

1991

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CASH TRANSACTION REPORTS AMENDMENT BILL 1991

EXPLANATORY MEMORANDUM

(Circulated by authority of the Honourable Michael Duffy
M.P. Attorney-General)



OUTLINE

The main purpose of the Cash Transaction Reports Amendment Bill 1991 is to require the reporting to the Cash Transaction Reports Agency (CTRA) by cash dealers in Australia of all international funds transfer instructions (including telex) into and out of Australia sent or received by them which effect a payment of funds either in Australia or a foreign country unless excluded by regulations.

Most international instructions are conducted by a small number of cash dealers through an international computer network known as SWIFT. It is proposed that the cash dealer duplicate the electronic instruction sent or received on behalf of a customer and transmit that information by computer link or disk to the CTRA.

Some instructions are sent by telex where the cash dealer is not a participant in SWIFT or the foreign country is not a member. Where telexes are processed electronically they will be dealt with in the same way as SWIFT transmitted instructions. Where they are processed manually a system of paper based reporting would be required which is costly and logistically difficult. It is envisaged that manually processed telex instructions will, in the short term, be exempt from the reporting requirements where the cash dealer conducts a substantial number of such transactions and is in the process of conversion to electronic processing on the time scale of the next 5 years.

Cash dealers operating in Australia will be protected from suit within Australia in relation to reports made under the provisions.

As a consequence of the increasing focus of the legislation on non-cash transactions e.g. suspect transactions and transactions effected by international electronic instructions, the name of the legislation and of the Agency receiving and analysing this information is to be changed.

The Bill will also clarify the exact time when a person is required under section 15 to make a report to a customs officer when bringing currency into or taking it out of Australia.

FINANCIAL IMPACT STATEMENT

The cost to the CTRA for the first two years of funding is anticipated to be \$13 million. This includes the major expenditure item of \$6 million for the purchase of the necessary computer mainframe and the acquisition and fitout of additional office space. In subsequent years the cost will be less than \$5 million.

The revenue gains flowing directly from the proposed requirements are expected to be \$37 million 1992/93, \$38.2 million 1993/84 and \$40.2 million 1994/95. Productivity gains of \$0.21 million p.a. have also been identified and agreed with the Department of Finance.

NOTES ON CLAUSES

PART 1 - PRELIMINARY

Clause 1 - Short Title

This clause cites the amending Act as the Cash Transaction Reports Amendment Act 1991.

Clause 2 - Commencement

Sections 1, 2, 3 and 7 of the Act will come into operation on Royal Assent. Subject to subclause 2(3), the remaining provisions are, by subclause 2(2), to come into operation on a date to be fixed by Proclamation. By subclause 2(3), if a provision of the Bill is not proclaimed within 12 months after Royal Assent, the provision will commence on the next following day.

The 12 month delay will enable banks to modify their computer facilities to produce and transmit reports and enable the Cash Transaction Reports Agency to acquire and program new computer equipment to receive and analyse the data.

PART 2 - AMENDMENT OF THE CASH TRANSACTION¹ REPORTS ACT 1988

Clause 3 - Principal Act

This clause is a formal provision identifying the Cash Transaction Reports Act 1988 as the Principal Act.

Clause 4 - Amendment of long title

This clause amends the long title of the Principal Act consequent upon a change of name of the Cash Transaction Reports Agency.

Clause 5 - Short title

This clause changes the short title of the Principal Act to the Financial Transaction Reports Act 1988. This change reflects the diminished prominence of cash transactions in the overall scheme of the legislation.

Clause 6 - Interpretation

This clause will make a number of amendments to section 3, the definition section of the Principal Act. To reflect its changed role the Cash Transaction Reports Agency is renamed the Australian Transaction Reports and Analysis Centre. The following terms are defined:

. "AUSTRAC" is defined to mean the Australian Transaction Reports and Analysis Centre. (Clause 11 renames the Cash

Transaction Reports Agency as the Australian Transaction Reports and Analysis Centre in the Principal Act. Consequential changes are made under clause 13).

