b>R.25</b>	<b>PC</b>	(25.1: DNFBP: ) AUSTRAC's Guidelines do not cover most DNFBPs.

### **4.4 Other non-financial businesses and professions - Modern secure transaction techniques (R.20)**

#### **4.4.1 Description and Analysis**

516. Australia has extended AML coverage to other businesses and professions, which have been identified as areas of greater money laundering vulnerability. Most notably, the FTR Act applies to bookmakers and Totalisator Betting Service Providers (as part of the broader gambling industry). Similarly, Motor Vehicle Dealers and Travel Agents have also been brought under the reporting regime.

517. Australia has a diverse, modern payments system that is evolving in broadly the same direction as systems in comparable countries. The ratio of currency to GDP in Australia is near the average for industrialised countries, which implies that the number and value of cash payments is also around average for a country of its size. It is believed that the average value of cash transactions is much lower than that for other forms of payment. Australia is moving relatively quickly to replace cheques with more modern and secure retail payment instruments, and automated direct credit and debit transfers and electronic bill payment systems are growing rapidly. The use of debit and credit card payments in Australia is near the average of industrialised countries. Australia's wholesale payments systems comply with international standards.

518. A number of initiatives are being progressed by industry and regulators to ensure the continued security of mechanisms for conducting financial transactions, such as through the Australian Bankers' Associations' Fraud and Online Authentication Taskforces. In addition, there are well-established industry protocols in relation to modern payments mechanisms, such as the Electronic Funds Transfer code of conduct which was developed by ASIC in consultation with industry.

#### **4.4.2 Recommendations and Comments**

519. Australia has adequately considered extending AML/CFT to other businesses and professions. Australia has encouraged the development and use of modern and secure techniques for conducting financial transactions that are less vulnerable to money laundering.

#### **4.4.3 Compliance with Recommendation 20**

	<b>Rating</b>	<b>Summary of factors underlying rating</b>
<b>R.20</b>	<b>C</b>	

## **5. LEGAL PERSONS AND ARRANGEMENTS AND NON-PROFIT ORGANISATIONS**

### **5.1 Legal Persons – Access to beneficial ownership and control information (R.33)**

#### **5.1.1 Description and Analysis**

520. The main types of legal persons exist in Australia are proprietary companies, public non-listed companies, public listed companies, incorporated limited partnerships, and incorporated associations. As of March 2005, there were approximately 1.4 million companies including consisting of approximately 1.2-1.3 million proprietary companies; and 100,000-200,000 public companies including approximately 1,650 publicly listed companies.

521. The rules for all companies are contained in the *Corporations Act 2001* and involve a system of registering with ASIC. ASIC also maintains public registers in respect of all companies (*Corporations Act* section 118). Information to be provided on the application under Section 117 includes:

- company details, including: class and type of company; the registered office details;
- details on principal business office; directors (who must be natural persons but the persons can be nominees) and secretary;
- share structure details (information on the top 20 shareholders);
- members' share details; including whether the shares will be beneficially owned by the member on the registration;
- Whether the company will have an ultimate holding company (if in Australia, the holding company's ABN, ACN, or ARBN; if outside of Australia, the place of incorporation);

522. ASIC is not required by legislation to verify the information it receives; registration is automatic upon presentation of receipt and recording of the required information. Bearer shares are prohibited under section 254F of the *Corporations Act*; however, shares may be issued to nominees including nominee companies.

523. Authorities from ASIC indicated that approximately 80% of companies are registered electronically or by third parties such as company service providers.

524. In addition to the requirement for ASIC to maintain a public register, companies are also under a statutory obligation to maintain certain registers (*Corporations Act* section 168), including a Register of Shareholders and a Register of Share Capital. The Register of Shareholders must include the shareholder's name and address, and the date on which their details were entered into the register (*Corporations Act* section 169). For all non-listed companies (both proprietary and public) the Register of Share Capital must indicate whether a shareholder holds their shares beneficially or not (Section 169(5A)), although there is no further requirement to indicate who holds shares beneficially. In this context, holding shares beneficially means holding the shares in trust.

525. These corporate registers are to be kept at one of: the company's registered office; the company's principal place of business; a place in Australia where work to maintain the registers is undertaken; or an office approved by ASIC (Section 172). The registers must be made available for inspection by anyone (Section 173).

526. ASIC maintains a record of the incorporation of each company on its public register of companies, which is updated and maintained through a number of statutory obligations imposed by the *Corporations Act* (section 1274). For example, all companies are required to respond (section 346C) to an annual

“extract of particulars” prepared by ASIC from information on its databases if any details on that extract of particulars (sent to the Company by ASIC) are incorrect, and must also notify ASIC on an ongoing basis of any changes regarding directors, officers or share issues. In addition, proprietary companies are required to notify ASIC within prescribed timeframes if there are changes to shareholders (such as share cancellation, change to members’ shareholding or change to share structure). Proprietary companies are also required to give notice of changes to their membership register and maintain this information up to date in their own registers on a continuing basis.

527. In addition to the general requirements of other public companies, listed companies have additional requirements. A substantial shareholder of a listed public company and managed investment scheme must also disclose its interest to the company within two business days after acquiring the interest and serve a copy of the notice on the Australian Stock Exchange (ASX). A substantial shareholding occurs when a person is entitled to 5 per cent or more of the relevant class of shares. The concept of ‘entitlement’ extends to associates and others who the person effectively ‘controls’. Upon reaching the 5 per cent limit, there is a continuing obligation to disclose any variations of 1 per cent or more in that entitlement within two business days. If these provisions are contravened, the court has a wide range of orders which it can make upon application of ASIC or the company.

528. Part 6C.2 of the *Corporations Act 2001* gives ASIC and listed companies the power to send out notices (called tracing notices) requiring a registered shareholder (member) of a listed company to provide details about their own relevant interest in the company’s shares and the relevant interest of other persons in those shares. This enables a listed company (and the regulator) to discover the beneficial interest in shares registered in the name of nominees (e.g. bank custodians). There is a requirement that the answers to tracing notices under Part 6C.2 be kept on a publicly available register. This register must be kept open for inspection without charge by any member of the company or scheme (subsection 672DA(7)). Non-members must be able to inspect the register either without charge or for a fee, which if required must not exceed a prescribed amount.

529. ASIC and law enforcement agencies also have powers to obtain information on ownership and control of both proprietary and public companies. ASIC can: inspect, without charge, books that an entity keeps as required by the corporations legislation; require the production of books by serving a notice to produce; through search warrants, search premises and seize evidential material; and require a person who carries on a financial services business, acquires or disposes of a financial product, or operates a financial market or clearing and settlement facility to disclose certain information regarding the acquisition or disposal of financial products. Law enforcement agencies also broad investigative and search powers, including powers to compel production of financial records and take witness statements, as outlined in Section 2 of this report. For example, the AFP uses the entire range of investigation tools of the POCA 2002, and in particular the compulsory examination provisions (s180), to identify ownership and control.

530. Depending on the matter under investigation, law enforcement agencies may also be able to obtain relevant tax information from the ATO. Section 3E of the Taxation Administration Act 1953 provides the Commissioner of Taxation with the discretion to disclose such taxation information to an authorised law enforcement agency officer (which includes the AFP, ACC all State and Territory Police and State Commissions) or to an authorised Royal Commission Officer. However, while this information can be shared for the purposes of investigating any serious offence, it can only be used as evidence for tax offences or production of proceeds of crime orders, thereby limiting its usefulness.

#### Registers and access to information

531. ASCOT is ASIC’s main database that compiles all the details collected during the registration and updating process. AUSTRAC pays a nominal fee to access a subset of this database, known as MASCOT, for the purpose of its investigative and analysis functions. In addition to the tracing mechanism for listed companies, much of the information that ASIC collects on companies is also available to the public, either free or for a limited fee.

532. For example, the National Names Index (NNI) is an index of Australian corporate and registered business names and incorporated associations, maintained by ASIC. In this context ‘corporate’ includes Australian companies (proprietary and public), foreign companies, managed investment schemes, and registrable Australian bodies such as trading co-operatives and incorporated associations.

- the entity’s registration number and type of entity, such as:
- an Australian Business Number (ABN) –required to register on the Australian Business Register with the Australian Taxation Office and receive an ABN for certain taxation purposes;
- an Australian Company Number (ACN) –receives when register with ASIC;
- an Australian Registered Body Number (ARBN) – registrable Australian bodies and foreign companies are required to register with ASIC and receive an ARBN;
- the town or suburb of an entity’s registered office (excluding managed investment schemes and with some exceptions for registered business names and incorporated associations);
- list of documents lodged by an entity since 1 January 1991 (with the exception of registered business names and incorporated associations); and the organisation responsible for administration of the law under which the organisation is created.
- the entity’s principal place of business;
- details on directors and company secretaries; and
- information on the ownership and share structure of the entity, including the names, addresses and number of shares held by the top twenty shareholders.

533. Information is also available through other registers, such as the Australian Business Register and the relevant State or Territory register of registered business names or incorporated associations. Information on companies listed on the Australian Stock Exchange (ASX) is also publicly available through the ASX.

#### Foreign Companies

534. Under section 21 of the *Corporations Act*, a corporation does not carry on business in Australia merely because it, for example, holds meetings, has a bank account, invests funds or holds property. Foreign companies that wish to carry on business in Australia must first register with ASIC. Foreign companies have similar obligations as Australian companies under the *Corporations Act* to notify ASIC of changes to: directors, local agent, office addresses, company name and constitution. Foreign companies must also lodge copies of their financial statements each calendar year (or annual return if applicable), and those with an AFS licence must also comply with AFSL requirements. A foreign company may also keep a branch register of members in Australia (s.601CM-CS) but are not required to provide share/share holder details to ASIC nor lodge notice of any such changes.

#### Other legal persons

535. In addition to companies, in Australia there are also incorporated limited partnerships and incorporated associations, both of which are governed by State and Territory regulations, such as the Partnership Act 1892 (New South Wales). Upon registration, an incorporated limited partnership becomes a separate legal entity from its partner members. They must generally keep a register of members and committee members (including information on name, address, and the date entered into the register). State and Territory authorities generally keep registers that are available to the public.

536. Associations, including societies, unions, clubs, federations, and charities are essentially voluntary in nature. Associations can incorporate under rules of States or Territories and become separate legal entities from their members (and hence members are immune from personal liability at the suit of third parties). Their public officer must lodge an annual statement with the regulator within one month after the annual general meetings; incorporated associations must keep registers of members and committee members (including information on name, address, and the date entered into the register). If incorporated the association wished to operate inter-state, it must register with ASIC, and the recorded information would be available in a similar way as with companies.



537. Co-operatives are also considered to be a separate legal entities. Co-operatives are usually non-profit associations, although co-operatives are run as businesses. There are various types: non-trading co-operatives (non-profit); trading co-operatives (commercial enterprises, often in the agricultural sector). Financial services co-operatives generally engage in deposit taking and lending to individuals, (including building societies, credit unions, co-operative housing societies and friendly societies) are subject to prudential supervision by APRA. Co-operatives are subject to annual reporting requirements. This includes: the financial accounts and those of any subsidiaries; an auditors report or a report from the directors on each of the financial accounts; the name and address of the current secretary, including those of any subsidiaries; and, if applicable, the principle executive officer's name and address; the position of the person sending the report to the regulator; and the number of persons who performed voluntary services for the co-operative during the reporting period.

#### Monitoring compliance

538. ASIC's surveillance activities in relation to the lodgement of required financial reports include programs to ensure that companies lodge the required annual statements, and other programs to address instances of non-compliance. For example, ASIC's program to ensure lodgement of financial reports by large proprietary companies identified 507 companies as large proprietary and ensured lodgement of 463 financial reports for July to December 2004.

539. ASIC has also engaged in a program aimed at enforcing lodgement of financial reports by unlisted public companies. For 2002, 427 civil court matters aimed at enforcing lodgement of financial reports by unlisted public companies. The overall compliance rate for unlisted public companies for the 2002 financial reports was 99%. For 2003, 227 civil court actions have been issued to date. The overall compliance rate for unlisted public companies for the 2003 financial reports is currently 97%. For 2004, the program commenced in December 2004 with the issue of 3383 warning letters to unlisted public companies with balance dates between January and June 2004.

540. ASIC also runs a program twice a year to identify companies that do not meet the *Corporations Act 2001* minimum officeholder requirements. A total of 2264 companies (1842 proprietary companies and 422 public companies) were identified as being in breach of officeholder requirements. A total of 585 companies appointed further officeholders as a result of this program. A further 325 companies were either placed into external administration, deregistered or are in the process of deregistration. In addition, the remaining 808 targeted companies will be reviewed for ASIC to commence deregistration where possible.

541. One of ASIC's compliance programs for 2005 is aimed at ensuring lodgement of financial reports or annual returns during the 2004 calendar year for foreign companies. In addition, ASIC has access to a compliance tool known as the Return of Particulars (ROP) form, which it can issue to companies that have not paid their review fee, have not lodged documents with ASIC for at least one year, or where ASIC suspects or believes that details recorded in its register about the company are incorrect. The ROP can thus be used to confirm or collect missing company data.

#### **5.1.2 Recommendations and Comments**

542. Australia has made positive efforts toward developing a national system to record and make available useful information on the ownership and control of its corporations, which constitute the vast majority of legal persons in Australia,. Information regarding shareholders and directors is publicly available on a timely basis, and this information must be updated in a timely fashion. Australia's requirements for public listed companies (a small minority of its companies) ensure that relevant information on beneficial ownership and control is accessible by the regulators and financial institutions. Some information on ownership/control appears to be kept on other types of legal persons. ASIC has a useful role in enforcing the corporate registration requirements, although this role could be expanded to include verification of the information it collects. Law enforcement authorities can also use their powers to obtain information on ownership and control, and beneficial ownership, where it exists. However,

current mechanisms (law enforcement or otherwise) could be improved so as to provide adequate access to information on beneficial ownership in a more timely manner.

543. Australia should consider broadening its requirements on beneficial ownership so that information on ownership/control is readily available in a more timely manner. This could include, for example, restricting the use of nominee directors and shareholders, , or obliging legal persons to record the information on beneficial ownership in its register.

### 5.1.3 Compliance with Recommendations 33

	Rating	Summary of factors underlying rating
<b>R.33</b>	<b>LC</b>	<ul style="list-style-type: none"> <li>Current mechanisms could be improved so as to provide adequate access in a more timely manner to adequate and accurate information on beneficial ownership and control for the majority of Australia's legal persons.</li> </ul>

## 5.2 Legal Arrangements – Access to beneficial ownership and control information (R.34)

### 5.2.1 Description and Analysis

544. Australia is a common law jurisdiction that, in addition to numerous types of legal persons, also has a system of trust law, including express trusts and discretionary trusts. Trustees hold trust property for the benefit of other parties, called beneficiaries. Trust agreements are usually constituted by deed, setting out the rights and obligations of the trustees and beneficiaries. Trusts are not separate legal entities; the trustee is the person responsible for the trust property; hence, the trustee is liable for the obligations incurred in the name of the trust.

545. Requirements for trusts are determined by State and Territory legislation, such as the Trustee Act 1925 (New South Wales). Contrary to the national system for registering companies, there are no corresponding State or Territory requirements for registration of trusts. Registration is required if the trust has a business name or if the trust/trustee requires a licence for business activities. If the trustee is a corporate entity, it must comply also with the registration and reporting requirements for a company and ASIC's disclosure requirements.

546. There are no State or Territory requirements to obtain, verify, or retain information on the beneficial ownership and control of trusts. In particular the settlor, trustee, and beneficiaries of express trusts are not recorded anywhere, except perhaps on the trust deed, and there are no requirements as to where trust deeds should be kept. However, if the trust receives income, the trust is required to lodge a tax return with the Australian Tax Office (ATO). Such a return must stipulate who the beneficiaries are and how much income they received. In 2003/2004, there were approximately 500, 000 tax returns lodged by trusts. While tax information can be shared with law enforcement agencies for the purposes of investigating any serious offence (under Section 3E of the Taxation Administration Act 1953), it can only be used as evidence for tax offences or production of proceeds of crime orders, thereby limiting its usefulness.

547. As discussed under Recommendation 33, law enforcement agencies such as the AFP and the ACC have powers to obtain information on the owners of trusts under investigation, including those outlined in Section 2 of this report. These include powers to compel production of financial records, trace property ownership, search premises for evidential material and summons a person to give evidence under oath.

### Unit and superannuation trusts and other managed investment schemes

548. Certain types of trusts in Australia operate essentially as financial institutions and are therefore subject to further disclosure and compliance requirements. Information regarding the control and beneficial ownership of corporate trustees and certain unit trusts must be registered with ASIC under requirements contained in the *Corporations Act*.

549. For unit and superannuation trusts, the beneficiaries' ownership interests in the trust property are divided into identifiable units, which are similar to shares in companies. APRA licensing these trust structures as they fall within the definition of a 'regulated superannuation fund'. This includes obtaining information on the transferor, trustee and beneficiaries. Superannuation trusts therefore face prudential supervision by APRA and must comply with APRA reporting requirements. The ATO's activities in regard to regulated superannuation funds are enhanced by the fact that there are significant tax concessions on withdrawal of superannuation funds where the beneficiary provides identification information by way of their tax file number.

550. Managed investment schemes, which are also constituted as trusts, are provided for in the *Corporations Act 2001*, must register with ASIC, and must comply with reporting requirements and maintain similar registers as companies.

## **5.2.2 Recommendations and Comments**

551. Tax information from certain trusts and law enforcement powers provide the means to access certain information on beneficial ownership and control of certain trusts. However, overall the mechanisms to obtain and have access in a timely manner to beneficial ownership and control of legal arrangements, and in particular the settlor, the trustee, and the beneficiaries of express trusts, are insufficient. There is considerable scope to introduce or improve the processes in place to enable competent authorities to obtain or have access in a timely fashion to such information. Australia should enact more comprehensive measures to require that this data be collected or otherwise ensure that it can be made available in a timely manner.

## **5.2.3 Compliance with Recommendations 34**

	<b>Rating</b>	<b>Summary of factors underlying rating</b>
R.34	PC	Competent authorities have some powers to obtain access to information on the beneficial ownership and control of certain legal arrangements. However, overall, the mechanisms in place are insufficient.

## **5.3 Non-profit organisations (SR.VIII)**

### **5.3.1 Description and Analysis**

552. Australia has reviewed the adequacy of its laws and regulations relating to NPOs. Recent reviews at the federal level have focused on the definition of what constitutes a charity and consideration of the introduction of a national charities commission. In 2000, the Government initiated an in depth review to examine options for updating charities legislation and published the 'Report of the Inquiry into the Definition of Charities and Related Organisations' in June 2001. The Report included analysis of the benefits of a 'dedicated administrative body' such as a Charities Commission. Following the charities definition inquiry the Government issued an exposure draft Charities Bill, which proposed excluding entities that engage in unlawful activities from the charities definition. However, in May 2004 the Government decided not to proceed with the Charities Bill and to pursue its policy objectives by other means. The Government has reviewed measures aimed at combating terrorist financing, including NPO laws and regulations, as part of its Anti-Money Laundering Review. It is anticipated that the AML Review will revisit the regulation of NPOs following the issuance of any further guidance by the FATF on SR VIII.

553. Australia also recently reviewed its non-profit sector in relation to terrorist financing as part of the Working Group on Terrorist Financing (WGTF) domestic non-profit sector reviews. A paper outlining Australia's approach to regulation of the non-profit sector was presented to the WGTF at the October 2004 Plenary meeting. The paper discusses the nature and scope of the sector, the extent to which NPOs are subject to AML/CFT measures, the extent to which NPOs are supervised or monitored, the types and prevalence of criminal activity in the NPO sector, and information-sharing capabilities regarding potential criminal activity.

554. Australia has a large non-profit sector, with as many as 700,000 non-profit organisations in various forms. Non-profit organisations (NPOs) in Australia include associations, charities, churches, clubs, cooperatives, foundations, societies and unions, with the majority of groups dedicated to education, health and community services. The great majority of these are small and rely entirely on the voluntary efforts of their members. NPOs are governed by State and Territory fundraising legislation, State and Territory associations legislation and the Commonwealth taxation and corporations legislation.

555. In Australia, there are three main types of formal structures for non-profit organisations: the unincorporated association, the incorporated association, and cooperatives. Approximately 380,000 are incorporated. Non-profit organisations in Australia are not required to register or incorporate, however if an organisation does not incorporate it will not have a legal identity separate to that of its members.

#### Charities and tax exemption

556. Eligibility for recognition for tax purposes where charitable purposes are involved is often an important determinant for adopting a formal structure. Under various State and Territory laws there are registration schemes for persons or organisations that wish to conduct fundraising appeals for charitable purposes. At the State and Territory level, the concept of charity is used to determine eligibility for exemption from rates, pay-roll tax, land tax and stamp duties and for laws governing fundraising activities.

557. At the Commonwealth level, NPOs must register with the Australian Taxation Office (ATO) for taxation purposes if they have a turnover of more than AUD 100,000 per year or if they are seeking eligibility for tax concessions or treated as deductible gift recipients. Commonwealth authorities indicated that there were approximately 50,000 such charities. Registration involves obtaining an Australian business number (ABN) and being included on the Australian Business Register (ABR), which makes key information such as the organisation's postal address and authorised contacts available to the public. Donors can also check an organisation's charitable and tax deductible status on the Australian Business Register website.

558. The ATO analyses FTR information to ensure that entities linked to known terrorists or known terrorist organisations are not endorsed for tax concessions or as deductible gift recipients. The ATO has strict requirements where a gift-deductible organisation receives money for overseas aid. The Treasurer must be satisfied that the fund has been established by an organisation declared by the Minister for Foreign Affairs to be an approved organisation which is solely for the relief of people in a country declared by the Minister for Foreign Affairs to be a developing country. There are a number of requirements that organisations have to satisfy to become an approved organisation, for example, an approved organisation must satisfy the Treasurer that:

- The fund is governed by a constitution or set of rules from which it is clear that its exclusive purpose is to provide relief to people in developing countries.
- Gifts to the fund are kept separate from any other funds of the sponsoring organisation and clear accounting procedures are followed.
- The fund is administered by a committee, the majority of whom have a degree of responsibility to the community. Details of occupations and positions in the community are required to be provided.
- Should the fund be wound up, any surplus money is to be transferred to another qualifying fund under the overseas aid gift provisions.

559. The ATO undertakes a variety of auditing processes in relation to the activities of these bodies, including cooperation with AML/CFT regulators, including: identifying non-profit organisations that inappropriately operate outside the revenue system, such as through data matching techniques; identifying organisations that may be inappropriately claiming concessional status as a charity; and monitoring for aggressive tax planning behaviour, including through the use of ‘closely controlled’ charities.

560. This occurs through cross-checking all names on applications ATO receives as well as other ATO system data against the list of known terrorists and terrorist organisations published under the *Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002*; the list is available on the DFAT website. Listed individuals and entities are subject to immediate asset freezing provisions. (See section 2.4 for a further discussion of the DFAT list and asset freezing/seizing provisions).

561. While there are no self-regulatory NPO groups, there are number of NPO industry bodies that provide advice and assistance to NPOs, such as Philanthropy Australia, the National Roundtable of Non-profit Organisations and the Fundraising Institute of Australia. There are also a number of bodies in each of the States that provide assistance to specific parts of the non-profit sector, e.g. the ACT Council of Social Service, Aged and Community Services Australia and the Australian Council for International Development (ACFID). ACFID has established an NPO Code of Conduct, which sets out standards on how organisations are managed, how they communicate with the public and how they spend the funds they raise. These standards include recommendations for internal control procedures to minimise the risk of misuse of funds and financial statements that should be audited by certified practicing accountant. NPOs can sign up to the Code and be monitored annually by ACFID.

562. AUSTRAC also monitors the financial transactions of non-profit organisations in the same way that it monitors other organisations, by scrutinising their international funds transfer instructions, significant cash transactions, suspect transactions and international currency transfers. To date there have been no substantiated links between terrorist groups and non-profit organisations in Australia.

### 5.3.2 Recommendations and Comments

563. Australia has reviewed its non-profit organisation sector and has taken some measures to ensure that these entities are not used to facilitate the financing of terrorism.. However, the reviews have not resulted in the actual implementation of any additional measures. Measures with regards to charities and fundraising for overseas causes are subject to stricter scrutiny through ATO than the non-profit sector as a whole, which is more broadly regulated by State and Territory laws. Australia should consider more thoroughly reviewing the adequacy of laws and regulations in place to ensure that terrorist organisations should cannot pose as legitimate non-profit organisations. Australia should give further consideration implementing specific measures from the Best Practices Paper to SR VIII or other measures to ensure that funds or other assets collected by or transferred through non-profit organisations are not diverted to support the activities of terrorist organisations..

### 5.3.3 Compliance with Special Recommendation VIII

	Rating	Summary of factors underlying rating
SR.VIII	PC	<ul style="list-style-type: none"> <li>• Australia has reviewed its NPO laws and sector; however, the reviews did not result in the implementation of any specific measures.</li> <li>• It is not clear that Australia has adequately implemented measures across the NPO sector to ensure that terrorists organisations cannot pose as legitimate non-profit organisations, or that funds or other assets collected or transferred by non-profit organisations are not diverted to support the activities of terrorists and terrorist organisations.</li> </ul>

## **6. NATIONAL AND INTERNATIONAL CO-OPERATION**

### **6.1 National co-operation and coordination (R.31 & 32)**

#### **6.1.1 Description and Analysis**

##### ***Recommendation 31***

564. Australian has put in place quite extensive arrangements within the Commonwealth Government and between the Commonwealth and State levels of Government to address co-operation at both the operational and policy levels. There are however some areas where co-operation and co-ordination could be further enhanced.

##### **Operational co-operation and co-ordination**

565. In relation to operational co-operation and co-ordination, a number of cross-agency communication arrangements and mechanisms exist to co-ordinate the analysis and assessment capabilities of a range of competent authorities and to better identify persons of interest and develop investigations. The task-force approach to law enforcement taken by Australian agencies allows for utilisation of a broad range of investigative, regulatory and intelligence experience and operational resources on particular cases or a whole of government perspective to be developed on sector-wide assessments. The mechanisms used to achieve cross-agency co-operation and co-ordination are outlined in some detail in section 2.6 of this report.

566. Broadly speaking, several Commonwealth agencies have important roles to play in relation to operational co-operation, including AUSTRAC, the AFP, the ACC, ASIC and APRA.

567. AUSTRAC is able to provide FTR information to 28 Australian Government, State and Territory agencies involved in law enforcement, revenue, national security and social justice programs. They are:

- Australian Crime Commission;
- Australian Customs Service;
- Australian Federal Police;
- Australian Securities and Investments Commission;
- Australian Security Intelligence Organisation;
- Australian Taxation Office;
- Centrelink;
- Child Support Agency;
- Crime and Misconduct Commission(Queensland);
- Corruption and Crime Commission(Western Australia);
- Independent Commission Against Corruption (New South Wales);
- New South Wales Crime Commission;
- Police Integrity Commission (New South Wales);
- State and Territory Police Services (7); and
- State and Territory Revenue Authorities (8).

568. An important tool in establishing effective relationships between AUSTRAC and domestic partner agencies has been the establishment of a Memorandum of Understanding (MOU) with each agency. These agreements provide the framework within which the Director of AUSTRAC grants agencies access to FTR information and financial intelligence developed from that information. AUSTRAC also provides partner agencies with assessments based on unusual financial activity, using AUSTRAC's automated monitoring system (TargIT). AUSTRAC has also played a role in developing indicators of terrorist financing and terrorist financiers and, in so doing, has developed a close working relationship with key

areas of AFP and ASIO. AUSTRAC also participates in the Financial Intelligence Assessment Team coordinated by the ACC with representatives from ACS, AFP, ASIC, and ATO.

569. One area of concern to the Evaluation Team was the level of formal co-operation between AUSTRAC, as the regulator for AML/CFT on the one hand, and APRA, as the prudential regulator, and ASIC, the market integrity and consumer protection regulator, on the other. In particular the list of agencies in section 27 of the FTR Act allowing AUSTRAC to provide FTR report information does not include APRA. While noting the ‘functional’ approach to financial sector regulation taken by Australia, the Evaluation Team nonetheless considered that there is scope for improved co-operation between AUSTRAC and APRA in particular.

570. At the Federal level, most money laundering investigations are conducted by the AFP. Money laundering is one of the AFP’s priority operational areas, and in recent years it has developed extensive financial analysis and investigation training programs for AFP members, Australian government agencies and staff of international counterparts. In addition a dedicated Financial Crimes Unit has been established which oversees proceeds of crime matters and other financial investigations. In April 2003, the AFP established a Counter Terrorism Division to undertake intelligence-led investigations to prevent and disrupt terrorist acts. Joint Counter Terrorism Teams, comprising AFP members and State and Territory police, are now in place.

571. The nature and structure of the ACC is designed to assist in the facilitation of co-operation and coordination with policy makers and law enforcement agencies in the development and implementation of policies and activities to combat serious and organized crime (including money laundering). The ACC works in a co-operative environment with all law enforcement agencies and competent authorities within Australia, including the AFP, each of the respective State and Territory Police Forces, Customs, AUSTRAC, the NSW Crime Commission, Commonwealth Attorney Generals Department, Commonwealth Director of Public Prosecutions, respective State DPP offices, ASIC, ASIO, ATO, the Queensland Crime and Misconduct Commission, and the Australian Institute of Criminology. The ACC has also established working liaison relationships with the Australian finance, banking and insurance sector, and the telecommunications industry, in respect to money laundering and predicate offences (including identity fraud).

572. Overall, in relation to operational co-operation and co-ordination, the Evaluation Team considers that Australia has largely effective mechanisms in place, particularly considering the Federal nature of the Australian state.

#### Policy co-operation and co-ordination

573. The situation in relation to policy co-operation was somewhat less clear than that pertaining to operational co-operation. The Attorney-General’s Department (AGD) coordinates the development of Australia’s AML/CFT program including legislative initiatives to improve its effectiveness and has played the central role in the current review of Australia’s AML/CFT system, in consultation with other relevant agencies. An FATF/APG coordination working group of relevant Federal agencies, chaired by the AGD, meets several times year to discuss issues arising out of the work of the FATF and the APG, but does not play a national co-ordination role per se. The Evaluation Team understands that there is in fact no formal, national co-ordination mechanism at the officials’ level, such as a national co-ordination committee, responsible for overall co-ordination of AML/CFT matters at either the Commonwealth level or at a Commonwealth/State level. While such a committee is not a pre-requisite for effective policy co-ordination, Australia should consider creating a mechanism that covers both Commonwealth and State/Territory responsibilities to interact and co-ordinate/co-operate on AML/CFT developments at the policy level.

#### Additional Elements – mechanisms for consultation between competent authorities, the financial sector and other sectors (including DNFBPs)

574. AUSTRAC in its regulatory role maintains communications with industry and business with FTR Act obligations and the financial sector in general. This takes place daily on an ad hoc basis but also through regular formal consultative forums. AUSTRAC devotes significant resources to the promotion of FTR compliance, particularly through the identification and education of reporting entities and the subsequent monitoring of FTR information reported to AUSTRAC. AUSTRAC's cash dealer education program is supported by industry meetings, a help desk facility, information circulars and guidelines, newsletters, and a high level consultation program with individual reporting entities. Industry consultation also occurs through Provider Advisory Group meetings (PAG) which include representatives from major reporting entities, industry bodies, AUSTRAC and partner agencies. PAG meetings are generally held every six months. A recent focus has been the remittance sector (that is, businesses that offer services to remit funds internationally). These alternative businesses usually operate within ethnic communities offering the transfer of funds between Australia and their former countries. Three campaigns involving advertising in ethnic newspapers were conducted during 2003/2004 to promote compliance with the requirements of the FTR Act.

575. The AFP provides assistance to the financial sector in relation to that sector's responsibilities under *Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002*. That assistance is in the form of providing a law enforcement assessment of whether an identified asset is likely or unlikely to be controlled by a proscribed person or entity.

### **Recommendation 32 (Criteria 32.1)**

576. Australian agencies, including AUSTRAC, review the effectiveness of their programs. Each law enforcement agency is required to report annually to Parliament on its operations and expenditure. This includes statistics and information on AML and CFT programs and operations. Annual reports for all agencies are available publicly. Policy agencies also regularly review their effectiveness. The Attorney General's Department is currently coordinating a major review of Australian Government AML and CFT systems with a view to introducing new legislation in 2005. However, the current "review" is aimed at implementing the revised Recommendations and not at evaluating the overall effectiveness Australia's AML/CFT systems. There have been other reviews which addressed the effectiveness of the Australian AML environment; however, it is not clear that these reviews have resulted in any specific actions. The reviews include:

- The 1998 review of the *Financial Transactions Reports Act 1988* - a report was prepared by the Director of AUSTRAC and submitted to the Minister of Justice and Customs in June 1998
- AUSTRAC reviewed the Review of the *Financial Transactions Reports Act 1988* in June 2003. This was later subsumed into the ongoing AML Reform process.

## **6.1.2 Recommendations and Comments**

577. The overall level of co-operation and co-ordination is good, in particular at the operational level. There is however scope to improve the level of co-operation and co-ordination between AUSTRAC and, APRA and ASIC and also to enhance co-ordination at the policy level, possibly through the establishment of a formal national co-ordination mechanism. In particular, section 27 of the FTR Act should be amended to include APRA and thereby allow AUSTRAC to provide FTR report information to APRA.

### **6.1.3 Compliance with Recommendation 31**

	Rating	Summary of factors underlying rating
<b>R.31</b>	<b>LC</b>	<ul style="list-style-type: none"> <li>• Extensive mechanisms have been put in place within the federal Government and between the Federal and State Governments for co-ordination and co-operation, but there is scope to improve co-operation/co-ordination between AUSTRAC, ASIC and APRA, and also to enhance co-operation at the policy level.</li> </ul>



<b>R.32</b>	<b>LC</b>	<ul style="list-style-type: none"> <li>It is not clear that the reviews initiated by the Australian government have resulted in any specific actions.</li> </ul>
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## 6.2 The Conventions and UN Special Resolutions (R.35 and SR.I)

### 6.2.1 Description and Analysis

#### *Recommendation 35*

##### Implementation of the Vienna Convention

578. Australia became a party to the UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Convention) on 16 November 1992. *The Mutual Assistance in Criminal Matters (Traffic in Narcotic Drugs and Psychotropic Substances) Regulations* commenced on 14 February 1993. The Regulations provide that the *Mutual Assistance in Criminal Matters Act 1987* applies to a Party to the Vienna Convention. Australia has implemented all of the measures in the Convention that are relevant to the FATF Recommendations.

##### The Palermo Convention

579. Australia signed the United Nations Convention against Transnational Organised Crime (the Palermo Convention) on 13 December 2000 and became a party to it on 27 May 2004. Australia appears to have fully implemented the Palermo provisions that are pertinent for the FATF recommendations.

##### The Terrorist Financing Convention

580. Australia signed the International Convention for the Suppression of the Financing of Terrorism on 15 October 2001 and became a party to it on 26 September 2002. Australia has fully implemented the vast majority of the Convention's provisions that are relevant for FATF recommendations. Australia has implemented the Terrorist Financing Convention through the *Suppression of the Financing of Terrorism Act 2002*. This Act amended or inserted provisions into the *Criminal Code Act 1995*, the *Charter of the United Nations Act 1945*, the *Extradition Act 1988* and the FTR Act to fulfil Australia's obligations under the Convention. Provisions include criminalising the financing of terrorism in Division 400 of the Criminal Code. However, Article 18(1)b of the Convention, which requires countries to implement efficient measures to identify customers in whose interests accounts are opened, is insufficiently implemented. Australia's implementation of Recommendation 5 does not include adequate measures to ascertain the identity of beneficial owners.

##### Additional Elements: The Council of Europe Convention

581. Australia ratified the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime on 18 June 1997. *The Mutual Assistance in Criminal Matters (Money-Laundering Convention) Regulations 1997* commenced on 1 November 1997. The Regulations provide that the *Mutual Assistance in Criminal Matters Act 1987* applies to countries that are parties to the Money Laundering Convention.

#### *Special Recommendation I*

582. As regards the Terrorist Financing Convention, see the paragraph above. Australia has fully implemented the measures speculated in the Convention except for requiring financial institutions to adopt customer due diligence measures identifying beneficial owners.

583. Australia appears to have fully implemented all the measures required in S/RES/1267 (and its successor resolutions) and S/RES/1373. These measures appear to be effective. The asset-freezing

requirements contained in UN Security Council Resolutions are implemented in Australia under the *Charter of the United Nations Act 1945* and its subsequent regulations, the *Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002*. In addition, the Criminal Code was amended by the *Criminal Code Amendment (Terrorist Organisations) Act 2004* which allows Australia to list terrorist organisations without reference to the list compiled by the 1267 Committee.

## 6.2.2 Recommendations and Comments

584. Australia has implemented the vast majority of the relevant sections of the Vienna, Palermo, and CFT Conventions. However, Australia needs to impose stricter customer identification (beneficial ownership) requirements for accounts and transactions in financial institutions as stipulated in Article 18 of the CFT Convention, which impacts its rating on Recommendation 35 and SR I.

## 6.2.3 Compliance with Recommendation 35 and Special Recommendation I

	Rating	Summary of factors underlying rating
<b>R.35</b>	<b>LC</b>	Australia has implemented the vast majority of the relevant provisions of the three Conventions; however, Australia has not fully implemented the CFT Convention because of insufficient measures to identify beneficial owners of accounts and transactions.
<b>SR.I</b>	<b>LC</b>	Australia has not fully implemented the CFT Convention because of insufficient measures to identify beneficial owners of accounts and transactions.

## 6.3 Mutual Legal Assistance (R.32, 36-38, SR.V)

### 6.3.1 Description and Analysis

#### *Recommendation 36 and Recommendation V*

585. Australia's mutual legal assistance mechanisms are set out in the *Mutual Assistance in Criminal Matters Act 1987* (MACMA), and operationally, mutual legal assistance is co-ordinated under the central authority of the Attorney General's Department. Commonwealth, State or Territory agencies may seek legal assistance through the Department for a range of criminal, regulatory or revenue matters or be required to provide such assistance as requested. This includes conducting the various elements of an investigation including the collection of evidence, taking of statements and the freezing and seizure of criminal assets or proceeds of crime. Statistical data on mutual assistance and other forms of international cooperation are maintained and reported by all relevant competent authorities.

586. Under the MACMA, Australia can seek and/or provide the following assistance:

- the production, search and seizure of information, documents or evidence (including financial records) from financial institutions or other natural or legal persons: Sections 12-13 allow Australia to seek and provide a document or other article. Sections 14-15 allow Australia to seek and provide material obtained by search and seizure subject to the provisions of the MACMA;
- the taking of evidence or statements from persons: Sections 12 and 13 allow Australia to seek and provide the taking of evidence;
- providing originals or copies of relevant documents and records as well as any other information and evidentiary items. Section 11 provides the Attorney-General with general power to receive requests from foreign countries. Section 9 provides that assistance may be provided to a foreign country subject to such conditions as they Attorney-General determines;
- Section 11 allows Australia to effect service of judicial documents;
- Sections 16-28 facilitate the voluntary appearance of persons for the purpose of providing information or testimony to the requesting country;

- f) identifying, freezing, seizing, or confiscating assets laundered or intended to be laundered, the proceeds of money laundering and assets used for terrorist financing, as well as the instrumentalities of such offences, and assets of corresponding value: This is done under sections 32-35M of the MACMA. The POCA 2002 allows Australia to take action for assets intended to be used for FT if the asset is intended to be used as an instrument.

587. There is no evidence to suggest that Australia does not provide assistance in a timely, constructive and effective manner in the circumstances of each case.

588. Mutual assistance is not prohibited or subject to unreasonable, disproportionate or unduly restrictive conditions. The grounds for refusing assistance are contained in section 8. The grounds include:

- the request relates to the prosecution or punishment of a person for an offence that is, or is by reason of the circumstances in which it is alleged to have been committed or was committed, a political offence;
- there are substantial grounds for believing that the request was made for the purpose of prosecuting, punishing or otherwise causing prejudice to a person on account of the person's race, sex, religion, nationality or political opinions;
- the granting of the request would prejudice the sovereignty, security or national interest of Australia or the essential interests of a State or Territory;

589. In addition, section 13 states that there must be a “proceeding” in the foreign country before the Minister can issue an authorization to take evidence. That term is defined in section 3(1) to include an inquisitorial proceeding before an investigative Magistrate or a grand jury but does not include a criminal investigation. Section 15 allows the use of search and seizure powers based on a request for both proceedings and investigations.