. "FTR information" (which replaces CTR information) is defined to mean information obtained by the Director of AUSTRAC under the Principal Act. The change from CTR to FTR information complements the amendment to the short title of the Principal Act. References to CTR information are amended to FTR information by clause 13 of this Bill.

. "international funds transfer instruction" is defined to mean an electronic or telegraphic instruction to effect a payment of funds (unless excluded by the regulations). The instruction may be for the crediting of an amount of funds to a customer's account or for the payment of an amount to a person (settlement is effected through a clearing house). The message which carries this instruction is transmitted electronically through the SWIFT network or telegraphically including by telex and telegram.

Clause 7 - Section 15 - Reports in Relation to Transfer of Currency into or out of Australia

This clause inserts new provisions in section 15 of the Principal Act to clarify the exact time when the obligation to report currency transfers into and out of Australia arises and the offence is complete. The uncertainty in the existing provision was brought to light by the decision of the Supreme Court of South Australia in Schultz v Taylor (unreported, 28 June 1991). Section 15 requires a person bringing into or taking out of Australia currency of a value greater than \$5,000 to make a report in a prescribed form to a customs officer. Proposed subsection 15(7A) requires the report to be made at the time the currency concerned is brought into, or taken out of Australia. The amendments will define the exact time at which time currency is brought into, or taken out of Australia in the following way.

Proposed subsection 15(7B) deals with currency being brought into Australia. Paragraph (a) defines the time for passengers entering Australia by aircraft or ship as the point at which the passenger, having collected baggage, arrives at the baggage inspection counter, after being directed to that place by a customs officer, where another customs officer conducts baggage inspection. This means that a person who is required by the section to make a report must present that report to the customs officer as soon as he or she arrives at that place, even before the customs officer asks the passenger any questions or opens the baggage belonging to that passenger. This is to discourage such a person from taking the risk of not making a report, hoping there would be no baggage inspection and then offering to make

the report on discovery by the customs officer of the currency in the baggage. The offence is complete if the report has not been given to the customs officer at this point.

Because customs officers do not inspect the baggage of every incoming passenger and therefore not everyone is directed to the baggage inspection counter, paragraph (a) defines, for those passengers, the time as the point at which they leave the customs hall, being the area set aside for the performance of duties in respect of disembarking passengers.

Paragraph (b) applies to persons who enter Australia by any other method and this includes ship or aircraft crew, passengers on private yachts or light aircraft. These people are required to report when they first come into contact with a customs officer, who will be performing the passport and (possibly baggage) functions described in paragraph (a).

Proposed section 15(7C) deals with the time at which currency is taken out of Australia by a person who is a passenger on an aircraft or ship. It is defined as the time the person arrives at the area where the customs officer examines the passport of the passenger for immigration purposes. A passenger with the relevant amount of currency who does not make a report at this time has committed the offence.

Paragraph (b) deals with the case of a person other than a passenger on an aircraft or ship, ie crew and persons travelling on private aircraft or yachts. The time to report is the time when a customs officer examines their passport or if that does not occur the last opportunity the person has to report to a customs officer before leaving Australia.

Because subsection 15(1) relates the commission of the offence to a transfer of currency, proposed subsection 15(8A) is included to avoid any doubt about when the transfer takes place for passengers leaving Australia. If a person is a passenger leaving Australia on an aircraft or ship and has, for instance, presented their ticket to the carrier for seat allocation and lodged baggage for transporting, thus arranging to leave Australia, and moves through the area described in proposed subsection 15(7C)(a) with currency on their person, in their hand luggage or in luggage which has been lodged with the carrier, they have for the purposes of the reporting requirements in subsection 15(1) transferred the currency out of Australia.

Proposed subsection 15(8B) excuses a person from reporting if the person passes the passport examination point as described in proposed subsection 15(7C)(a)

declaring an intention to the customs officer at that point that they intend to spend the currency in their possession and in fact spend the currency in duty free shops located beyond the relevant point but before boarding the aircraft or ship.

Clause 8 - Reports of suspect transactions

This clause amends subsection 16(1) of the Principal Act which requires a cash dealer to report suspect transactions. This amendment preserves the obligation to report a transaction as suspect even though the cash dealer may also be required to report the transaction as an international funds transfer instruction under the new Division 3. This is already the case with significant cash transactions and reflects the status of suspect transaction reports as a vital intelligence tool highlighting activity which may require urgent investigation.