590. Discretionary provisions provide that a request may be refused if the provision of the assistance may result in the death penalty being imposed on a person; and after taking into consideration the interests of international criminal co-operation, in the circumstance of the case the request should not be granted (section 8(1B)).

#### Processing MLA requests

591. Australia has processes for the execution of mutual legal assistance requests. The Department of the Attorney General first receives and records all incoming requests for mutual legal assistance requests. The staff of the division receiving and processing these requests was only two people prior to 9/11, but with increases in the number of requests afterwards, Attorney General has increased the staff of this division, which is now between five to seven people, depending on need and availability.

592. When the Attorney-General authorises the taking of evidence formally in court or the issuing of search warrants in Australia (pursuant to sections 13 and 15 of the MA Act), the CDPP provides assistance. Under section 6(l)(k) of the Director of Public Prosecutions Act 1983, the CDPP appears in proceedings and represents the foreign country making the request under the MACMA. The CDPP also has conduct of court proceedings in Australia where the Attorney-General has authorised a request by a foreign country to take action in Australia to enforce proceeds of crime orders made in the foreign country. In addition, the CDPP also provides advice, if required, to Commonwealth investigative agencies that are called on to take action under mutual assistance requests.

593. The CDPP also has an interest in outgoing mutual assistance requests in Commonwealth cases where the case is nearing the prosecution stage or where action on the confiscation of criminal assets is contemplated. In these cases, the CDPP would go through the Attorney-General to make outgoing requests.

594. Assistance is not refused on the sole ground that the offence involves fiscal matters, as this is not a ground for refusal under section 8 of the MACMA. Section 8 of the Act provides a list of mandatory and

discretionary grounds for the Attorney-General to refuse a request for assistance by a foreign country. Nor is assistance refused on the grounds of laws that impose secrecy or confidentiality requirements on financial institutions or designated non financial businesses or professions.

595. Competent authorities in Australia have the power to search and seize under section 15 of the Act once authorized by the Attorney-General. The AFP can access a range of coercive powers as described in Recommendation 28 to facilitate mutual legal assistance requests; however, this is dependent on the nature of the request and the information and the evidence accompanying it.

596. There are no formal mechanisms for avoiding conflicts of jurisdiction. Where it appears that there may be a conflict of jurisdiction Australia considers the best venue for prosecutions on an agency to agency basis.

#### *Additional Elements*

597. The powers of competent authorities required under R.28 are not readily available for use when there is a direct request from foreign judicial or law enforcement authorities unless there is evidence of an offence committed in Australia and a domestic investigation is pursued.

#### Statistics

598. The Attorney General's office provided the following statistics for all mutual legal assistance requests received by Australia for all offences from 2000-2004:

	Cases carried forward	New requests	Requests granted	Requests refused	Requests otherwise completed
1999-2000	66	149	122	0	5
2000-2001	78	153	148	0	38
2001-2002	45	156	78	0	13
2002-2003	110	166	124	2	38
2003-2004*	117	179	109	1	30

\*The higher figures for mutual assistance requests carried forward in 2003-04 for request made to and from Australia reflect the practice adopted in 2003-04 of counting supplementary requests as separate requests.

599. The Attorney General's Department provided these additional figures concerning mutual legal assistance requests relating to money laundering and terrorism. There were no requests relating to the financing of terrorism.

	Requests involving ML— incoming	Requests involving ML— outgoing	Requests involving terrorism—incoming	Requests involving terrorism—outgoing
2000-2001	2	4		
2001-2002	7	6		
2002-2003	9	14	2	4
2003-2004	10	28	8	10

600. The CDPP also maintains a file registry database which records details of mutual assistance requests that the Attorney General's Department refers to the CDPP. In 2003, the CDPP introduced a new database for recording mutual assistance matters which records the requests under matter type. The following statistics relate to the number of mutual assistance requests the CDPP has dealt with in the last four financial years.

#### **Incoming requests processed by CDPP and offences**

	# requests incoming	narcotics	fraud	terrorism	ML	POC	other
2000-2001	14						
2001-2002	27	5	17				5

2002-2003	31	7	13			7	4
2003-2004	41	13	12	2	3	4	7

#### **Outgoing requests processed by CDPP and offences**

	# requests outgoing	narcotics	fraud	terrorism	ML	Proceeds of Crime	other
2000-2001	27						
2001-2002	57	25	25			4	3
2002-2003	85	32	26	9		9	9
2003-2004	135	54	51	8	3	4	15

601. The statistics indicate that Australia has been receiving and increasing number of mutual legal assistance requests. Australia has adequately responded in a timely manner to the vast majority of requests. The statistics are comprehensive and include all mutual legal assistance requests (including requests relating to freezing, seizing and confiscation) that are made or received, relating to ML, the predicate offences and FT, including the nature of the request, whether it was granted or refused, and the time required to respond. These details are all recorded in the CDPP's database of requests.

602. The obligations for mutual assistance apply to terrorist financing and terrorist acts in the same way that they apply to other offences and situations. As of November 2004, the CDPP had 17 formal mutual legal assistance requests on hand relating to terrorism which covered 8 separate suspects. The majority of the requests sought assistance for the investigation and/or prosecution of people suspected of belonging to terrorist organisations or training or preparing to commit terrorist acts. There have been two formal requests made involving one person who is suspected of receiving money from a terrorist organisation contrary to section 102.6 of the Criminal Code. There have also been two formal requests made involving another person who is suspected of making funds available to a terrorist organisation contrary to section 102.6 of the *Commonwealth Criminal Code 1995*. The assessment team was advised that requests had been processed promptly, though the length of time varied from case to case.

#### ***Recommendation 37 and Special Recommendation V***

603. Dual criminality is not a requirement when considering requests for mutual legal assistance; however, dual criminality is a discretionary ground for refusal under section 8 of the MACMA. Included in the discretionary grounds in section 8, a request may be refused if, in the opinion of the Attorney-General, the request relates to the prosecution or punishment of a person in respect of an act or omission that would not have constituted an offence against Australian law had it occurred in Australia. Australian authorities indicated that this could only apply to the use of coercive powers and would not apply to less intrusive and non-compulsory measures.

604. Australia renders mutual legal assistance where the conduct underlying the offence is criminalised in both countries. Technical differences between laws do not impede the provision of mutual legal assistance. Australian authorities indicated that the discretion described above has not created a problem since Australia has not received any legal assistance requests where there was no dual criminality.

605. The evaluation team had a small concern that the discretionary grounds of the MA Act could be used to refuse certain legal assistance requests involving the collection of funds for terrorist organisations, or the provision/collection of funds involving individual terrorists, since the evaluation team was not satisfied that these were sufficiently covered as part of the terrorist financing offence in Australia.

#### ***Recommendation 38 and Special Recommendation V***

606. Foreign orders can be enforced in Australia through the process of registration, which is done under a combination of the *Mutual Assistance in Criminal Matters Act 1987* (MACMA) and the *Proceeds of Crime Act 2002* (POCA). Sections 34 –35M of the MACMA set out requirements for receiving and dealing with requests made by foreign countries. These provisions provide for the enforcement of foreign orders, including: forfeiture orders (which includes laundered property and proceeds), pecuniary penalty orders (which designate a value rather than a property), restraining orders, production orders, monitoring

orders, and search warrants to identify and seize property. Action can also be taken against the instruments of offences (used in or intended for use in) if the action is conviction based.

607. The process involves the foreign country making a mutual legal assistance request to Australia. The Minister must decide whether to accept the request. If so, the Minister signs an authorisation for the CDPP to apply to a court in Australia to register the foreign order. If a foreign order is registered in Australia, it is enforceable as if it was an order made in Australia under the POCA 2002. One result is that any money recovered will become the property of the Australian Government, with scope for equitable sharing with the foreign country. If the foreign order is conviction based, there is no limit on the range of countries to which assistance can be provided.

608. The system enables Australia to provide legal assistance without having entered into a treaty with the other jurisdiction involved. However, some jurisdictions require the existence of a treaty in order to engage in such arrangements. Where that occurs, Australia has shown a willingness to enter into such bi-lateral treaties. In at least one instance, however, that process has been exceedingly slow and should be expedited. Australia currently has bi-lateral treaties and agreements in place with 24 countries.

609. Australia does not have any formal arrangements in place for co-ordinating seizure and confiscation actions with other countries; however where possible Australia co-ordinates these activities with other countries as provided for in the POCA 2002. The AFP works collaboratively with the CDPP and AGD in effecting these outcomes.

610. Under the POCA 2002, pecuniary penalties and the proceeds of sale of confiscated assets are paid into a confiscated assets trust fund. The statute sets out uses to be made of this fund, and includes programs involving law enforcement purposes and payments to foreign countries in recognition of the contribution of the foreign country to the confiscation action. Australia's mutual assistance in criminal matters treaties in some cases mandate payment of proceeds seized at the request of the other party to that requesting party.

611. Australia has no formal mechanisms for considering asset-sharing requests. There have been two requests made by foreign countries for foreign asset sharing—Indonesia and one other (for which a public announcement has not yet been made). According to Australian authorities, the low number of cases reflects the fact that international co-operation to recover proceeds of crime is still in its infancy and there are not many cases. Australia has received money from other countries including the United States and Switzerland, but mostly on an informal sharing basis rather than in response to a formal request.

#### *Additional Elements*

612. The MACM Act also provides for the registration and enforcement of civil-based proceeds of crime orders, provided the country is listed in the Regulations. The current list is not long but includes the UK, USA, Ireland and South Africa. Other countries can be added to the list by regulation at short notice if the need arises.

613. Action can also be taken under civil forfeiture for instruments of terrorism offences as provided for in the POCA 2002.

#### ***Recommendation 32: Statistics relating to mutual legal assistance***

614. Australia maintains adequate statistics on requests made and received for mutual legal assistance. The statistics all mutual legal assistance requests (including requests relating to freezing, seizing and confiscation) that are made or received, relating to ML, the predicate offences and FT, including the nature of the request, whether it was granted or refused, and the time required to respond. For those requests processed by the CDPP, these details are all recorded in the CDPP's database.

### **6.3.2 Recommendations and Comments**

615. Australia has a comprehensive system for providing mutual legal assistance and co-operating fully with other jurisdictions. The obligations for mutual assistance apply to terrorist financing and terrorist acts (to the extent that the offence is covered in Australia) in the same way that they apply to other offences and situations. Australia's statutory framework gives the competent authorities the ability to engage in generally effective mutual assistance, and that authority has shown a willingness to so act.

616. Australia should consider, on a timely basis, entering into further agreements for co-ordination of asset sharing, as this may be needed by other countries in order to share and receive proceeds from confiscated property.

### 6.3.3 Compliance with Recommendations 32, 36 to 38, and Special Recommendation V

	Rating	Summary of factors relevant to s.6.3 underlying overall rating
<b>R.32</b>	<b>LC</b>	(Statistics are comprehensive for mutual legal assistance purposes.)
<b>R.36</b>	<b>C</b>	
<b>R.37</b>	<b>C</b>	
<b>R.38</b>	<b>C</b>	
<b>SR.V</b>	<b>LC</b>	(There are adequate measures in place for mutual legal assistance for the purposes of SR.V.)

## 6.4 Extradition (R.32, 37 and 39, and SR.V)

### 6.4.1 Description and Analysis

#### *Recommendation 37, Recommendation 39, and Special Recommendation V*

617. Extradition matters are covered by the *Extradition Act 1988*, and operationally, the Attorney-General's Department is the central authority for co-ordinating all incoming and outgoing extradition requests and whether or not they should proceed. Extradition requests may also involve a number of other agencies including the Commonwealth Director of Public Prosecutions, the AFP and other Commonwealth, State or Territory law enforcement, revenue or regulatory bodies. The CDPP represents the requesting foreign country in extradition proceedings in Australia and in doing so acts on the instructions of the Attorney-General's Department. The CDPP only has a role in outgoing extradition cases if the matter is being prosecuted by the CDPP.

618. Section 19 of the Extradition Act requires production of certain documents to support a request for extradition. There must be a warrant for the person's arrest, a statement in writing setting out a description of, and the penalty applicable in respect of, the offence, and a statement setting out the conduct constituting the offence. Where a particular extradition treaty requires production of further documents, those documents must also be provided.

619. Dual criminality is a requirement for extradition in Australia. The Extradition Act 1988 requires that the conduct constituting the foreign offence for which extradition of a person is sought must, if it had occurred in the State or Territory of Australia where the person is found, be an offence against the law of that State or Territory. In assessing dual criminality, where the conduct consists of 2 or more acts or omissions, regard may be had to all or to only some of those acts or omissions, and any difference between the denomination or categorisation of offences under the law of the requesting country and the law of Australia, or the law in force in the part of Australia, shall be disregarded.

620. The *Extradition Act 1988* does not include money laundering or terrorist financing as extradition offences *per se*. However, section 5 defines an "extradition offence" as one for which the maximum

penalty is a period of imprisonment for not less than 12 months. Therefore, this would cover all Commonwealth money laundering offences from Division 400 of the Criminal Code, apart from the most minor offences which concern recklessly or negligently dealing in the proceeds of crime of less than AUD1000. These offences carry maximum penalties of 6 months imprisonment and 10 penalty units (AUD1100).

621. Australia inherited 33 extradition treaties<sup>23</sup> from the United Kingdom. These treaty countries are regarded as “extradition countries” for the purposes of the Extradition Act. Some of these treaties list specific offences for which extradition shall be granted and may not include money laundering or terrorist financing. However, there is usually a clause in the list treaties which either allow a discretion on the part of the requested country to entertain a request for an offence not included in the list, or which may allow a request for an offence not included in the list provided that the offence is one which both countries (i.e. the requesting and the requested country) recognise as an offence. In the situation where a list treaty applied, money laundering was not on the list, and Australia had discretion whether to accept the request, Australia would accept the request. Because some of these treaties are old, Australia indicated that before making extradition requests it would seek advice from the other country as to whether they regard the treaty as being in force for Australia before relying on it to make the request.

622. The Extradition Act also allows Australia to designate a country or territory as an “extradition country” by declaration. There are currently 11 countries<sup>24</sup> in this category of non-treaty countries.

623. Finally, the Commonwealth and the Extradition Regulations (Commonwealth Countries) Regulations 1998, also established under the Extradition Act 1998, detail the “London scheme” on extradition from Australia to Commonwealth countries. There are currently 64 countries or territories covered under this scheme. The regulations specify that for Commonwealth countries the maximum penalty of the underlying offence for extradition must be a period of imprisonment of 2 years or more. In these cases, it would cover most money laundering offences, but would not technically cover all offences in Division 400 of the Criminal Code (such as negligently dealing in the proceeds of crime between AUD 1,000 and AUD 10,000; dealing with the proceeds of crime of less than AUD 1,000 with any intent element), since penalties of less than two years apply in these cases. However, Australia notes that the more minor nature and amount involved in these offences means that in practice countries would not seek extradition in such cases. Australia has never received an extradition request involving one of these lesser offences of Division 400, and never expects to receive one. Therefore, this technicality does not negatively affect the effectiveness of the extradition system. It should also be noted, however, that Australia has issued special regulations for the United Kingdom and Canada lowering the minimum penalty requirement to one year.

624. The *Extradition Act 1988* also contains provision for prosecution in lieu of extradition of certain Australian citizens (section 45). The Attorney-General can consent to a such a prosecution only after: 1) determining not to surrender the person because the he/she was an Australian citizen when the offence was committed; 2) being satisfied that the country would not have surrendered one of its nationals if the national had engaged in that conduct in Australia.

625. Australian practice is to assist other countries with prosecutions in lieu of extradition. If a prosecution in lieu of extradition were to be conducted, Australia would seek co-operation from the requesting country either through formal or informal channels to obtain evidence for use in the prosecution.

626. There are no time limits in the *Extradition Act 1988* which govern the processing of an extradition request and there are a number of factors which can impact on the time taken to finalise a request,

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<sup>23</sup> Argentina, Austria, Belgium, Brazil, Chile, Ecuador, Finland, France, Germany, Greece, Hong Kong, Hungary, Indonesia, Ireland, Israel, Italy, Republic of Korea, Luxembourg, Mexico, Monaco, Kingdom of the Netherlands, Norway, Paraguay, Philippines, Poland, Portugal, South Africa, Spain, Sweden, Switzerland, Turkey, United States, Venezuela.

<sup>24</sup> Cambodia, Denmark, Estonia, Fiji, Iceland, Japan, Jordan, Latvia, Lebanon, the Marshall Islands, and Thailand.



including appeals and reviews brought by the person concerned. As persons subject to extradition proceedings are usually in custody, every effort is made to process the extradition request expeditiously. However, if the person is provisionally arrested, the Minister must issue a notice (which effectively directs a Magistrate to commence extradition proceedings) within 45 days of that person's arrest (some treaty provisions and/or Regulations vary this period, usually up to 60 days). Also, if the Minister has determined that a person should be surrendered, and they are not removed to the requesting country within two months of the Minister's determination, the person can bring proceedings for his/her release from custody.

627. As the terrorist financing offence in Australia does not specifically cover collection of funds for terrorist organisations or the provision/collection of funds for individual terrorists, the evaluation team had a concern that the dual criminality requirement for extradition could preclude extradition for these acts.

### ***Additional Elements***

628. The means by which requests for extradition are transmitted is a matter for the Attorney-General's Department. However, extradition requests are usually submitted by the diplomatic channel or Interpol. Provisional arrest requests can be transmitted directly between appropriate ministries or authorities.

629. Extradition cannot be granted solely on the basis of warrants or judgements, except in the case of requests between Australia and New Zealand, where a 'backing of warrants' scheme applies under the Extradition Act 1988.

630. Under the *Extradition Act 1988*, a person can consent to his or her extradition, provided a Magistrate is satisfied that such consent is voluntary and the person is informed of the consequences of consenting. The Minister for Justice and Customs then has to make a decision on whether to surrender the person. Section 18 of the Extradition Act 1988 allows for consent to extradition without a formal hearing to determine eligibility. A formal request for extradition must be received and a notice signed by the Attorney-General advising of receipt of the request issued before consent can take place.

### ***Recommendation 32: Statistics on Extradition***

631. The CDPP maintains statistics for all requests received from the Attorney-General's Department in which the CDPP has been asked to appear in extradition proceedings on behalf of the foreign country, or to provide advice to the Attorney-General's Department. The CDPP also maintains statistics for all requests which it asks the Attorney-General to make to foreign countries. The statistics kept include the nature of the request, whether it was granted or refused, and the time taken to respond.

#### **Requests from foreign countries**

632. In the past 4 years, the Attorney-General's Department has not asked the CDPP to act in any extradition proceedings in relation to a primary offence of money laundering or financing of terrorism, however, the following represent requests involving drug or people smuggling cases in which a money laundering charge existed:

<b>Requesting Country</b>	<b>Offences</b>	<b>Date of Request</b>	<b>Result</b>
United States of America	Money laundering, Drugs, Continuing Criminal Enterprise	13 November 2000	Surrendered 20 May 2002
United States of America	Money laundering, Drugs, Continuing Criminal Enterprise	13 November 2000	Surrendered 20 May 2002
Switzerland	Money Laundering, Drug Trafficking	30 May 2003; Provisional arrest 4 July 2003	Surrendered 24 August 2004

#### **Requests to foreign countries**

633. In the past 4 years, the CDPP has asked the Attorney-General to make one request for extradition involving offences of dealing in the proceeds of crime, with predicate offences being conspiracy to import drugs and aiding and abetting the importation of drugs. Australia is awaiting a final decision. In addition, two requests were made in matters in which money laundering was a secondary offence:

Australia (request to Egypt)	Money Laundering, People Smuggling	8 June 2003	Egypt undertook its own prosecution. Person convicted of people smuggling related offences. No Egyptian charges brought for money laundering.
Australia (request to Sweden)	Money Laundering, People Smuggling	19 June 2003  Provisional arrest 22 May 2003	Surrendered from Sweden on 7 November 2003. On advice of Commonwealth DPP money laundering charge not presented in Australia. Person has been committed to stand trial on people smuggling charges. Trial scheduled for February 2005.

634. The CDPP has not asked the Attorney-General to make any extradition requests to foreign countries for an offence of financing terrorism.

#### 6.4.2 Recommendations and Comments

635. Australia's statutory scheme allows for a generally comprehensive means of dealing with extraditions. While statistics are low with respect to money laundering, incoming requests appear to have been effectively handled. The obligations for extradition apply to terrorist financing and terrorist acts (to the extent that the offences are covered in Australia) in the same way that they apply to other offences and situations.

636. Australia should specifically criminalise the collection of funds for terrorist organisations and the provision/collection of funds involving individual terrorists, to ensure that the dual criminality requirement in current law could not prevent the extradition of those who have engaged in these acts.

#### 6.4.3 Compliance with Recommendations 32, 37 & 39, and Special Recommendation V

	Rating	Summary of factors relevant to s.6.4 underlying overall rating
R.32	LC	Statistics are comprehensive for extradition
R.37	C	
R.39	C	
SR.V	LC	As the terrorist financing offence in Australia does not specifically cover collection of funds for terrorist organisations or the provision/collection of funds for individual terrorists, there is a concern that the dual criminality requirement for extradition could preclude extradition for these acts.

### 6.5 Other Forms of International Co-operation (R.32 and 40, and SR.V)

#### 6.5.1 Description and Analysis

637. Australia has in recent years increased its regional engagement in terms of international cooperation, assistance and needs assessments and training. In recognition of the transnational nature of money laundering and terrorist financing, Australia has committed significant resources to enhancing the regional ability to identify, prosecute and coordinate ML and TF efforts. This has seen a large number of

initiatives involving the AFP and AUSTRAC designed to build analytical, investigative law enforcement and counter-terrorist capacities within neighbouring jurisdictions.

638. The AFP is presently negotiating in excess of 30 international agreements with partner law enforcement agencies in relation to the agency to agency communication of FTR information. This was made possible by amendments that were made to the FTR Act 1988 with effect from 6 July 2002 by the passage of the *Suppression of the Financing of Terrorism Act 2002*. Section 27 (11B) of the FTR Act was added to allow the Commissioner or his delegate to communicate Financial Transaction Reports (FTR) information to a foreign law enforcement agency.

639. AUSTRAC works bilaterally and multilaterally with overseas FIUs to facilitate the exchange of financial information, share knowledge and help establish effective procedures for countering money laundering and terrorist financing. At the multilateral level, Australia participates in a range of international forums including FATF, the APG and the Egmont Group of Financial Intelligence Units. AUSTRAC's bilateral initiatives include the exchange of information underpinned by Exchange Instruments (EIs), usually in the form of a Memorandum of Understanding (MOU). AUSTRAC's bilateral initiatives also include providing technical assistance and training (TA and T) by which AUSTRAC seeks to assist countries to develop stronger AML/CFT systems.

640. The obligations for other forms of international cooperation apply to terrorist financing and terrorist acts in the same way that they apply to other offences and situations.

#### ***Recommendation 40 and Special Recommendation V***

##### **Provision of wide range of international co-operation to foreign counterparts**

641. AUSTRAC is able to share FTR information with foreign jurisdictions, and has exchange instruments in place with 37 overseas FIUs. According to Australian authorities, this intelligence has been effective in assisting those agencies by supplementing their intelligence holdings and in initiating or providing assistance in investigations into a wide range of criminal matters, such as transnational organised crime, drug trafficking, major tax evasion, terrorism financing and people smuggling. All requests are prioritised in terms of urgency and where possible, AUSTRAC aims to work within the time frames of the counterpart FIU. Generally, AUSTRAC respond to requests within a two to four week period.

642. AUSTRAC co-operates effectively internationally in its role as an FIU. Section 27(11A) of the FTR Act enables AUSTRAC to share information with "foreign countries" and does not restrict the organisations with which AUSTRAC can share information in those countries. Accordingly, AUSTRAC is able to share information with foreign supervisors without the need for a specific agreement. However, in practice AUSTRAC uses Exchange Instruments (EIs) to exchange information, and currently AUSTRAC only has exchange instruments with foreign FIUs (based on the Egmont model) but not with foreign supervisors for the exchange of supervisory data. Since an agreement is not necessary, AUSTRAC can and would share information with countries with whom AUSTRAC does not have an agreement on a case-by-case basis. To this point in time, AUSTRAC has not been approached to exchange information with foreign supervisors and has not had the need to initiate such an exchange. In addition, APRA as the prudential regulator has information exchange arrangements in place, both formally (including six MOUs) and informally. While not directly related to AML/CFT matters, it nevertheless has regard to the broader financial framework, including where AML/CFT regulation overlaps with its regulatory responsibilities. More broadly, these arrangements will continue to complement the exchange of AML/CFT regulatory information.

643. Provision also exists under the *Mutual Assistance in Business Regulation Act 1992* (MABRA) that allows for Commonwealth regulators (such as ASIC or APRA), at the request of a foreign regulator, to arrange for obtaining information, documents or evidence from a person in Australia to assist a foreign regulator in the administration or enforcement of a foreign business law. MABRA operates separately to the *Mutual Assistance in Criminal Matters Act 1987*.

644. The AFP has an international liaison officer network comprising 63 people in 30 offices in 25 countries. Some of these offices are also responsible for providing assistance to law enforcement partners in countries within specified geographical zones beyond their host country. Australia is a member of Interpol and the national central bureau is located within the AFP headquarters. Interpol provides a complementary vehicle for providing assistance to foreign counterparts. As part of its role, the ACC also co-operates and liaises with appropriate competent authorities in other countries. This liaison is primarily facilitated through the AFP, and also involves the Attorney General's Department in respect to mutual legal assistance requests and extraditions. Co-operation with overseas law enforcement agencies may also involve the use of lawful special investigative techniques, subject to appropriate consideration of the relevant laws, practices and procedures in respect to each of the cooperating jurisdictions.

#### Clear and effective gateways for information exchange

645. Section 27(11A) of the FTR Act outlines the provisions under which the Director of AUSTRAC may communicate FTR information to a foreign country. It provides that the Director may communicate such information if satisfied that the foreign country has given appropriate undertakings for protecting the confidentiality of the information, controlling the use that will be made of it; and ensuring that the information will be used only for the purpose for which it is communicated to the foreign country.

646. AUSTRAC's standard practice is to establish an Exchange Instrument (EI), usually in the form of a Memorandum of Understanding (MOU) or Exchange of Letters which enables it to exchange financial intelligence with international counterpart FIUs by demonstrating compliance with paragraph 27(11A)(a) of the FTR Act. The EI contains the relevant protocols and controls on usage of AUSTRAC's FTR information. The AUSTRAC Model EI is based on the Egmont Model MOU and includes an undertaking as to confidentiality of information and the use to which it can be put. To date AUSTRAC has Exchange Instruments with 37 international counterpart FIUs to enable the exchange of financial intelligence. The follow table outlines AUSTRAC's current Exchange Instruments, and the dates these instruments were established.

#### **Countries with which AUSTRAC has an Exchange Instrument (EI)**

Year Signed	Jurisdiction
1991	France
1996	United States
1998	New Zealand, United Kingdom
1999	Denmark
2000	Italy
2002	Vanuatu, Singapore, Isle of Man, Israel
2003	Malaysia, Canada, Republic of Korea
2003	The Netherlands, Guernsey, Poland, Portugal, South Africa, Venezuela, Lebanon, Croatia, Mauritius, Slovenia
2004	Indonesia, The Bahamas, Cyprus, Argentina, Belgium, Colombia, Cook Islands, Estonia, Ireland, Slovakia, Thailand, Spain, Bulgaria, Romania

647. Following the establishment of an EI, intelligence exchanges on behalf of AUSTRAC's domestic partner agencies generally take place via the Egmont Secure Web email system. Under the EI, information received from an international FIU is not disseminated to a third party without the prior written consent of the disclosing FIU and is subject to the same conditions and standards of privacy and secrecy as all other information domestically collected and held by AUSTRAC. The table below outlines the number of requests received from international FIUs and made to international FIUs for financial intelligence by AUSTRAC since 1 January 2000.

#### **Requests received from and made to International Counterpart FIUs in the calendar years from 1 January 2000 to 31 December 2004**

Year	Jan-Dec	Jan-Dec	Jan-Dec	Jan-Dec	Jan-Dec
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	2000	2001	2002	2003	2004
Number of Requests Received	17	7	17	54	80
Number of Requests Made	11	5	5	24	41

648. AUSTRAC, as a member of the Egmont Group of FIUs, also shares information with Egmont counterparts via the Egmont Group's secure website service

649. In addition to AUSTRAC's ability to exchange FTR information internationally, sections 27(11B) and 27AA(5A) of the FTR Act provide that the Commissioner of the Australian Federal Police and the Director-General of Security of the Australian Security Intelligence Organisation may communicate financial transaction reports information to a foreign law enforcement agency and a foreign intelligence agency, respectively, if the Commissioner and the Director-General are satisfied that the foreign law enforcement agency or intelligence agency have given appropriate undertakings for (i) protecting the confidentiality of the information; (ii) controlling the use that will be made of it; (iii) ensuring that the information will be used only for the purpose for which it is communicated to the foreign country; and (iv) it is appropriate, in all the circumstances of the case, to do so. The AFP is presently negotiating in excess of 30 international agreements with partner law enforcement agencies in relation to the agency to agency communication of FTR information.

650. The AFP's international network has all overseas liaison offices connected to a real time online case management system. The AFP has established a number of MOUs on cooperation in combating transnational crime in the Asia/Pacific Region and beyond. The AFP has entered into MOUs with Indonesia, Thailand, Philippines and Colombia. The AFP is currently negotiating further MOUs with key law enforcement partners in other countries. The AFP has established through its Law Enforcement Cooperation Program a network of Transnational Crime Units in the Pacific Region which provide a capacity for criminal intelligence exchanges on transnational crime issues in the region.

651. While the capacity for and extent of information exchange at the FIU and law enforcement level is significant, there has not been any international information exchange with foreign supervisory authorities on AML/CFT issues. Consideration needs to be given to ensuring that AUSTRAC enters into exchange instruments with foreign supervisors to facilitate the formal exchange of AML/CFT regulatory information..

#### Spontaneous exchanges of information

652. Under amendments in 2002 to the FTR Act, by the *Suppression of Financing of Terrorism Act 2002*, AUSTRAC has the authority to spontaneously disseminate information to international counterpart FIUs with which an Exchange Instrument is in place. The following table outlines the number of spontaneous disseminations in this period.

#### **Spontaneous disclosures made to International Counterpart FIUs in the calendar years from 1 Jan 2003 to 31 Dec 2004**

	Jan-Dec 2003	Jan-Dec 2004
Number of Spontaneous Disclosures	11	12

653. AFP MOUs, the International Officer Network and other cooperative arrangements provide a mechanism for the provision of international assistance. In early 2004, the AFP had 56 Federal Agents across 31 offices in 26 countries to exchange information as required.

#### Conduct of inquiries on behalf of foreign counterparts

654. The AFP is authorised to conduct inquiries on behalf of foreign law enforcement either on an agency to agency basis or as part of a mutual legal assistance request.

655. AUSTRAC, as the FIU, is authorised by the terms of MOUs held between AUSTRAC and foreign counterparts to search its own databases, including with respect to information related to suspicious transaction reports, on behalf of foreign counterparts. AUSTRAC also has access to certain law enforcement databases, and other public, administrative or commercial databases, which it can search when responding to counterpart requests. As noted in section 2.5 of this report, however, direct access to law enforcement information is limited, and AUSTRAC is presently negotiating access to several data sources including but not limited to law enforcement information. Such access would improve AUSTRAC's ability to assist foreign counterparts.

#### Disproportionate or unduly restrictive conditions

656. Sections 27(11A), 27(11B) and 27AA(5A) of the FTR Act set out the conditions on which exchanges may be made. The requesting country must have given appropriate undertakings for protecting the confidentiality of the information, controlling the use which will be made of it and ensuring that it will only be used for the purpose for which it is communicated. Prior to entering into EI negotiations with other FIUs, AUSTRAC engages in a process of research and domestic consultation. Open and closed source research about both the FIU and the broader AML regime in place within a jurisdiction is conducted. Domestic consultation is conducted with government departments and agencies to ensure the establishment of an Exchange Instrument (usually in the form of a Memorandum of Understanding) with a counterpart FIU is consistent with broader Australian government policy. In particular, AUSTRAC seeks comment from the Department of Foreign Affairs and Trade (DFAT) and the AFP in relation to every proposed Exchange Instrument. Consultation is also conducted with the Attorney-General's Department in specific cases. Following this process, an Exchange Instrument is signed with the counterpart FIU. This Instrument is based on the Egmont Model MOU and does not contain any unduly restrictive conditions. AUSTRAC does not refuse requests solely on the basis of fiscal matters, nor does it refuse requests solely on the grounds of financial or DNFBP secrecy or confidentiality laws.

#### Safeguards for information received by competent authorities

657. Secrecy and access provisions contained in sections 25 – 27AA of the FTR Act define the prohibitions on the use and duplication of financial intelligence and other data and outline the conditions under which information may be shared with prescribed competent authorities. AFP governance arrangements ensure appropriate safeguards exist and are adhered to in relation to handling information received during the course of a member's duty.

#### Additional elements

658. Where countries request assistance involving enforceable powers, the search and seizure of material or the production of documents or evidence, then the request needs to meet certain conditions as set out in the *Mutual Assistance in Criminal Matters Act 1987* – sections 13 and 15 refer.

659. Mechanisms for the exchange of financial transaction report data exist under sections 27 (11A), 27(11B) and 27AA (5A) of the FTR Act. These processes are normally formalised as the subject of an MOU in order for information to be shared. In terms of financial data provided by the AFP, ASIO or AUSTRAC, provisions listed in sections 27(11A)(a)(iii), 27(11B)(a)(iii) and 27AA (5A)(a)(iii) of the FTR Act require that the competent authority sharing or disseminating the information should seek appropriate assurances regarding the use, confidentiality of the information. In addition, it is a condition set out in the terms of the memoranda of understanding held with counterparty FIUs, that the requesting counterparty FIU must indicate not only the purpose of the information request but also which counterparty law enforcement or security agency on whose behalf the request has been made.

660. In terms of other information sharing, all information requests received from other countries are covered by terms and conditions of treaties, memoranda of understanding, letters of agreement and legislation such as the *Mutual Assistance in Criminal Matters Act 1987*. Under the Act, international requests for assistance in criminal matters should state (i) the name of the authority concerned with the criminal matter to which the request relates, (ii) the nature of the criminal matter summarising the relevant

facts and laws, and (iii) the purpose of the request and the nature of the assistance being sought (section 11 refers).

661. The FTR Act allows for the spontaneous dissemination of information by a range of intelligence bodies ensuring that the FIU is not tasked as the sole channel through which financial intelligence may be shared with international counterparts. Under the provisions of sections 27(11B) and 27AA(5A), information may be sent through competent authorities such as the AFP and ASIO.

#### Supplementary information provided by Australia in relation to international co-operation

662. As part of its International TA and T initiative, an AUSTRAC team is providing mentoring, training, IT and financial intelligence technical and analytical expertise to FIUs in the South East Asian region and to a lesser degree in the Pacific region. Assistance is provided through the delivery of training programs, focusing on technical and analytical capabilities, and in-country FIU mentoring exercises aimed at technical skill consolidation and broader FIU development. The IT needs of FIUs will also be assessed, and strategies and solutions to meet these needs will be developed. AUSTRAC's TA and T team is also involved in developing typologies through the analysis of case study material. AUSTRAC has conducted a long term mentoring project at Indonesia's FIU, the PPATK. AUSTRAC has also developed close bilateral relations with FIUs in the Pacific region by working cooperatively with the Pacific Islands Forum Secretariat (PIFS), the Asia/Pacific Group on Money Laundering (APG) and a number of international organisations over many years. AUSTRAC has put in place a Pacific Financial Intelligence Unit Development Program to provide practical assistance to Pacific Island FIUs with development of IT solutions to manage the receipt, analysis and dissemination of financial transaction reports.

663. AUSTRAC continues to share and enhance its knowledge on methods to detect and counter money laundering and terrorist financing. One of the means to achieve this is by hosting visits from officers of overseas financial intelligence units and other organisations that cooperate in AML/CFT initiatives. In 2004, AUSTRAC initiated a series of attachments to AUSTRAC by the officers of partner FIUs. These attachments are week-long programs designed to give the officers in depth knowledge and experience of AUSTRAC's systems and processes, and the application of analytical skill and IT capabilities to identify and track money laundering, the financing of terrorism and other major crimes. According to AUSTRAC, feedback received from participants has been very positive.

#### ***Recommendation 32 (Statistics related to other forms of international co-operation)***

664. Statistical data on mutual assistance and other forms of international cooperation are maintained and reported by relevant competent authorities such as the AFP, AGD, AUSTRAC and the CDPP. Relevant statistics can be found in the following section of this report (dealing with FATF Recommendation 40), and statistics relating to mutual legal assistance and extradition are contained in sections 6.3 and 6.4 of this report. There have not been any requests or dissemination of AML/CFT information to or from foreign supervisors by AUSTRAC.

#### **6.5.2 Recommendations and Comments**

665. Australia has put in place comprehensive measures to facilitate a wide range of international co-operation with foreign counterpart FIUs and law enforcement agencies. The same general observation made in relation to mutual legal assistance applies to Australia's approach to other forms of international co-operation: Australia generally appears to be co-operating fully with other jurisdictions. Australia's statutory framework gives the competent authorities the ability to engage in generally effective international co-operation, and the Australian authorities have shown a willingness to so act. In addition, Australia has taken a proactive approach to assisting FIUs in the Asia/Pacific region to meet the international standards, which is to be commended.

666. While the capacity for and extent of information exchange at the FIU, law enforcement, prudential and corporate levels is significant and seems to be working well, AUSTRAC has not received any requests or made any disseminations of AML/CFT information to or from foreign supervisors. Although AUSTRAC does not need an agreement to share information, AUSTRAC should consider initiating

exchange instruments to formalise exchange of AML/CFT regulatory information with foreign supervisors.

### 6.5.3 Compliance with Recommendations 32 & 40, and Special Recommendation V

	Rating	Summary of factors relevant to s.6.5 underlying overall rating
<b>R.32</b>	<b>LC</b>	(Statistics are adequate for foreign regulatory requests—Australia has neither received nor made any such requests.)
<b>R.40</b>	<b>C</b>	
<b>SR.V</b>	<b>LC</b>	(Adequate with respect to FIU and LE co-operation.)



## 8. TABLES

**Table 1. Ratings of Compliance with FATF Recommendations**

The rating of compliance vis-à-vis the FATF Recommendations should be made according to the four levels of compliance mentioned in the 2004 Methodology (Compliant (C), Largely Compliant (LC), Partially Compliant (PC), Non-Compliant (NC)), or could, in exceptional cases, be marked as not applicable (N/A).

Forty Recommendations	Rating	Summary of factors underlying rating <sup>25</sup>
<b>Legal systems</b>		
1. ML offence	LC	<ul style="list-style-type: none"> <li>The lack of money laundering prosecutions indicates that the regime is not being effectively implemented.</li> </ul>
2. ML offence – mental element and corporate liability	LC	<ul style="list-style-type: none"> <li>The regime for sanctions appears to be comprehensive, dissuasive and proportional but is not being effectively applied. In the cases where it has been applied, sentences appears to be low.</li> </ul>
3. Confiscation and provisional measures	C	
<b>Preventive measures</b>		
4. Secrecy laws consistent with the Recommendations	C	<ul style="list-style-type: none"> <li></li> </ul>
5. Customer due diligence	NC	<ul style="list-style-type: none"> <li>CDD requirements are limited in scope to the obligations on <i>cash dealers</i>, which does not cover the full range of financial institutions.</li> <li>There is a complex and only indirect obligation to identify and verify customer identity upon account opening.</li> <li>Certain loans are excluded from customer identification requirements.</li> <li>CDD obligations when establishing business relations are limited to the context of opening or operating “<i>account</i>” facilities with the <i>cash dealers</i>, and do not cover all situations of establishing business relationships.</li> <li>No customer identification/verification is required at the account opening stage; rather accounts below the prescribed low value (AUD 1,000/2,000) can operate indefinitely without customer identification until such time as the thresholds are triggered. The application of the low threshold provisions appears to both an unnecessary regulatory burden as well as creating potential loopholes for criminals and terrorists.</li> <li>It is not clear what prescribed verification procedures are when identifying customers conducting cash transactions of AUD 10,000 or more.</li> <li>There are no identification requirements for other (non-cash) occasional transactions of USD/ EUR 15,000 or more.</li> <li>For IFTIs the FTR Act requires identification but no verification of the customer. Furthermore, there are no requirements for the</li> </ul>

<sup>25</sup> These factors are only required to be set out when the rating is less than Compliant.