Clause 9 - Insertion of Proposed Division 3: - Reports of International funds transfer instructions

Proposed section 17B - Reports of international funds transfer instructions

Proposed subsection 17B(1) requires a cash dealer in Australia who is a sender or recipient of an international funds transfer instruction and who is acting on behalf of another person other than a bank, to prepare a report within the required reporting time of 14 days as defined in subclause 17B(8).

The obligation applies only to a cash dealer operating in Australia. This will capture instructions to and from a foreign bank operating in Australia but will not require reports from a branch of an Australian cash dealer located and operating in a foreign country. Such instructions will, however, be reportable in the hands of the cash dealer at the Australian end of the instruction.

A report is required whenever a cash dealer sends or receives an instruction unless the cash dealer is a bank (as defined in section 3 of the Act) acting solely on its own behalf, or on behalf of another bank (which is not acting for another person). Where the cash dealer is not a bank acting on its own behalf, it must report all transactions conducted whether on behalf of an individual, itself or on behalf of another cash dealer.

Instructions that only involve banks acting solely on their own behalf, such as where there is a transfer of funds to effect bank to bank settlements to meet obligations which arise out of international funds transfer instructions or foreign exchange transactions

simply involving conversion from one currency to another, are of no law enforcement value and need not be reported.

Whilst customer related transactions are of most interest to law enforcement, subparagraph 17B(1)(b)(ii) requires cash dealers who are not banks to report when acting on their own behalf. The banks within the exemption in (i) are those caught by the stringent regulatory and supervisory requirements of the Banking Act 1959. There may be transactions conducted by some cash dealers acting on their own behalf which are of the same character as the bank to bank transactions exempted by subparagraph (i) which will not be of interest to law enforcement. It is not possible to define in the legislation the cash dealers or the transactions falling within that class. To avoid the creation of an avenue for potential abuse, the regulations will allow for exemption of these on a case by case basis on the advice of law enforcement.

Proposed subsection 17B(2) provides that the report will be in the form, to be prescribed by regulations and contain the prescribed details.

Proposed subsection 17B(3) requires the report to be sent to the director. This will be done electronically, where that is possible, and by physical delivery on paper or disk or tape form where not possible electronically. The regulations will be developed in consultation with cash dealers to establish the appropriate form of the report and its contents for the varying circumstances which will exist.

In the case of an electronically processed international funds transfer instruction, the report will be an electronic copy of the whole or part of the message transmitted or received by the cash dealer and where that message does not for some reason contain all prescribed details, it will be an electronic record of any prescribed details not contained in the electronic copy. In a small number of cases it may be necessary to report other information which is prescribed but which does not form part of the instruction.

Prescribed details will also include, if necessary, information in addition to the minimum information required for law enforcement purposes. This will be directed towards particular information like the SWIFT authentication code, if it cannot be conveniently excluded from the message. Privacy principles will continue to apply to the CTFA in relation to such information. If this additional information is included in a report transmitted to the Director the cash dealer will be protected from suit in relation to disclosure of this information.

In the case of a telegraphic transfer or telex the prescribed details may include such information as the

name of the sender or recipient of the instruction, name and address of customer, amount, date of transfer, account details, etc. The precise details are to be worked out in consultation with cash dealers.

Where telexes are electronically processed these electronic records will be duplicated and transmitted by computer link. Manually processed telexes may be either photocopied or a report specifically generated. For this reason it is proposed to exempt reporting of manually processed telexes by a cash dealer who conducts large numbers of telex transactions and who will convert to electronic processing of those telexes in the next 5 years.

This has been provided for in proposed subsection 17B(4) which allows the Director of AUSTRAC by notice published in the Australian Government Gazette to exempt a particular cash dealer from sending reports to the Director by declaring that proposed subsection 17B(3) does not apply.

Proposed subsection 17B(5) requires the cash dealer to retain the reports (to which proposed subsection 17B(3) has been declared not to apply) prepared in accordance with proposed subsection 17B(2) for a period of 7 years. This is consistent with record keeping provisions of the Proceeds of Crime Act 1987.