		<p>identification and verification of customers making use of domestic wire transfers within Australia.</p> <ul style="list-style-type: none"> <li>• There is no requirement that existing clients' information be re-examined on the basis of materiality and risk or to conduct due diligence on such existing relationships at appropriate times.</li> <li>• There is no specific obligation requiring CDD when there is a suspicion of money laundering or terrorist financing.</li> <li>• The methods of verifying the customer identification are inadequate. The acceptable referee method is not an adequate method to verify the identity of a customer; the 100-point check system of verification involves a number of documents of questionable reliability, such as the inclusion of identification references.</li> <li>• The FTR Act does not have comprehensive requirements to identify and verify beneficial owners. There is no obligation for financial institutions to determine whether the customer is acting on behalf of another person, and if so, take reasonable steps to verify the identity of that other person.</li> <li>• For customers that are corporate entities, there are no requirements to identify the directors or provisions regulating the power to bind the entity. Moreover, Regulation 5 allows a wide range of incorporated bodies to do their own identification and verification on signatories once the nominated person has been checked by the cash dealer.</li> <li>• There are no obligations that financial institutions be required to obtain information on the purpose and intended nature of the business relationship.</li> <li>• There are no obligations to conduct ongoing due diligence on the business relationship or conduct due diligence on such existing relationships at appropriate times.</li> <li>• There are inadequate obligations for financial institutions to keep document, data, and information collected under the CDD process current or up-to-date.</li> <li>• There are no obligations for cash dealers to perform enhanced due diligence for higher risk categories of customer, business relationship or transaction.</li> <li>• While there is an obligation to block the account in the cases of lack of identification (and above the AUD 1,000/2,000 thresholds), there is no obligation to consider filing a suspicious transaction report in these circumstances, although in practice financial institutions will often do so.</li> </ul>
6. Politically exposed persons	NC	<ul style="list-style-type: none"> <li>• There are no legislative or other enforceable obligations regarding the identification and verification of PEPs.</li> </ul>
7. Correspondent banking	NC	<ul style="list-style-type: none"> <li>• There are no legislative or other enforceable obligations for financial institutions that pertain to correspondent banking or relationships.</li> </ul>
8. New technologies & non face-to-face business	NC	<ul style="list-style-type: none"> <li>• There are no requirements for financial institutions to have policies in place or take such measures as needed to prevent the misuse of technological developments in ML/FT, or specific and effective CDD procedures that apply to non-face to face customers.</li> </ul>
9. Third parties and introducers	NC	<ul style="list-style-type: none"> <li>• While financial institutions relying on third parties are ultimately responsible for compliance with the FTR Act, the other provisions of Recommendation 9 are not required.</li> <li>• The current list of acceptable referees is overly broad and</li> </ul>

		<p>includes many entities that are unregulated (for AML/CFT or any other purpose).</p> <ul style="list-style-type: none"> <li>Financial institutions relying on third parties are not required to: immediately obtain the identification data from referees; take adequate steps to satisfy themselves that copies of identification data and other relevant documentation relating to CDD requirements will be made available from the third party upon request without delay; and satisfy themselves that the third party is regulated and supervised (in accordance with Recommendation 23, 24 and 29), and has measures in place to comply with, the CDD requirements set out in R.5 and R.10.</li> </ul>
10. Record keeping	PC	<ul style="list-style-type: none"> <li>Transaction records must be kept for at least 7 years after the day the account is closed or the transaction takes place. However, this is limited to “financial institutions”—a smaller category of cash dealers—and in the context of accounts as defined in the FTR Act. The FTR Act requirements therefore do not include records of transactions from securities or insurance entities, foreign exchange dealers, or money remitters.</li> <li>The provisions for record keeping do not specifically require that all account files and business correspondence be retained; these provisions could be clarified.</li> </ul>
11. Unusual transactions	PC	<ul style="list-style-type: none"> <li>There are no specific obligations for financial institutions to monitor all complex, unusual large transactions, transactions with no visible economic purposes, to further examine these situations and to set out these findings in writing; the monitoring obligation is only implied and indirect, and it does not cover the full range of monitoring situations as stipulated in Recommendation 11.</li> <li>AUSTRAC Guideline #1 provides some information to assist in this regard. However, Guidelines are not legally enforceable and do not cover the full scope of financial institutions.</li> </ul>
12. DNFBP – R.5, 6, 8-11	NC	<ul style="list-style-type: none"> <li>Under the present legal regime, most DNFBPs operating in Australia do not have mandatory CDD, record keeping and other obligations as required under the FATF Recommendations 5, 6, 8, 9, and 10.</li> <li>There are no specific requirements for most of the DNFBPs to pay special attention to the complex &amp; unusual transactions (applying R.11).</li> </ul>
13. Suspicious transaction reporting	LC	<ul style="list-style-type: none"> <li>The provisions are generally adequate, but there is a limitation of “cash dealer” definition which does not apply to all financial institutions.</li> <li>There is a requirement to report transactions suspected of being related to a terrorist financing offence; however the evaluation team’s concern regarding the scope of the terrorist financing offence (as discussed in section 2.2) led the team also to be concerned that this could limit the reporting obligation.</li> </ul>
14. Protection & no tipping-off	C	
15. Internal controls, compliance & audit	NC	<ul style="list-style-type: none"> <li>Legislative amendments are required to oblige financial institutions to have in place institutionalised AML/CFT internal controls, policies. Such obligations should include requirements for financial institutions to: have a designated AML/CFT compliance officer at the management level; have an adequately resourced and independent audit function, establish ongoing</li> </ul>

		employee training, put in place adequate screening procedures.
16. DNFBP – R.13-15 & 21	NC	<ul style="list-style-type: none"> <li>• Most DNFBPs are not legally required to report suspicious transactions to AUSTRAC.</li> <li>• DNFBPs are not required to develop internal policies, procedures, internal controls, ongoing employee training and compliance in respect of AML/CFT.</li> <li>• There are sanctions in relation to non-reporting of STRs, to the extent that Casinos and bullion dealers are required to report STRs. However, the FTR Act contains criminal sanctions only, and the lack of administrative sanctions shows that in practice sanctions are rarely applied.</li> <li>• There are not adequate, enforceable measures for DNFBPs to pay special attention to transaction involving certain countries, make their findings available in writing, or apply appropriate counter-measures.</li> </ul>
17. Sanctions	PC	<ul style="list-style-type: none"> <li>• The only sanctions for AUSTRAC are criminal sanctions and an injunction power under section 32 of the FTR Act, although the latter has been used in limited circumstances. The lack of intermediate sanctions, such as administrative sanctions, means in practice that formal sanctions are generally not applied. However, Australia notes that agreed remedial action with the cash dealer, while not a formal sanction, successfully encourages improvements.</li> <li>• APRA and ASIC have powers to apply sanctions, including revoking an entity's licence, in circumstances where there is a breach of the relevant legislation. Powers extend to directors and senior managers; ASIC can also ban and disqualify persons, including banning from acting as a director or from managing a corporation; however, it was unclear how these could be applied in practice, as there are no express powers to remove management or revoke a license in breach of AML/CFT requirements. No sanctions have yet been applied by APRA or ASIC for AML/CFT failings.</li> <li>• AUSTRAC does not have corresponding powers to revoke the licence of cash dealers or to disqualify persons from being a manager, director, or employee due to serious non-compliance with FTR Act.</li> </ul>
18. Shell banks	PC	<ul style="list-style-type: none"> <li>• There is no prohibition on financial institutions from entering into, or continuing, correspondent banking relationships with shell banks.</li> <li>• Nor are financial institutions required to satisfy themselves that respondent financial institutions in a foreign country do not permit their accounts to be used by shell banks.</li> </ul>
19. Other forms of reporting	C	
20. Other NFBP & secure transaction techniques	C	
21. Special attention for higher risk countries	PC	<ul style="list-style-type: none"> <li>• While AUSTRAC has the authority under section 38(1)(e) of the FTR Act to indicate other countries as higher risk, AUSTRAC has made limited use of this provision.</li> <li>• There is no specific requirement for financial institutions to pay special attention to transactions involving countries that do not adequately apply the FATF Recommendations, in accordance with Recommendation 21. AUSTRAC Guidelines and</li> </ul>

		Information Circulars provide additional information and advise cash dealers on the need to scrutinise such transactions to so as to determine whether they should be reported. However, these measures are not legally enforceable.
22. Foreign branches & subsidiaries	NC	<ul style="list-style-type: none"> <li>• Although under Section 6 of the FTR Act extends application of the FTR Act outside Australia, Australian banks themselves indicated that they would first apply the local laws, and that in several cases local laws prohibited full implementation of the Australian standards due to local secrecy provisions.</li> <li>• There is no requirement that this principle be observed with respect to their branches and subsidiaries in countries which do not or insufficiently apply the FATF Recommendations.</li> <li>• There is no legal obligation or guidance requirement under the FTR Act directing in fulfilment of requirement that where the minimum AML/CFT requirements of the home and host countries differ, branches and subsidiaries in host countries should be required to apply the higher standard, to the extent that local (i.e. host country) laws and regulations permit.</li> <li>• There is no requirement that financial institutions inform their home country supervisor when a foreign branch or subsidiary is unable to observe appropriate AML/CFT measures because this is prohibited by local (i.e. host country) laws, regulations or other measures.</li> </ul>
23. Regulation, supervision and monitoring	PC	<ul style="list-style-type: none"> <li>• The evaluation team did not find the implementation of the AML/CFT supervisory system to be effective in terms of the standards required by the revised 40 Recommendations. . The supervisory system would also be enhanced if co-ordination between all the relevant authorities were to be improved. AUSTRAC is currently limited in the information it can share with the APRA.</li> <li>• AUSTRAC's on-site supervision activities do not cover the full range of tools available to it under the FTR Act. The statistics confirm that the focus of AUSTRAC's on-going supervision is currently limited to educational visits.</li> <li>• It is of concern that the number of formal compliance inspection audits has been very low across the range of supervised entities: the only compliance inspection audit conducted in 2004 was for a remittance dealer. AUSTRAC has conducted only two compliance inspection audits of banks in the last four years; banks and money remittance dealers are the only financial institutions to receive any compliance inspection audits in the last two years.</li> <li>• More generally, it appears to be a policy decision to conduct education visits rather than compliance inspection audits. The main focus of identifying these entities and bringing them into the reporting regime appears to reflect AUSTRAC's limited role as AML/CFT regulator. However, education visits can result in agreed remedial action by the cash dealer.</li> <li>• There is not a general requirement that all remittance dealers (whether formal or informal), bureaux de change, lease financing companies, finance companies and issuers of travellers cheques, be licensed or registered.</li> </ul>
24. DNFBP - regulation, supervision and monitoring	PC	<ul style="list-style-type: none"> <li>• Casinos are largely compliant except for concerns regarding the scope of AML/CFT requirements and the effectiveness of the supervisory regime.</li> </ul>

		<ul style="list-style-type: none"> <li>Casinos, bullion sellers and to some extent solicitors are covered by the FTR Act and are monitored by AUSTRAC to a limited extent for the purposes of AML/CFT compliance. However, most of the DNFBPs are not covered under the FTR Act and lack effective regulatory and supervisory systems for monitoring to ensure compliance with AML/CFT requirements.</li> <li>Criminal sanctions that exist in the FTR Act do not extend to most DNFBPs. Secondly, there are no administrative sanctions for breach of AML/CFT requirements. The lack of administrative sanctions coupled with an absence of criminal prosecutions of DNFBPs suggests that sanctions are generally not applied for breaches of AML/CFT requirements.</li> </ul>
25. Guidelines & Feedback	PC	<p><u>Guidelines: Financial institutions</u></p> <ul style="list-style-type: none"> <li>In terms of reporting guidelines and basic STR guidelines, measures are adequate. However, issues not expressly covered in the FTR Act are not covered in other guidelines—i.e., internal controls, CDD. Most of the presently issued guidance is heavily focused on suspect transaction reporting, but inadequate in regard to general detailed CDD guidance, with particular reference to the identification and verification of clients, internal controls and record keeping.</li> </ul> <p><u>Guidelines: DNFBP</u></p> <ul style="list-style-type: none"> <li>AUSTRAC's Guidelines do not cover most DNFBPs.</li> </ul> <p><u>Feedback</u></p> <ul style="list-style-type: none"> <li>Although AUSTRAC provides some general and specific feedback on STRs, AUSTRAC could provide more sanitised examples of actual money laundering cases and/or information on that decision or result of an STR.</li> <li>During assessment discussions the private sector generally indicated that it did not receive adequate feedback on STRs filed.</li> </ul>
<b>Institutional and other measures</b>		
26. The FIU	C	
27. Law enforcement authorities	LC	<ul style="list-style-type: none"> <li>Legal measures appear comprehensive but are not fully effective—investigators generally do not investigate and refer ML as a separate charge at either the Commonwealth or the State level.</li> </ul>
28. Powers of competent authorities	C	
29. Supervisors	PC	<ul style="list-style-type: none"> <li>Due to the absence of the requirements for AML/CFT programs and internal rules, the generally accepted standard inspection powers and procedures, such as checking the institutions policies and procedures are not required by the FTR Act.</li> <li>AUSTRAC has powers to conduct compliance inspections to assess AML compliance with the reporting and identification obligations of the FTR Act. However, formal compliance inspections are rarely conducted. Australia notes, however, that educational visits include inspections of records to ascertain whether an entity is a cash dealer, and if so, whether they have reporting obligations and whether they are complying with them.</li> <li>APRA and ASIC have extensive monitoring, investigation and enforcement powers that are supported by a wide range of civil,</li> </ul>

		<p>criminal and administrative sanctions; however, they are not specifically aimed at AML/CFT.</p> <ul style="list-style-type: none"> <li>• AUSTRAC's powers of enforcement and AML/CFT sanctions exist but are limited to criminal sanctions and hence rarely applied; there is a need to institute a regime of administrative penalties.</li> </ul>
30. Resources, integrity and training	LC	<ul style="list-style-type: none"> <li>• Notwithstanding the existence of technological aids and AUSTRAC systems, the number of supervisory and compliance staff appears limited given the varied extent and numbers of the existing reporting entities under the FTR Act.</li> <li>• Additional resources are required by AUSTRAC to enable it to effectively fulfil its role as AML/CFT regulator under the revised FATF standards. As Australia considers expanding the scope and detail of AML/CFT requirements, the need for additional resources will be critical.</li> <li>• There remains a need for an enhancement of supervisory skills and training pertaining to the conduct of on-site inspections and enforcement related activities.</li> </ul>
31. National co-operation	LC	<ul style="list-style-type: none"> <li>• There is scope to improve co-operation/co-ordination between AUSTRAC, ASIC, and APRA, and also to enhance co-operation at the policy level. In particular, section 27 of the FTR Act should be amended to include APRA and thereby allow AUSTRAC to provide FTR report information to APRA.</li> </ul>
32. Statistics	LC	<ul style="list-style-type: none"> <li>• It is not clear that the reviews initiated by the Australian government have resulted in any specific actions.</li> <li>• There is a lack of State/territory statistics on prosecutions and convictions for ML.</li> <li>• There are not clear statistics on ML/FT investigations (for offences under Division 400) at the Commonwealth level.</li> <li>• There are not adequate statistics on ML/FT investigations at the State/territory level.</li> </ul>
33. Legal persons – beneficial owners	LC	<ul style="list-style-type: none"> <li>• Current mechanisms could be improved so as to provide adequate access in a more timely manner to adequate and accurate information on beneficial ownership and control for the majority of Australia's legal persons.</li> </ul>
34. Legal arrangements – beneficial owners	PC	<ul style="list-style-type: none"> <li>• Competent authorities have some powers to obtain access to information on the beneficial ownership and control of certain legal arrangements. However, overall, the mechanisms in place are insufficient.</li> </ul>
<b>International Co-operation</b>		
35. Conventions	LC	<ul style="list-style-type: none"> <li>• Australia has not fully implemented the CFT Convention because of insufficient measures to identify beneficial owners of accounts and transactions as required by Article 18.</li> </ul>
36. Mutual legal assistance (MLA)	C	
37. Dual criminality	C	
38. MLA on confiscation and freezing	C	
39. Extradition	C	
40. Other forms of co-operation	C	
<b>Nine Special</b>	<b>Ra</b>	<b>Summary of factors underlying rating</b>

Recommendations	tin g	
SR.I Implement UN instruments	LC	<ul style="list-style-type: none"> <li>Australia has implemented the vast majority of the relevant provisions of the three Conventions; however, Australia has not fully implemented the CFT Convention because of insufficient measures to identify beneficial owners of accounts and transactions as required by Article 18.</li> </ul>
SR.II Criminalise terrorist financing	LC	<ul style="list-style-type: none"> <li>The range of offences are generally broad but do not specifically cover certain requirements of SR II: the collection of funds for a terrorist organisation; the collection or provision of funds for an individual terrorist.</li> </ul>
SR.III Freeze and confiscate terrorist assets	LC	<ul style="list-style-type: none"> <li>Measures are generally comprehensive and appear to be effective; however, Australian law does not explicitly cover funds of terrorists and those who finance terrorism or terrorist organisations outside of specific terrorist acts.</li> </ul>
SR.IV Suspicious transaction reporting	LC	<ul style="list-style-type: none"> <li>The provisions are generally adequate, but there is a limitation of “cash dealer” definition which does not apply to all financial institutions;</li> <li>As the reporting obligation relates to the suspected terrorist financing offences, the evaluation team’s concern regarding the scope of the terrorist financing offence (as discussed in section 2.2) led the team also to be concerned that this could limit the reporting obligation.</li> </ul>
SR.V International co-operation	LC	<ul style="list-style-type: none"> <li>As the terrorist financing offence in Australia does not specifically cover collection of funds for terrorist organisations or the provision/collection of funds for individual terrorists, there is a concern that the dual criminality requirement for extradition could preclude extradition for these acts.</li> </ul>
SR VI AML requirements for money/value transfer services	PC	<ul style="list-style-type: none"> <li>There is not a general requirement that all MVT service operators be licensed or registered. Australia is considering a more workable and simpler licensing / registration system is being designed to prevent these dealers from going underground. AUSTRAC maintains a list and details of those operators that it has identified.</li> <li>MVT services operators are “cash dealers” under the FTR Act. They are thus subject to the same limitations of the scope of the FTR Act.</li> <li>While education visits to remittance dealers have been helpful for identifying and bringing MVT service operators into the reporting regime, AUSTRAC has not adequately used its on-site inspection powers to ensure compliance.</li> <li>MVT service operators are not required to maintain a current list of its agents which must be made available to AUSTRAC or another competent authority.</li> </ul>
SR VII Wire transfer rules	NC	<ul style="list-style-type: none"> <li>There is no obligation to verify that the sender’s information is accurate and meaningful or to require that the account number be included.</li> <li>There are no requirements for domestic transfers to record originator information.</li> <li>Nor is there a requirement to include the originator information with the transfer instruction, either for international transfers or domestic wire. There is no obligation under FTR Act ensuring that occasional transfers are not batched when sent.</li> <li>There is no obligation that each intermediary financial institution</li> </ul>



		<p>in the payment chain should be required to maintain all the required originator information with the accompanying wire transfer.</p> <ul style="list-style-type: none"> <li>• There are no obligations under the FTR Act requiring risk-based procedures for identifying and handling wire transfers that are not accompanied by complete originator information.</li> <li>• As the measures to include the full originator information with wire transfer instructions generally do not apply, there is no corresponding monitoring for compliance with these provisions.</li> </ul>
SR.VIII Non-profit organisations	PC	<ul style="list-style-type: none"> <li>• Australia has reviewed its NPO laws and sector; however, the reviews did not result in the implementation of any specific measures.</li> <li>• It is not clear that Australia has adequately implemented measures across the NPO sector to ensure that terrorist organisations cannot pose as legitimate non-profit organisations, or that funds or other assets collected or transferred by non-profit organisations are not diverted to support the activities of terrorists and terrorist organisations.</li> </ul>
SR. IX	PC	<ul style="list-style-type: none"> <li>• Australia has a comprehensive system for reporting cross-border movements of currency above AUD 10,000 to AUSTRAC; however, there is no corresponding system for declaration/disclosure of bearer negotiable instruments and therefore: <ul style="list-style-type: none"> <li>○ No sanctions for false declaration/disclosure relating to bearer negotiable instruments;</li> <li>○ No ability to stop or restrain bearer negotiable instruments in relation to a false declaration or disclosure.</li> </ul> </li> </ul>