Proposed subsection 17B(6) states that the person on whose behalf an instruction is transmitted is not the sender. This avoids double reporting when a cash dealer transmits an instruction on behalf of another cash dealer. In that case the cash dealer who transmits the message is required to report it.

Proposed subsection 17B(7) ensures the capture of the instruction when a person who is not a cash dealer transmits the instruction on behalf of a cash dealer or at the cash dealer's request. In that case it is the cash dealer who asks for the instruction to be sent who is required to report it.

Proposed subsection 17B(8) defines 'required reporting time' to mean 14 days (or such later time as is specified in the regulations) from the date that the instruction was sent or received. It may be necessary to extend the time limit of 14 days, for example, in the case of telexes which are reported on paper. Because these reporting requirements apply to telex messages which may be received or sent by cash dealers in remote locations in Australia, some practical difficulties might emerge in creating and forwarding reports to the CTRA (AUSTRAC). It is intended to deal with these kinds of situations by providing specifically for reporting times to fit the needs of those cash dealers.

Proposed section 17C - Bank acting on behalf of another bank

This provision makes it clear that when a bank is acting on behalf of another bank, a report will be required if the second bank is acting on behalf of a person who is not a bank. This relates to proposed paragraph 17B(1)(b)(i) which is intended to exclude true bank to bank settlements which do not involve customers.

Proposed sections 17D, 17E and 17F

Proposed sections 17D, 17E and 17F restate the existing private international law principles on extra-territorial enforcement of laws. They are included to make it very clear to cash dealers that they are protected in Australia from suits arising out of action they are required to take by these provisions which may be contrary to the law of a foreign country. Cash dealers operating outside Australia are not required to report transactions which relate to those overseas operations. Only the cash dealers inside Australia who may be receiving or transmitting overseas instructions will be reporting. They will be reporting in Australia in accordance with Australian law and are not recognised in Australia as being subject to any law of a foreign country to the contrary. For example, if there are obligations of confidentiality between banks and customers under a foreign law they will not affect a cash dealer in relation to action taken in Australia under this Act. These provisions clearly protect the cash dealer in Australia against any action or suit or judgment in a foreign country resulting from an alleged breach of those foreign obligations. The provisions are included to meet any provisions in a foreign law, which could give rise to questions of conflict.

Proposed section 17D - No cause of action arises from compliance with section 17B

Proposed section 17D precludes legal action arising or being taken in Australia against a cash dealer or person (which includes a member of staff or agent of the cash dealer) who makes a report either in compliance with proposed section 17B, or under the mistaken belief that the report was required under proposed section 17B. Although this provision may not be strictly necessary as a matter of law to protect the cash dealer from suit for complying with a legal obligation, it has been included for abundance of caution because some judgement by the cash dealer is called for in determining whether a transaction falls within the ambit of the reporting requirement.

Proposed section 17E - Legal action not to be taken under a foreign law as a result of cash dealer etc. providing information

Proposed section 17E provides that a suit or legal proceeding under a foreign law, but sought to be pursued in an Australian court, does not lie against a cash dealer or member of the staff or agent of the cash dealer for reporting under proposed section 17B or under the mistaken belief that action was required under proposed section 17B. For there to be an action under a foreign law or a foreign judgment presupposes that a foreign law purposes to act directly on an Australian cash dealer for acts done in Australia. While that is possible, it would clearly be a matter to which Australia could take exception. Such a situation is quite different from a foreign law purporting to control a cash dealer outside Australia.

The protection precludes an Australian court providing judicial assistance in relation to a cause of action originating in a foreign court. The proposed section does not apply to proceedings in a foreign court.

Proposed section 17F - Certain foreign judgments not to be recognised or enforced in Australia

Proposed section 17F provides that if a foreign court gives a judgment in connection with action taken by a person in complying with the reporting requirements of proposed section 17B, the judgment will not be recognised or enforced in Australia. This proposed section also restates the common law principles of private international law.

Proposed section 17G - Inspection of record systems etc.

Proposed section 17G empowers the Director of AUSTRAC, on written notice, to require a cash dealer to allow a member of the staff of AUSTRAC, or a consultant engaged to perform services for AUSTRAC under section 40A of the Principal Act, access to the cash dealer's premises to inspect records and systems for the purpose of monitoring the cash dealers' compliance with proposed section 17B. Inspection may cover:

- . any records relating to international funds transfer instructions;
- . any system used for keeping international funds transfer instructions records;
- . any report retained in accordance with proposed subsection 17B(5); and
- . any system used in the preparation of reports for international funds transfer instructions and which are sent to the Director of AUSTRAC.

Proposed subsection 17G(5) allows an authorised officer to make copies of, or take extracts from, the records inspected.

The Director already has similar power to monitor cash dealers' compliance with the other requirements of the Principal Act under sections 14A and 17A.

Clause 10 - Failure to provide information

This clause amends section 28 of the Principal Act to include proposed section 17G in the offence created by that section where the cash dealer refuses, or fails, to comply with written notice as provided in proposed section 17G.

Clause 11 - Establishment of AUSTRAC

This clause amends section 35 of the Principal Act by changing the name of the Cash Transaction Reports Agency to the Australian Transaction Reports and Analysis Centre (AUSTRAC). The change of name will not affect any existing obligations or staffing arrangements of the Agency in any way. The change reflects the decreasing emphasis on cash in the operations of the Centre.

Clause 12 - Administrative Decisions (Judicial Review) Act 1977 not to apply to decisions under this Act

This provision amends section 42 of the Principal Act to include within the ambit of the Administrative Decisions (Judicial Review) Act 1977 the decision of the Director to exempt a cash dealer from reporting as provided in proposed subsection 17B(4).

Clause 13 - Amendment relating to changing the name of the Cash Transaction Reports Agency to the Australian Transaction Reports and Analysis Centre (AUSTRAC)

Clause 13 provides for amendments consequential upon the change of name of the Cash Transaction Reports Agency to the Australian Transaction Reports and Analysis Centre (AUSTRAC) and of CTR information to FTR information, as set out in the Schedule to this Bill.

Clause 14 - Application of amendments

This clause provides that the amendments will apply to international funds transfer instructions sent or received after the commencement date.

Clause 15 - Transitional - CTR information to be FTR information

This clause contains the transitional arrangements for the amendments to the Principal Act proposed by clause 6 of this Bill. The result is that the information that was CTR information immediately before the commencement of the amendments becomes FTR information.

PART 3 - CONSEQUENTIAL AMENDMENTS OF THE AUSTRALIAN
SECURITIES COMMISSION ACT 1989

Clause 16 - Principal Act

This clause is a formal provision identifying the Australian Securities Commission Act 1989 as the Principal Act.

Clause 17 - Financial transaction reports

This clause makes consequential amendments to section 243D of the Australian Securities Commission Act 1989. The existing section 243D imposes a duty on cash dealers to provide the Cash Transaction Reports Agency with information that may be relevant to the investigation and prosecution of offences against the Australian Securities Commission Law or the Corporations Law. The amendments are consequential upon the change of name of the Cash Transaction Reports Act 1988 and Cash Transaction Reports Agency respectively to the Financial Transaction Reports Act and Australian Transaction Reports And Analysis Centre. The clause also corrects a minor typographical error.

PART 4 - CONSEQUENTIAL AMENDMENTS OF THE MUTUAL
ASSISTANCE IN CRIMINAL MATTERS ACT 1987

Clause 18 - Principal Act

This clause is a formal provision identifying the Mutual Assistance in Criminal Matters Act 1987 as the Principal Act.

Clauses 19, 20 and 21

These clauses amend references to CTR information, the Cash Transaction Reports Act 1988 and the Cash Transaction Reports Agency in sections 7 and Part VIA of the Principal Act to FTR information, the Financial Transaction Reports Act and AUSTRAC, respectively as they occur. The amendments are consequential on the changes of name effected by this Bill.

Clause 22 - Transition

This clause contains the transitional arrangements for the amendments to the Principal Act proposed by clauses 19, 20 and 21.