**Table 2: Recommended Action Plan to Improve the AML/CFT System**

AML/CFT System	Recommended Action (listed in order of priority)
<b>1. General</b>	
<b>2. Legal System and Related Institutional Measures</b>	
Criminalisation of Money Laundering (R.1 & 2)	<ul style="list-style-type: none"> <li>• Improve implementation of the money laundering offence: provide incentive to its investigators and prosecutors to prosecute money laundering cases as separate and serious offences.</li> <li>• States and Territories should all adopt the national model) to allow them a broader ability to prosecute and convict for money laundering.</li> </ul>
Criminalisation of Terrorist Financing (SR.II)	<ul style="list-style-type: none"> <li>• Criminalise the collection or provision of funds for an individual terrorist, as well as the collection of funds for a terrorist organisation.</li> </ul>
Confiscation, freezing and seizing of proceeds of crime (R.3)	<ul style="list-style-type: none"> <li>• Other States and Territories that have not yet adopted similar civil forfeiture schemes should consider doing so.</li> <li>• Consider civil forfeiture for instrumentalities of crime.</li> </ul>
Freezing of funds used for terrorist financing (SR.III)	<ul style="list-style-type: none"> <li>• Amend regulations to cover where the obligations of SR.III exceed the requirements of the Resolutions—i.e., specifying that obligations apply to funds of terrorists and those who finance terrorism, outside of the context of specific terrorist acts</li> <li>• Outreach further to DNFBPs to ensure that those sectors are aware of their obligations and procedures for complying.</li> </ul>
The Financial Intelligence Unit and its functions (R.26, 30 & 32)	<ul style="list-style-type: none"> <li>• AUSTRAC is encouraged to seek direct access to additional law enforcement data sources as this non-financial data will also enhance their intelligence analysis capability.</li> <li>• AUSTRAC is encouraged to expand their team of financial analysts.</li> <li>• AUSTRAC should continue to seek and encourage regular feedback from partner agencies on their performance and on the benefits and results achieved by partner agencies through use of the FTR information.</li> <li>• AUSTRAC in consultation with partner agencies should consider how to share information/results more effectively with reporting entities.</li> <li>• AUSTRAC and APRA should negotiate a formal information sharing arrangement similar to those memorandums of understanding with other government agencies under which each organization is required to use its best endeavours to provide information which is likely to assist the other agency in carrying out its particular regulatory function.</li> </ul>
Law enforcement, prosecution and other competent authorities (R.27, 28, 30 & 32)	<ul style="list-style-type: none"> <li>• The investigative and prosecutorial authorities need to focus more on investigating and prosecuting ML and not just predicate offences. Australian authorities are encouraged to continue to make this a priority.</li> <li>• There is also a need for Australian authorities to keep clearer statistics for investigations and prosecutions of the ML offence</li> </ul>

	<p>at the commonwealth level.</p> <ul style="list-style-type: none"> <li>• There is also a need for Australian authorities to ensure adequate statistics are maintained with respect to money laundering (investigations, prosecutions, convictions, property seized, etc.) at the State/territory level.</li> <li>• Consider establishing an AML working group with State, Territory and federal representatives from government to regularly discuss issues of common interest such as statistic gathering and develop approaches for dealing with emerging issues.</li> </ul>
<b>3. Preventive Measures – Financial Institutions</b>	
Risk of money laundering or terrorist financing	
Customer due diligence, including enhanced or reduced measures (R.5 to 8)	<ul style="list-style-type: none"> <li>• In general, the regime could be made simpler and contain a more direct obligation to identify and verify customers.</li> <li>• Loans should not be excluded from CDD requirements.</li> <li>• The definition of “cash dealer” or otherwise obliged reporting entities should be extended to include the full range of financial institutions as defined in the FATF recommendations.</li> <li>• The scope of “account” should be extended to capture a wider range of products, services or business activity so that CDD applies for all cases of establishing business relations.</li> <li>• Australia should amend its legislation to remove the possibility of accounts operating below the threshold of AUD 1,000/ 2,000 without any verification requirements.</li> <li>• The Regulation 4(1)(i) of the FTR Act not requiring existing clients of over 36 months to be re-examined for identity and verification purposes should be repealed.</li> <li>• Financial institutions should be required to apply CDD requirements to existing customers on the basis of materiality and risk.</li> <li>• While Australia has a system to identify customers (but not beneficial owners) of occasional cash transactions above AUD 10,000, verification requirements should be clearer.</li> <li>• Australian legislation should be amended to require identification of those occasional transactions that exceed the USD/EUR 15,000 which are not cash transactions.</li> <li>• Australia needs to require financial institutions to identify occasional customers as contemplated in SRVII for domestic transfers and in the cases where there is a suspicion of money laundering or terrorist financing.</li> <li>• The acceptable referee method should be substantially tightened or even removed except for exceptional cases where reliance on other identification methods is not possible.</li> <li>• The 100-point check should be strengthened by placing reliance on identification documents or methods of proven acceptability, which should exclude identification references, for example.</li> <li>• Create a general obligation to identify and verify the details of the beneficial owner, in respect of all customers; oblige financial institutions to determine whether the customer is acting on behalf of another person, and if so, take reasonable steps to verify the identity of that other person.</li> <li>• For customers that are legal persons, financial institutions</li> </ul>

	<p>should be required to take reasonable measures to understand the ownership and control structure and determine who are the natural persons that ultimately own or control the customer, and gather information on the directors and the provisions regulating the power to bind the entity.</p> <ul style="list-style-type: none"> <li>• Tighten the use of third parties to complete verification of signatories as currently contained in Regulation 5.</li> <li>• Require financial institutions to: obtain information on the purpose and intended nature of the business relationship, obtain information on the purpose and intended nature of the business relationship, conduct on-going due diligence of the business relationship, and keep CDD data up-to-date.</li> <li>• In the cases where adequate CDD data is not obtained, financial institutions should be required to consider filing a suspicious transaction report.</li> <li>• Adopt requirements for financial institutions to perform enhanced due diligence for higher risk categories of customers, business relationships, and transactions.</li> <li>• Adopt requirements for PEPs as contemplated in Recommendation 6.</li> <li>• Adopt measures for correspondent relationships as contemplated in Recommendation 7.</li> <li>• Require financial institutions to have policies in place or take such measures as may be needed to prevent the misuse of technological developments in money laundering or terrorist financing.</li> <li>• The FTR Act should be amended to provide specific, clear and effective CDD procedures that apply to non-face to face customers.</li> </ul>
Third parties and introduced business (R.9)	<ul style="list-style-type: none"> <li>• Financial institutions should be required to: immediately obtain the identification data from referees; take adequate steps to satisfy themselves that copies of identification data and other relevant documentation relating to CDD requirements will be made available from the third party upon request without delay.</li> <li>• Financial institutions should be required to satisfy themselves that the third party is regulated and supervised (in accordance with Recommendation 23, 24 and 29), and has measures in place to comply with, the CDD requirements set out in R.5 and R.10.</li> </ul>
Financial institution secrecy or confidentiality (R.4)	
Record keeping and wire transfer rules (R.10 & SR.VII)	<ul style="list-style-type: none"> <li>• Broaden the scope of record-keeping requirements to include all financial institutions as defined in the FATF Recommendations. Clarify provisions to ensure that requirements apply to all account files and records of business correspondence.</li> <li>• Australia should adjust its legislation and implement measures of SR VII to require that: <ul style="list-style-type: none"> <li>○ financial institutions verify that the sender's information is accurate and meaningful and include the account number;</li> <li>○ full originator information, in addition to being sent to AUSTRAC, also be included in the wire transfer instruction itself, and that similar obligations also apply to domestic transfers.</li> <li>○ intermediary financial institutions maintain all the required originator information with the accompanying wire</li> </ul> </li> </ul>

	<p>transfer.</p> <ul style="list-style-type: none"> <li>○ beneficiary financial institutions have risk-based procedures in place for dealing with incoming transfers that do not have adequate originator information.</li> <li>○ 'non-routine transactions are not batched where this would increase the risk of money laundering or terrorist financing'.</li> </ul>
Monitoring of transactions and relationships (R.11 & 21)	<ul style="list-style-type: none"> <li>• Adopt legally enforceable regulations or guidelines establishing an explicit obligation for all financial institutions to perform the elements required by Recommendation 11.</li> <li>• Adjust legislation to clarify obligations under Recommendation 21 in its Guidelines and Information Circulars and making these measures legally enforceable.</li> </ul>
Suspicious transaction reports and other reporting (R.13-14, 19, 25 & SR.IV)	<ul style="list-style-type: none"> <li>• Amend the FTR Act to apply to all financial institutions as defined in the FATF Recommendations.</li> <li>• Expand the definition of the FT offence (to include the provision/collection of funds for an individual terrorist and the collection of funds for a terrorist organisation) so as to ensure that transactions related to these activities is reportable.</li> <li>• AUSTRAC could provide more sanitised examples of actual money laundering cases and/or information on that decision or result of an STR filed.</li> </ul>
Cross-border declaration or disclosure (SR.IX)	<ul style="list-style-type: none"> <li>• Amend legislation to cover incoming and outgoing cross-border transportations of bearer negotiable instruments.</li> </ul>
Internal controls, compliance, audit and foreign branches (R.15 & 22)	<ul style="list-style-type: none"> <li>• Impose obligations for all cash dealers to ensure that the proposed controls, policies and procedures cover, <i>inter alia</i>, CDD obligations, record detection, the detection of unusual and suspicious transactions, and the reporting obligations, designation of a AML/CFT compliance officer at the management level; an adequately resourced and independent audit function, ongoing employee training, and adequate screening procedures.</li> <li>• Require branches and subsidiaries to apply the higher AML/CFT standard, to the extent that the laws of the host country allows.</li> <li>• In the event where a foreign branch or subsidiary is unable to observe appropriate AML/CFT measures because this is prohibited by local (i.e. host country) laws, regulations or other measures, those financial institutions should be required to inform Australian authorities.</li> <li>• Require financial institutions to pay particular attention that the principle is observed wherewith to branches and subsidiaries in countries which do not or insufficiently apply the FATF Recommendations.</li> </ul>
Shell banks (R.18)	<ul style="list-style-type: none"> <li>• Prohibit financial institutions from entering into, or continuing, correspondent banking relationships with shell banks and require financial institutions to satisfy themselves that respondent financial institutions in a foreign country do not permit their accounts to be used by shell banks.</li> </ul>
The supervisory and oversight system - competent authorities and SROs Role, functions, duties and powers (including sanctions)	<ul style="list-style-type: none"> <li>• Foster greater formal co-operation amongst relevant financial sector supervisors and regulators on AML/CFT issues and operational developments going forward.</li> <li>• Develop an on-going and comprehensive system of on-site AML/CFT compliance inspections across the full range of</li> </ul>

(R. 23, 30, 29, 17, 32, & 25).	<p>financial institutions.</p> <ul style="list-style-type: none"> <li>• Institute an administrative penalty regime under which administrative penalties can be imposed on regulated entities and persons who are materially non-compliant in respect of their obligations under the FTR Act.</li> <li>• It should also be provided that a failure or wilful disregard of FTR Act obligations would constitute a ground for declaring a director, manager or employee of a cash dealer to be in breach of fit and proper norms, with the resultant consequences.</li> <li>• Inspections powers in the FTR Act should also be amended to expressly include such generally accepted standard inspection powers such as checking policies and procedures, sample testing, or the investigation of any other issue required by the FTR Act.</li> <li>• There should also be a provision clarifying that offences by a cash dealer in specific contravention of Australia's AML/CFT legislation can result in the cancellation of a licence or revocation of authorisation held by that person or body corporate cash dealer.</li> <li>• Remedy the current limitation on AUSTRAC's ability to share information with APRA.</li> <li>• For AUSTRAC to be an effective AML/CFT regulator under the current FATF standards, substantial dedicated financial resources must be directed toward the Reporting and Compliance section to increase staff numbers, to train existing staff and to embark on a targeted compliance drive amongst cash dealers through actual audit inspections in increased numbers.</li> <li>• There remains a distinct need for an enhancement of supervisory skills and training pertaining to the conduct of on-site inspections and enforcement-related activities.</li> <li>• Australia needs to develop a system to license and/or register all remittance dealers and bureaux de change. Australia also needs to extend licensing requirements to the remaining financial institutions not covered by current arrangements.</li> <li>• AUSTRAC should issue further guidance on the other AML/CFT preventative measures.</li> </ul>
Money value transfer services (SR.VI)	<ul style="list-style-type: none"> <li>• Australia should require all MVT service operators to be licensed or registered, and AUSTRAC should maintain a comprehensive list of such service providers and their details;</li> <li>• Australia should therefore revise the FTR Act accordingly and subject MVT service operators to comprehensive AML/CFT requirements (the full scope of Recommendations 4-11, 13-15, 21-23, and SR VII).</li> <li>• Australia should also require MVT service operators to maintain a current list of their agents and make these available to AUSTRAC.</li> <li>• While AUSTRAC has invested considerable effort to locate and educate MVT operators so as to bring them into the reporting regime, AUSTRAC or another competent authority needs to go beyond education visits and fully supervise these entities, including full on-site inspections.</li> </ul>
<b>4. Preventive Measures – Non-Financial Businesses and Professions</b>	

Customer due diligence and record-keeping (R.12) (Applying R.5, 6, 8-11, 17)	<ul style="list-style-type: none"> <li>• Australia should bring in legislative changes to ensure that all DNFBPs have adequate CDD and record-keeping, and transaction monitoring obligations in the situations required by Recommendation 12.</li> <li>• Appropriate sanctions should be adopted for non-compliance, including a regime of administrative sanctions.</li> </ul>
Suspicious transaction reporting (R.16) (Applying R. 13-15, 17, 21)	<ul style="list-style-type: none"> <li>• The scope of FTR Act needs to be enhanced so as to bring all types of DNFBPs under the STR regime. A regime of administrative sanctions should also be considered for DNFBPs for non-compliance with reporting obligations.</li> <li>• DNFBPs should be required to establish and maintain internal procedures, policies and controls to prevent ML and FT, and to communicate these to their employees. These procedures, policies and controls should cover, inter alia, CDD, record retention, the detection of unusual and suspicious transactions and the reporting obligation. DNFBPs should be required to maintain an independent audit function, establish ongoing employee training.</li> <li>• Australia should compel DNFBPs to pay special attention to transaction involving certain countries, make their findings available in writing, and apply appropriate counter-measures. Information Circulars issued for DNFBPs in this area would need to be transformed into legally enforceable circulars.</li> </ul>
Regulation, supervision and monitoring (R.17, 24-25)	<ul style="list-style-type: none"> <li>• Australia should introduce administrative sanctions for breaches of AML/CFT requirements by all DNFBPs, once they are made subject to the FTR Act or other AML/CFT requirements.</li> <li>• The scope and coverage of reporting entities should be enhanced to include DNFBPs enabling AUSTRAC or SROs to regulate and supervise such entities from AML/CFT perspective.</li> <li>• Competent authorities such as AUSTRAC or SROs should establish guidelines that would cover the full range of DNFBP and assist them to implement and comply with their respective AML/CFT requirements.</li> </ul>
Other designated non-financial businesses and professions (R.20)	
<b>5. Legal Persons and Arrangements &amp; Non-Profit Organisations</b>	
Legal Persons – Access to beneficial ownership and control information (R.33)	<ul style="list-style-type: none"> <li>• Australia should consider broadening its requirements on beneficial ownership so that information on ownership/control is more readily available in a more timely fashion. This could include, for example, restricting the use of nominee directors and shareholders, or obliging legal persons to record the information on beneficial ownership in its register.</li> </ul>
Legal Arrangements – Access to beneficial ownership and control information (R.34)	<ul style="list-style-type: none"> <li>• Improve the processes in place to enable competent authorities to obtain or have access in a timely fashion to adequate, accurate and current information on the beneficial ownership and control of legal arrangements, and in particular the settlor, the trustee and the beneficiaries of express trusts. Australia should enact more comprehensive measures to require that this data be collected or otherwise ensure that it can be made available.</li> </ul>

Non-profit organisations (SR.VIII)	<ul style="list-style-type: none"> <li>• Australia should consider more thoroughly reviewing the adequacy of laws and regulations in place to ensure that terrorist organisations cannot pose as legitimate non-profit organisations.</li> <li>• Australia should give further consideration to implementing specific measures from the Best Practices Paper to SR VIII or other measures to ensure that funds or other assets collected by or transferred through non-profit organisations are not diverted to support the activities of terrorist organisations.</li> </ul>
<b>6. National and International Co-operation</b>	
National co-operation and coordination (R.31)	<ul style="list-style-type: none"> <li>• Improve the level of co-operation and co-ordination between AUSTRAC, ASIC, and APRA, and also to enhance co-ordination at the policy level, possibly through the establishment of a formal national co-ordination mechanism.</li> </ul>
The Conventions and UN Special Resolutions (R.35 & SR.I)	<ul style="list-style-type: none"> <li>• Impose stricter customer identification (beneficial ownership) requirements for accounts and transactions in financial institutions as stipulated in Article 18 of the CFT Convention.</li> </ul>
Mutual Legal Assistance (R.32, 36-38, SR.V)	<ul style="list-style-type: none"> <li>• Consider, on a timely basis, entering into further agreements for co-ordination of asset sharing, as this may be needed by other countries in order to share and receive proceeds from confiscated property.</li> <li>• Specifically criminalise the collection of funds for terrorist organisations and the provision/collection of funds involving individual terrorists, to ensure that the discretionary grounds of dual criminality is not used in the future to refuse legal assistance requests involving these crimes.</li> </ul>
Extradition (R.32, 37 & 39, & SR.V)	<ul style="list-style-type: none"> <li>• Specifically criminalise the collection of funds for terrorist organisations and the provision/collection of funds involving individual terrorists, to ensure that the dual criminality requirement in current law could not prevent the extradition of those who have engaged in these acts.</li> </ul>
Other Forms of Co-operation (R.32 & 40, & SR.V)	<ul style="list-style-type: none"> <li>• Australia is compliant with Recommendation 40. Although AUSTRAC does not need an agreement to share information, AUSTRAC should consider initiating exchange instruments to formalise exchange of AML/CFT regulatory information with foreign supervisors.</li> </ul>



**Table 3: Authorities' Response to the Evaluation (if necessary)**

Relevant sections and paragraphs	Country Comments
Page 153 (Table 1)	<p>Recommendation 27: Footnote 12 of the report notes the initiatives the Australian government through the AFP has already taken to enhance the ability of the AFP to investigate and pursue money laundering as a separate charge.</p>
Page 158 (Table 2)	<p>Criminalisation of Money Laundering (Recommendations 1 &amp; 2): Footnote 12 of the report notes the initiatives the Australian government through the AFP has already taken to enhance the ability of the AFP to investigate and pursue money laundering as a separate charge.</p>
Page 158 (Table 2)	<p>Criminalisation of Terrorist Financing (Special Recommendation II): The Australian Government will be introducing legislative amendments to address this requirement.</p>
Page 158 (Table 2)	<p>Law enforcement, prosecution &amp; other competent authorities: Footnote 12 of the report notes the initiatives the Australian government through the AFP has already taken to enhance the ability of the AFP to investigate and pursue money laundering as a separate charge.</p>
Page 161 (Table 2)	<p>Cross-border declaration or disclosure (Special Recommendation IX): The Australian Government will be introducing legislative amendments to address this requirement.</p>
Page 164 (Table 2)	<p>Mutual Legal Assistance (Special recommendation V) &amp; Extradition (Special Recommendation (Special Recommendation V): The Australian Government will be introducing legislative amendments to address this requirement.</p>

## **9. ANNEXES**

**Annex 1: List of abbreviations**

**Annex 2: Overview of the Financial Institutions Sector**

**Annex 3: Overview of the types of legal persons and arrangements**

**Annex 4: Money laundering statute**

**Annex 5: Details of all bodies met on the on-site mission**

## List of abbreviations

ABA	Australian Banker's Association
ABN	Australian Business Number
ACC	Australian Crime Commission
ACCC	Australian Competition and Consumer Commission
ACN	Australian Company Number
ACS	Australian Customs Service
AFP	Australian Federal Police
AGD	Attorney-General's Department
AIC	Australian Institute of Criminology
ALIEN	Australian Law Enforcement Intelligence Net
AML	Anti-money laundering
APG	Asia Pacific Group on Money Laundering (APG)
APRA	Australian Prudential Regulatory Authority
ARBN	Australian Registered Business Number
ARSN	Australian Registered Scheme Number
ASIC	Australian Securities and Investments Commission
ASIO	Australian Security Intelligence Organisation
ASX	Australian Stock Exchange
ATO	Australian Taxation Office
AUSTRAC	Australian Transaction Reports Analysis Centre
CDD	Customer Due Diligence
CDPP	Commonwealth Director of Public Prosecutions
CFT	Counter finance-terrorism
DFAT	Department of Foreign Affairs and Trade
DNFBP	Designated Non-Financial Businesses and Professions
EI	Exchange Instrument
FIAT	Financial Intelligence Assessment Team
FIT	Financial Investigation Team
FIU	Financial Intelligence Unit
FTR Act	<i>Financial Transaction Reports Act 1988</i>
GPAG	Gaming Provider Advisory Group
GST	Goods and Services Tax
KYC	Know Your Customer
NCA	National Crime Authority (the ACC prior to 2002)
NCCT	Non-Cooperative Countries and Territories
NNI	National Names Index
NSWCC	New South Wales Crime Commission
MACMA	<i>Mutual Assistance in Criminal Matters Act 1987</i>
PAG	Provider Advisory Group
POCA 1987	<i>Proceeds of Crime Act 1987</i>
POCA 2002	<i>Proceeds of Crime Act 2002</i>
PEP	Politically Exposed Person
RBA	Reserve Bank of Australia
COTUNA	<i>Charter of the United Nations Act 1945</i>
SCTR	Significant Cash Transaction
SFE	Sydney Futures Exchange
IFTI	International Funds Transfer Instruction
ICAA	Institute of Chartered Accountants in Australia
ICTR	International Currency Transfer
NIDS	National Illicit Drug Strategy
SUSTR	Suspect Transactions
TAB	Totalisator Agency Board

## OVERVIEW OF THE FINANCIAL INSTITUTIONS SECTORS

FINANCIAL INSTITUTIONS: NUMBER AND TYPE OF ENTITIES, AND SERVICES PROVIDED (as of 30 June 2004)			
Number of entities <sup>26</sup>	Type of Financial institution	Services that the financial institution provides <sup>27</sup>	Supervisory Authority(ies) <sup>28,29,30</sup>
52	Banks (ADI)	Deposit taking (foreign branches are limited to deposits above \$250,000), lending. Australia's larger banks provide a full range of financial products and services in addition to performing a traditional banking function	APRA, AUSTRAC ASIC State credit regulator
14	Building Societies (ADI)	Deposit taking, lending	APRA, AUSTRAC ASIC State credit regulator
178	Credit Unions (ADI) (includes 1 savings and loans)	Deposit taking, lending	APRA, AUSTRAC ASIC State credit regulator
2	Specialised credit card institutions (ADI)	Deposit taking, lending, issuing and managing means of payment	APRA, AUSTRAC ASIC State credit regulator
3	Other ADIs	Provide services to credit unions and building societies, e.g. treasury functions and payment clearing facilities	APRA, AUSTRAC ASIC
20	Representative offices of foreign banks	Representative function only - may not undertake banking business in Australia	APRA <sup>31</sup> ASIC
	Finance companies	Lending, factoring	ASIC AUSTRAC State credit regulator

<sup>26</sup> The number of financial service providers may not equal the number of ASIC licences, as numerous providers may be covered by a single license. In particular, where a financial service provider is acting as an authorised representative of a licensee, they do not require a separate license.

<sup>27</sup> Australia's financial sector regulation is primarily *function*-based rather than *institution*-based. Whether an entity is legally able to perform a particular financial activity will generally depend on whether it has the appropriate licenses and/or other authorisations and meets the associated conditions, not the nature or structure of the entity and its other functions. For this reason, a single entity may provide a wide range of financial services. For example, in addition to traditional banking services such as deposit-taking and lending, Australia's larger banks provide a full range of financial products and services including currency exchange, financial advice, capital raising and securities dealing.

<sup>28</sup> Reflecting Australia's functional and objectives-based approach to financial sector regulation, the financial sector regulators have *function*-based rather than *institution*-based jurisdictions and accountabilities. This means that a single financial service provider may be supervised by more than one regulator, for different and distinct purposes.

<sup>29</sup> References to ASIC refer to its financial services regulation. Additionally, all corporations are regulated by ASIC for the purposes of corporations regulation.

<sup>30</sup> References to AUSTRAC mean the financial service provider meets the 'cash dealer' definition under the FTR Act and is therefore subject to AUSTRAC regulation under the Act. However, whether the provider has any obligations under the Act will depend on the nature of their transactions.

<sup>31</sup> Reflecting the limited activities undertaken by representative offices of foreign banks, many aspects of APRA's supervisory regime for banks and other ADIs do not apply to these entities.

FINANCIAL INSTITUTIONS: NUMBER AND TYPE OF ENTITIES, AND SERVICES PROVIDED (as of 30 June 2004)			
	Lease finance companies	Financial leasing	State credit regulator
142	General Insurers	Insurance	APRA, ASIC, AUSTRAC
37	Life Insurers	Insurance	APRA, ASIC, AUSTRAC
32	Friendly societies	Individual and collective portfolio management	APRA, ASIC
150	Approved trustees (of superannuation funds)	Individual and collective portfolio management	APRA, ASIC
9,980	Superannuation entities	Individual and collective portfolio management	APRA, ASIC
281,298	Self-managed superannuation funds	Individual and collective portfolio management	ATO
11	Financial markets	Participation in securities issues	ASIC
4	Clearing and settlement facilities	Participation in securities issues	ASIC
Approx. 540 total	Market dealers (includes stockbrokers, futures brokers, FX brokers)	Participation in securities issues	ASIC, AUSTRAC
809	Investment advisors	Individual and collective portfolio management	ASIC
578	Funds managers	Individual and collective portfolio management	ASIC, AUSTRAC
4,360	Managed investment schemes	Individual and collective portfolio management	ASIC
462	Life insurance brokers	Underwriting and placement of life insurance	ASIC
60 known dealers	Bureaux de change	Money and currency changing, transfer of money or value	AUSTRAC
250 known entities (estimated as half of total number), including 4,300 Western Union agents; 25 Travelex outlets; other alternative remittance companies	Money remittance companies	Money and currency changing, transfer of money or value	ASIC, AUSTRAC

## OVERVIEW OF THE TYPES OF LEGAL PERSONS AND ARRANGEMENTS

TYPE OF LEGAL PERSON/ARRANGEMENT	CHARACTERISTICS OF THE LEGAL PERSON	REQUIREMENTS FOR THE ESTABLISHMENT OF THE LEGAL PERSON
Company (proprietary)	<ul style="list-style-type: none"> <li>• Must have between one and 50 shareholders (which may be natural or corporate legal persons).</li> <li>• Must have at least one director (at least one director must be a natural person) who must reside in Australia. Not required to have a secretary, but, if it does, at least one secretary must ordinarily reside in Australia.</li> <li>• Directors are responsible for managing the company's business. It is a replaceable rule that shareholders may appoint directors by resolution at a general meeting. The directors of a proprietary company are paid remuneration as determined by resolution.</li> <li>• Must maintain a register of members (name, address, and date entered into the register) and make the register available to anyone (but the register must not be used to contact a person or send them material). The register of companies with share capital must also show shares held by each member and other details.</li> </ul>	<ul style="list-style-type: none"> <li>• To register a company, a person must lodge an application with the Australian Securities and Investments Commission (ASIC).</li> <li>• Must submit details of: the proposed company name, the class and type of company; the registered office and principal place of business (if different to the registered office address); director and secretary; share structure; and members' share.</li> <li>• Information available to public through ASIC's corporate database includes: Australian Company Number (ACN) and/or Australian Business Number (ABN), entity's current status; registered office address and principal place of business, details of officeholders—directors and secretary; charges and documents lodged, information on ownership &amp; share structure (names, addresses, and number of shares held by top 20 shareholders). However, a company notifies ASIC of this information from its own members' register that it is required to maintain under the <i>Corporations Act 2001</i>.</li> </ul>
Company (public - limited by shares)	<ul style="list-style-type: none"> <li>• Must have at least one shareholder (which may be natural or corporate legal persons).</li> <li>• Must have at least three directors (at least 2 of which must ordinarily reside in Australia) and must have one company secretary and at least one secretary must ordinarily reside in Australia.</li> <li>• Directors are responsible for managing the company's business. The appointment of directors of a public company must be voted upon individually unless the company unanimously agrees that two or more directors may be elected by the same resolution. The ASX listing rules require listed companies to hold an election of directors each year. The directors of a company are paid remuneration as determined by resolution, and there are additional rules for the payments of remuneration to directors under Chapter 2E of the <i>Corporations Act 2001</i>.</li> <li>• Must maintain a register of members (name, address, and date entered into the register) and</li> </ul>	<ul style="list-style-type: none"> <li>• To register a company, a person must lodge an application with ASIC.</li> <li>• Must submit details of: the proposed company name, the class and type of company; the registered and principal business office; director and secretary; share structure; and members' share.</li> <li>• Information available to public through ASIC's corporate database includes: ACN/ABN, entity's current status; registered office and principal place of business, details of office holders—directors and secretary; charges and documents lodged, information on ownership &amp; share structure (names, addresses, and number of shares held by top 20 shareholders). However, a company notifies ASIC of share and member details from its own members' register that it is required to maintain under the <i>Corporations Act 2001</i>. The notification obligations on a public company in relation to share and member</li> </ul>

	make the register available to anyone (but the register must not be used to contact a person or send them material). The register of companies with share capital must also show shares held by each member and other details.	details is generally once a year at the time of responding to the information contained in the company's annual statement given by ASIC to a company at the time of its review date.
<b>Company (public - limited by guarantee)</b>	<ul style="list-style-type: none"> <li>• Characteristics similar to public company limited by shares (see above), except public company limited by guarantee cannot issue share capital.</li> <li>• On winding up, company debts are to be met from the company's assets, in the first instance. Members' liability is limited to the agreed guarantee amount.</li> </ul>	<ul style="list-style-type: none"> <li>• To register a company, a person must lodge an application with ASIC.</li> <li>• Must submit details of: the proposed company name, the class and type of company; the registered and principal business office; director and secretary; member's guarantee.</li> <li>• Information available to public through ASIC's corporate database includes: ACN/ABN, entity's current status; registered office and principal place of business, details of office holders—directors and secretary; charges and documents lodged, information on ownership &amp; guarantee amounts (names, addresses, etc). However, a company notifies ASIC of member details from its own members' register that it is required to maintain under the <i>Corporations Act 2001</i>. The notification obligations on a public company limited by guarantee in relation to member details is generally once a year at the time of responding to the information contained in the company's annual statement given by ASIC to a company at the time of its review date.</li> </ul>
<b>Partnership</b>	<ul style="list-style-type: none"> <li>• Formed to carry on business with a view to profit for members.</li> <li>• Partnership agreement usually constituted by deed, setting out rights and obligations of partners. Partners can be natural or corporate legal persons.</li> <li>• Partnerships are not separate legal entities and hence not a legal person.</li> <li>• The partners are jointly and severally liable for the obligations incurred in the name of the partnership.</li> </ul>	<ul style="list-style-type: none"> <li>• Requirements determined by State and Territory legislation, such as <i>Partnership Act 1892</i> (NSW).</li> <li>• Not required to be registered as a partnership. Registration is required for the partnership's business name or if partnership requires a licence for its business activities.</li> </ul>
<b>Limited partnership</b>	<ul style="list-style-type: none"> <li>• Formed to carry on business with a view to profit for members.</li> <li>• Partnership agreement usually constituted by deed, setting out rights and obligations of partners. Partners can be natural or corporate legal persons.</li> <li>• Not a separate legal entity or a legal person.</li> <li>• Partners are jointly and severally liable for the obligations incurred in the name of the partnership.</li> <li>• Limited partner's liability is limited to the amount the partner contributes to the capital of the firm as appears on the register.</li> <li>• Must keep register of members and committee</li> </ul>	<ul style="list-style-type: none"> <li>• Requirements determined by State and Territory legislation, such as <i>Partnership Act 1892</i> (NSW).</li> <li>• Required to be registered as a limited partnership with relevant State or Territory authority, such as NSW Office of Fair Trading, in addition to business name or business licence requirements; States and Territories keep registers which are available to public.</li> </ul>

	members (name, address, and date entered into the register).	
<b>Incorporated limited partnership</b>	<ul style="list-style-type: none"> <li>Formed to carry on business with a view to profit to members.</li> <li>Partnership agreement usually constituted by deed, setting out rights and obligations of partners.</li> <li>Upon registration, partnership becomes a separate legal entity from its partner members. A partnership consists of at least one general partner, whose liability is unlimited, and one limited liability partner. Either type of partner can be natural or corporate legal persons.</li> <li>General partners are responsible for the management of the partnership. Limited partners are generally precluded from taking part in the management of the partnership.</li> <li>Partnership debts are to be met from the partnership's assets, in the first instance. General partners are jointly and severally liable for any short fall.</li> <li>Limited partner's liability is limited to the amount the partner contributes to the capital of the firm as appears on the register.</li> <li>Must keep register of members and committee members (name, address, and date entered into the register).</li> </ul>	<ul style="list-style-type: none"> <li>Requirements determined by State and Territory legislation, such as <i>Partnership Act 1892 (NSW)</i>.</li> <li>Required to be registered as an incorporated limited partnership with relevant State or Territory Authority, such as NSW Office of Fair Trading, in addition to business name or business licence requirements; States and Territories keep registers which are available to public.</li> </ul>
<b>Unincorporated Association</b>	<ul style="list-style-type: none"> <li>Associations, societies, chambers, institutes, unions, clubs, federations, councils, leagues, guilds or charities which are essentially voluntary in nature.</li> <li>Unincorporated associations are not separate legal entities and hence not a legal person.</li> </ul>	<ul style="list-style-type: none"> <li>Largely governed by Australian common law requirements.</li> <li>Not subject to registration or ongoing compliance requirements in relation to their formation or activities.</li> </ul>
<b>Incorporated Association</b>	<ul style="list-style-type: none"> <li>Associations, societies, clubs, institutions or bodies, including charitable foundations, formed or carried on for any lawful, non-profit purpose that have no less than five members.</li> <li>Upon incorporation, the organisation becomes a separate legal entity from its members, hence members immune from personal liability at the suit of third parties.</li> <li>Must hold annual general meetings and submit financial statements to members, which must give a true and fair view of the financial position of the association.</li> <li>The public officer must lodge an annual statement with the regulator within one month after the annual general meeting.</li> <li>Must keep register of members and committee members (name, address, and date entered into the register).</li> </ul>	<ul style="list-style-type: none"> <li>Requirements determined by State and Territory legislation, such as <i>Associations Incorporation Act 1984 (NSW)</i></li> <li>Must register with the relevant State or Territory authority, such as the NSW Registry of Co-operatives &amp; Associations;</li> <li>If operating inter-state, must register with ASIC;</li> <li>Information available to public through ASIC's corporate database includes: ABN, entity's current status; principal place of business, details of office holders—committee members; information on membership (names, addresses, etc); and through State or Territory authority.</li> </ul>
<b>Co-operative (non-trading)</b>	<ul style="list-style-type: none"> <li>A co-operative may carry out any activity or activities contained within its rules. These activities will reflect the nature of the co-operative's involvement in areas such as primary production, manufacturing, trading,</li> </ul>	<ul style="list-style-type: none"> <li>Requirements determined by State and Territory legislation, such as <i>Co-operatives Act 1992 (NSW)</i> or <i>Co-operative Housing and Starr-Bowkett Societies Act 1998 (NSW)</i>.</li> </ul>



	<p>community or social activity.</p> <ul style="list-style-type: none"> <li>• Non-trading co-operatives must not give returns or distributions on surplus or share capital to members other than the nominal value of shares (if any) at winding up. Co-operatives must have no less than five members.</li> <li>• Co-operatives belong to and are run for the benefit of their members on mutual and democratic principles.</li> <li>• Upon registration, the co-operative becomes a separate legal entity from its members; hence members are immune from personal liability at the suit of third parties.</li> <li>• Must hold annual general meetings and submit financial statements to members, which must give a true and fair view of the financial position of the association.</li> <li>• The public officer must lodge an annual statement with the regulator within one month after the annual general meeting.</li> <li>• Must keep registers of members, directors and shares; loans, debentures, deposits and securities given and taken; subordinated debt; co operative capital units (CCUs); fixed assets; notifiable interests, and memberships cancelled.</li> </ul>	<ul style="list-style-type: none"> <li>• Must register with the relevant State or Territory authority, such as the NSW Registry of Co-operatives &amp; Associations;</li> <li>• If operating inter-state, must register with ASIC;</li> <li>• Information available to public through ASIC's corporate database includes: ABN, entity's current status; principal place of business, details of office holders—directors; information on membership (names, addresses, etc); and through State or Territory authority.</li> </ul>
Co-operative (trading)	<ul style="list-style-type: none"> <li>• A co-operative may carry out any activity or activities contained within its rules. These activities will reflect the nature of the co-operative's involvement in areas such as primary production, manufacturing, trading, community or social activity.</li> <li>• A trading co-operative must have a share capital and is allowed to give returns or distributions on surplus or share capital. Co-operatives must have no less than five members.</li> <li>• Financial trading co-operatives, those generally engaged in deposit taking and lending to individuals, commonly referred to as non-bank financial institutions, such as building societies, credit unions, co-operative housing societies and friendly societies, face prudential regulation by the Australian Prudential Regulatory Authority (APRA).</li> <li>• Co-operatives belong to and are run for the benefit of their members on mutual and democratic principles.</li> <li>• Upon registration, the co-operative becomes a separate legal entity from its members; hence members are immune from personal liability at the suit of third parties.</li> <li>• Must hold annual general meetings and submit financial statements to members, which must give a true and fair view of the financial position of the association.</li> <li>• The public officer must lodge an annual statement with the regulator within one month</li> </ul>	<ul style="list-style-type: none"> <li>• Requirements determined by State and Territory legislation, such as <i>Co-operatives Act 1992</i> (NSW) and <i>Co-operative Housing and Starr-Bowkett Societies Act 1998</i> (NSW).</li> <li>• Must register with the relevant State or Territory authority, such as the NSW Registry of Co-operatives &amp; Associations;</li> <li>• If operating inter-state, must register with ASIC;</li> <li>• Information available to public through ASIC's corporate database includes: ABN, entity's current status; principal place of business, details of office holders—directors; information on membership (names, addresses, etc); and through State or Territory authority.</li> </ul>

	<p>after the annual general meeting. Financial trading co-operatives must comply with APRA reporting requirements.</p> <ul style="list-style-type: none"> <li>• Must keep registers of members, directors and shares; loans, debentures, deposits and securities given and taken; subordinated debt; co-operative capital units (CCUs); fixed assets; notifiable interests, and memberships cancelled.</li> </ul>	
Trusts (unit and superannuation trusts)	<ul style="list-style-type: none"> <li>• Trustees, who must be legal persons, either real or corporate, hold trust property for the benefit of other parties, called beneficiaries. For unit and superannuation trusts, the beneficiaries' ownership interests in the trust property are divided into identifiable units, which are similar to shares in companies.</li> <li>• Trust agreement usually constituted by deed, setting out rights and obligations of the trustees and beneficiaries.</li> <li>• Trusts are not separate legal entities. The trustee is the legal entity responsible for the trust property; hence trustee is liable for the obligations incurred in the name of the trust.</li> <li>• Superannuation trusts face prudential supervision by APRA, and must comply with APRA reporting requirements.</li> <li>• Managed investment schemes, which are constituted as trusts, are provided for in the <i>Corporations Act 2001</i>. Managed investment schemes must be registered with ASIC, comply with reporting requirements, and maintain similar registers as companies.</li> </ul>	<ul style="list-style-type: none"> <li>• Requirements determined by State and Territory legislation, such as <i>Trustee Act 1925</i> (NSW).</li> <li>• Not required to be registered as a trust. Registration is required for the trust's or trustee's business name or if the trust or trustee requires a licence for its business activities.</li> <li>• If the trustee is a corporate entity, it must comply with the registration requirements for a company (see above).</li> </ul>
Trusts	<ul style="list-style-type: none"> <li>• Trustees, who must be legal persons, either real or corporate, hold trust property for the benefit of other parties, called beneficiaries.</li> <li>• Trust agreement usually constituted by deed, setting out rights and obligations of the trustees and beneficiaries.</li> <li>• Trusts are not separate legal entities. The trustee is the legal entity responsible for the trust property; hence trustee is liable for the obligations incurred in the name of the trust.</li> </ul>	<ul style="list-style-type: none"> <li>• Requirements determined by State and Territory legislation, such as <i>Trustee Act 1925</i> (NSW).</li> <li>• Not required to be registered as a trust. Registration is required for the trust's or trustee's business name or if the trust or trustee requires a licence for its business activities.</li> <li>• If the trustee is a corporate entity, it must comply with the registration and reporting requirements for a company (see above).</li> </ul>

## Chapter 10—National infrastructure

## Part 10.2—Money laundering

## Division 400—Money laundering

## 400.1 Definitions

- (1) In this Division:

**ADI** (authorised deposit-taking institution) means:

- (a) a body corporate that is an ADI for the purposes of the *Banking Act 1959*; or
- (b) the Reserve Bank of Australia; or
- (c) a person who carries on State banking within the meaning of paragraph 51(xiii) of the Constitution.

**deals with money or other property** has the meaning given by section 400.2.

**instrument of crime**: money or other property is an instrument of crime if it is used in the commission of, or used to facilitate the commission of, an offence that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence).

**proceeds of crime** means any money or other property that is derived or realised, directly or indirectly, by any person from the commission of an offence that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence).

**property** means real or personal property of every description, whether situated in Australia or elsewhere and whether tangible or intangible, and includes an interest in any such real or personal property.

- (2) To avoid doubt, a reference in this Division to **money or other property** includes a reference to financial instruments, cards and other objects that represent money or can be exchanged for money, whether or not they have intrinsic value.

400.2 Meaning of *dealing with money or other property*

- (1) For the purposes of this Division, a person **deals with money or other property** if:

- (a) the person does any of the following:
  - (i) receives, possesses, conceals or disposes of money or other property;
  - (ii) imports money or other property into, or exports money or other property from, Australia;
  - (iii) engages in a banking transaction relating to money or other property; and
- (b) the money or other property is proceeds of crime, or could become an instrument of crime, in relation to an offence that is a Commonwealth indictable offence or a foreign indictable offence.

- (2) For the purposes of this Division, a person **deals with money or other property** if:

- (a) the person does any of the following:
  - (i) receives, possesses, conceals or disposes of money or other property;
  - (ii) imports money or other property into, or exports money or other property from, Australia;
  - (iii) engages in a banking transaction relating to money or other property; and
- (b) the person does any of the matters referred to in paragraph (a):
  - (i) in the course of or for the purposes of importation of goods into, or exportation of goods from, Australia; or

- (ii) by means of a communication using a postal, telegraphic or telephonic service within the meaning of paragraph 51(xx) of the Constitution; or
- (iii) in the course of banking (other than State banking that does not extend beyond the limits of the State concerned).

(3) In this section:

**banking transaction** includes:

- (a) any transaction made at an ADI; and
- (b) any transaction involving a money order.

**Commonwealth indictable offence** means an offence against a law of the Commonwealth, or a law of a Territory (other than the Australian Capital Territory and the Northern Territory), that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence).

**export money or other property**, from Australia, includes transfer money or other property from Australia by an electronic communication.

**foreign indictable offence** means an offence against a law of a foreign country constituted by conduct that, if it had occurred in Australia, would have constituted an offence against:

- (a) a law of the Commonwealth; or
- (b) a law of a State or Territory connected with the offence;

that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence).

1. Note: See subsection (4) for when a law of a State or Territory is connected with the offence.

**import money or other property**, into Australia, includes transfer money or other property to Australia by an electronic communication.

(4) For the purposes of the definition of **foreign indictable offence** in subsection (3), a State or Territory is connected with the offence if:

- (a) a dealing in money or property takes place in the State or Territory; and
- (b) the money or property would be proceeds of crime, or could become an instrument of crime, in relation to the offence if the offence were a foreign indictable offence.

#### **400.3 Dealing in proceeds of crime etc.—money or property worth \$1,000,000 or more**

(1) A person is guilty of an offence if:

- (a) the person deals with money or other property; and
- (b) either:
  - (i) the money or property is, and the person believes it to be, proceeds of crime; or
  - (ii) the person intends that the money or property will become an instrument of crime; and
- (c) at the time of the dealing, the value of the money and other property is \$1,000,000 or more.

Penalty: Imprisonment for 25 years, or 1500 penalty units, or both.

(2) A person is guilty of an offence if:

- (a) the person deals with money or other property; and
- (b) either:
  - (i) the money or property is proceeds of crime; or
  - (ii) there is a risk that the money or property will become an instrument of crime; and
- (c) the person is reckless as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires); and
- (d) at the time of the dealing, the value of the money and other property is \$1,000,000 or more.

Penalty: Imprisonment for 12 years, or 720 penalty units, or both.

- (3) A person is guilty of an offence if:
- (a) the person deals with money or other property; and
  - (b) either:
    - (i) the money or property is proceeds of crime; or
    - (ii) there is a risk that the money or property will become an instrument of crime; and
  - (c) the person is negligent as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires); and
  - (d) at the time of the dealing, the value of the money and other property is \$1,000,000 or more.

Penalty: Imprisonment for 5 years, or 300 penalty units, or both.

- (4) Absolute liability applies to paragraphs (1)(c), (2)(d) and (3)(d).

2. Note: Section 400.10 provides for a defence of mistake of fact in relation to these paragraphs.

#### **400.4 Dealing in proceeds of crime etc.—money or property worth \$100,000 or more**

- (1) A person is guilty of an offence if:
- (a) the person deals with money or other property; and
  - (b) either:
    - (i) the money or property is, and the person believes it to be, proceeds of crime; or
    - (ii) the person intends that the money or property will become an instrument of crime; and
  - (c) at the time of the dealing, the value of the money and other property is \$100,000 or more.

Penalty: Imprisonment for 20 years, or 1200 penalty units, or both.

- (2) A person is guilty of an offence if:
- (a) the person deals with money or other property; and
  - (b) either:
    - (i) the money or property is proceeds of crime; or
    - (ii) there is a risk that the money or property will become an instrument of crime; and
  - (c) the person is reckless as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires); and
  - (d) at the time of the dealing, the value of the money and other property is \$100,000 or more.

Penalty: Imprisonment for 10 years, or 600 penalty units, or both.

- (3) A person is guilty of an offence if:
- (a) the person deals with money or other property; and
  - (b) either:
    - (i) the money or property is proceeds of crime; or
    - (ii) there is a risk that the money or property will become an instrument of crime; and
  - (c) the person is negligent as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires); and
  - (d) at the time of the dealing, the value of the money and other property is \$100,000 or more.

Penalty: Imprisonment for 4 years, or 240 penalty units, or both.

- (4) Absolute liability applies to paragraphs (1)(c), (2)(d) and (3)(d).

3. Note: Section 400.10 provides for a defence of mistake of fact in relation to these paragraphs.

#### **400.5 Dealing in proceeds of crime etc.—money or property worth \$50,000 or more**

- (1) A person is guilty of an offence if:
- (a) the person deals with money or other property; and
  - (b) either:
    - (i) the money or property is, and the person believes it to be, proceeds of crime; or
    - (ii) the person intends that the money or property will become an instrument of crime; and
  - (c) at the time of the dealing, the value of the money and other property is \$50,000 or more.

Penalty: Imprisonment for 15 years, or 900 penalty units, or both.

- (2) A person is guilty of an offence if:
- (a) the person deals with money or other property; and
  - (b) either:
    - (i) the money or property is proceeds of crime; or
    - (ii) there is a risk that the money or property will become an instrument of crime; and
  - (c) the person is reckless as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires); and
  - (d) at the time of the dealing, the value of the money and other property is \$50,000 or more.

Penalty: Imprisonment for 7 years, or 420 penalty units, or both.

- (3) A person is guilty of an offence if:
- (a) the person deals with money or other property; and
  - (b) either:
    - (i) the money or property is proceeds of crime; or
    - (ii) there is a risk that the money or property will become an instrument of crime; and
  - (c) the person is negligent as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires); and
  - (d) at the time of the dealing, the value of the money and other property is \$50,000 or more.

Penalty: Imprisonment for 3 years, or 180 penalty units, or both.

- (4) Absolute liability applies to paragraphs (1)(c), (2)(d) and (3)(d).

4. Note: Section 400.10 provides for a defence of mistake of fact in relation to these paragraphs.

#### **400.6 Dealing in proceeds of crime etc.—money or property worth \$10,000 or more**

- (1) A person is guilty of an offence if:
- (a) the person deals with money or other property; and
  - (b) either:
    - (i) the money or property is, and the person believes it to be, proceeds of crime; or
    - (ii) the person intends that the money or property will become an instrument of crime; and
  - (c) at the time of the dealing, the value of the money and other property is \$10,000 or more.

Penalty: Imprisonment for 10 years, or 600 penalty units, or both.

- (2) A person is guilty of an offence if:
- (a) the person deals with money or other property; and
  - (b) either:
    - (i) the money or property is proceeds of crime; or
    - (ii) there is a risk that the money or property will become an instrument of crime; and

- (c) the person is reckless as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires); and
- (d) at the time of the dealing, the value of the money and other property is \$10,000 or more.

Penalty: Imprisonment for 5 years, or 300 penalty units, or both.

- (3) A person is guilty of an offence if:
  - (a) the person deals with money or other property; and
  - (b) either:
    - (i) the money or property is proceeds of crime; or
    - (ii) there is a risk that the money or property will become an instrument of crime; and
  - (c) the person is negligent as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires); and
  - (d) at the time of the dealing, the value of the money and other property is \$10,000 or more.

Penalty: Imprisonment for 2 years, or 120 penalty units, or both.

- (4) Absolute liability applies to paragraphs (1)(c), (2)(d) and (3)(d).

5. Note: Section 400.10 provides for a defence of mistake of fact in relation to these paragraphs.

#### **400.7 Dealing in proceeds of crime etc.—money or property worth \$1,000 or more**

- (1) A person is guilty of an offence if:
  - (a) the person deals with money or other property; and
  - (b) either:
    - (i) the money or property is, and the person believes it to be, proceeds of crime; or
    - (ii) the person intends that the money or property will become an instrument of crime; and
  - (c) at the time of the dealing, the value of the money and other property is \$1,000 or more.

Penalty: Imprisonment for 5 years, or 300 penalty units, or both.

- (2) A person is guilty of an offence if:
  - (a) the person deals with money or other property; and
  - (b) either:
    - (i) the money or property is proceeds of crime; or
    - (ii) there is a risk that the money or property will become an instrument of crime; and
  - (c) the person is reckless as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires); and
  - (d) at the time of the dealing, the value of the money and other property is \$1,000 or more.

Penalty: Imprisonment for 2 years, or 120 penalty units, or both.

- (3) A person is guilty of an offence if:
  - (a) the person deals with money or other property; and
  - (b) either:
    - (i) the money or property is proceeds of crime; or
    - (ii) there is a risk that the money or property will become an instrument of crime; and
  - (c) the person is negligent as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires); and
  - (d) at the time of the dealing, the value of the money and other property is \$1,000 or more.

Penalty: Imprisonment for 12 months, or 60 penalty units, or both.

- (4) Absolute liability applies to paragraphs (1)(c), (2)(d) and (3)(d).

6. Note: Section 400.10 provides for a defence of mistake of fact in relation to these paragraphs.

#### **400.8 Dealing in proceeds of crime etc.—money or property of any value**

- (1) A person is guilty of an offence if:
- (a) the person deals with money or other property; and
  - (b) either:
    - (i) the money or property is, and the person believes it to be, proceeds of crime; or
    - (ii) the person intends that the money or property will become an instrument of crime.

Penalty: Imprisonment for 12 months, or 60 penalty units, or both.

- (2) A person is guilty of an offence if:
- (a) the person deals with money or other property; and
  - (b) either:
    - (i) the money or property is proceeds of crime; or
    - (ii) there is a risk that the money or property will become an instrument of crime; and
  - (c) the person is reckless as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires).

Penalty: Imprisonment for 6 months, or 30 penalty units, or both.

- (3) A person is guilty of an offence if:
- (a) the person deals with money or other property; and
  - (b) either:
    - (i) the money or property is proceeds of crime; or
    - (ii) there is a risk that the money or property will become an instrument of crime; and
  - (c) the person is negligent as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires).

Penalty: 10 penalty units.

#### **400.9 Possession etc. of property reasonably suspected of being proceeds of crime etc.**

- (1) A person is guilty of an offence if:
- (a) the person:
    - (i) receives, possesses, conceals or disposes of money or other property; or
    - (ii) imports money or other property into, or exports money or other property from, Australia; and
  - (b) it is reasonable to suspect either or both of the following:
    - (i) the money or property is proceeds of crime in relation to a Commonwealth indictable offence or a foreign indictable offence;
    - (ii) the money or property is proceeds of crime, and the person's conduct referred to in paragraph (a) takes place in circumstances referred to in subsection (3).

Penalty: Imprisonment for 2 years, or 50 penalty units, or both.

- (2) Without limiting paragraph (1)(b), that paragraph is taken to be satisfied if:
- (a) the conduct referred to in paragraph (1)(a) involves a number of transactions that are structured or arranged to avoid the reporting requirements of the *Financial Transaction Reports Act 1988* that would otherwise apply to the transactions; or
  - (b) the conduct involves using one or more accounts held with ADIs in false names; or
  - (c) the value of the money and property involved in the conduct is, in the opinion of the trier of fact, grossly out of proportion to the defendant's income and expenditure; or



- (d) the conduct involves a significant cash transaction within the meaning of the *Financial Transaction Reports Act 1988*, and the defendant:
  - (i) has contravened his or her obligations under that Act relating to reporting the transaction; or
  - (ii) has given false or misleading information in purported compliance with those obligations; or
- (e) the defendant:
  - (i) has stated that the conduct was engaged in on behalf of or at the request of another person; and
  - (ii) has not provided information enabling the other person to be identified and located.
- (3) Subparagraph (1)(b)(ii) applies if the conduct in question takes place:
  - (a) in the course of or for the purposes of importation of goods into, or exportation of goods from, Australia; or
  - (b) by means of a communication using a postal, telegraphic or telephonic service within the meaning of paragraph 51(xx) of the Constitution; or
  - (c) in the course of banking (other than State banking that does not extend beyond the limits of the State concerned).
- (4) Absolute liability applies to paragraph (1)(b).
- (5) This section does not apply if the defendant proves that he or she had no reasonable grounds for suspecting that the money or property was derived or realised, directly or indirectly, from some form of unlawful activity.
- 7. Note: A defendant bears a legal burden in relation to the matter in subsection (5) (see section 13.4).

#### **400.10 Mistake of fact as to the value of money or property**

- (1) A person is not criminally responsible for an offence against section 400.3, 400.4, 400.5, 400.6 or 400.7 in relation to money or property if:
  - (a) at or before the time of dealing with the money or property, the person considered what was the value of the money or property, and was under a mistaken but reasonable belief about that value; and
  - (b) had the value been what the person believed it to be, the person's conduct would have constituted another offence against this Division for which the maximum penalty, in penalty units, is less than the maximum penalty, in penalty units, for the offence charged.
- 8. Example: Assume that a person deals with money or property that is the proceeds of crime. While the person believes it to be proceeds of crime, he or she is under a mistaken but reasonable belief that it is worth \$90,000 when it is in fact worth \$120,000.
- 9. That belief is a defence to an offence against subsection 400.4(1) (which deals with money or property of a value of \$100,000 or more). However, the person would be guilty of an offence against subsection 400.5(1) (which deals with money or property of a value of \$10,000 or more). Section 400.14 allows for an alternative verdict of guilty of an offence against subsection 400.5(1).
- 10. Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3)).
- (2) A person may be regarded as having considered what the value of the money or property was if:
  - (a) he or she had considered, on a previous occasion, what the value of the money or property was in the circumstances surrounding that occasion; and
  - (b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.

#### **400.11 Proof of certain matters relating to kinds of offences not required**

In a prosecution for an offence against a provision of this Division, it is not necessary to prove the existence of any fault element in relation to any of the following:

- (a) whether an offence may be dealt with as an indictable offence;
- (b) whether an offence is an indictable offence;
- (c) whether an offence is a Commonwealth indictable offence;
- (d) whether an offence is a foreign indictable offence.

#### **400.12 Combining several contraventions in a single charge**

- (1) A single charge of an offence against a provision of this Division may be about 2 or more instances of the defendant engaging in conduct (at the same time or different times) that constitutes an offence against a provision of this Division.
- (2) If:
  - (a) a single charge is about 2 or more such instances; and
  - (b) the value of the money and other property dealt with is an element of the offence in question; that value is taken to be the sum of the values of the money and other property dealt with in respect of each of those instances.

#### **400.13 Proof of other offences is not required**

- (1) To avoid doubt, it is not necessary, in order to prove for the purposes of this Division that money or property is proceeds of crime, to establish:
  - (a) a particular offence was committed in relation to the money or property; or
  - (b) a particular person committed an offence in relation to the money or property.
- (2) To avoid doubt, it is not necessary, in order to prove for the purposes of this Division an intention or risk that money or property will be an instrument of crime, to establish that:
  - (a) an intention or risk that a particular offence will be committed in relation to the money or property; or
  - (b) an intention or risk that a particular person will commit an offence in relation to the money or property.

#### **400.14 Alternative verdicts**

If, on a trial for an offence against a provision of this Division (the *offence charged*), the trier of fact:

- (a) is not satisfied that the defendant is guilty of the offence charged; but
- (b) is otherwise satisfied that the defendant is guilty of another offence against this Division for which the maximum penalty, in penalty units, is less than the maximum penalty, in penalty units, for the offence charged;

the trier of fact may find the defendant not guilty of the offence charged but guilty of the other offence, so long as the person has been accorded procedural fairness in relation to that finding of guilt.

#### **400.15 Geographical jurisdiction**

Section 15.2 (extended geographical jurisdiction—category B) applies to each offence against this Division.

#### **400.16 Saving of other laws**

This Division is not intended to exclude or limit the operation of any other law of the Commonwealth or any law of a State or Territory.

## DETAILS OF ALL BODIES MET DURING THE ON-SITE MISSION

### I. MINISTRIES/DEPARTMENTS OF STATE

1. Department of the Treasury (Commonwealth Government)
  - *Financial Systems Division*
2. Attorney-General's Department (Commonwealth Government)
  - *Criminal Justice Division*
3. Department of Foreign Affairs & Trade (Commonwealth Government)
4. Ministry of Police (New South Wales Government)
5. Attorney-General's Department (New South Wales Government)

### II. OPERATIONAL AND LAW ENFORCEMENT AGENCIES

1. Australian Transaction Reports and Analysis Centre (AUSTRAC)
2. Australian Federal Police
3. Australian Crime Commission
4. Australian Customs Service
5. Australian Taxation Office
6. New South Wales Police
7. New South Wales Crime Commission

### III. PROSECUTORIAL AUTHORITIES

1. Commonwealth Director of Public Prosecutions
2. New South Wales Director of Public Prosecutions

### IV. FINANCIAL INSTITUTIONS

1. Supervisory bodies
  - *Australian Prudential Regulatory Authority*
  - *Reserve Bank of Australia*
  - *Australian Securities and Investment Commission*
2. Professional associations
  - *Australian Bankers' Association*
  - *International Banks and Securities Association*
  - *Investment and Financial Services Association*
  - *Securities Institute of Australia (check if an SRO)*
  - *Insurance Council of Australia*

### V. REPRESENTATIVES FROM THE FINANCIAL INSTITUTIONS SECTOR

1. Banks
2. Insurance companies
3. Bureaux de change and money/value transfer service providers
4. Securities sector participants

## **VI. DESIGNATED NON-FINANCIAL BUSINESSES AND PROFESSIONS**

1. Supervisory bodies
  - *Casino Control Authority (New South Wales Government)*
2. Self-regulatory organisations
  - *NSW Law Society*
  - *Institute of Chartered Accountants in Australia*
  - *CPA Australia*
3. Professional associations
  - *Real Estate Institute of Australia*
  - *Law Council of Australia*
  -

## **VII. REPRESENTATIVES FROM THE DESIGNATED NON-FINANCIAL BUSINESSES AND PROFESSIONS SECTOR**

1. Accountants and auditors
2. Dealers in precious metals and stones
3. Lawyers
4. Casino operators
5. Holding companies/professional company incorporation
6. Trust law specialist