

## NYMAN GIBSON MIRALIS RESPONSE TO THE ANTI-MONEY LAUNDERING AND COUNTER-TERRORISM FINANCING AMENDMENT BILL 2017

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### Introduction

1. Nyman Gibson Miralis is a leading Australian criminal law firm with substantial experience in transnational criminal defence law, which includes AML, Bitcoin and encryption related offences.
2. We have particular expertise in international law enforcement investigations conducted by the Federal Bureau of Investigations (FBI), the Australian Federal Police (AFP) the Australian Criminal Intelligence Commission (ACIC) and other Australian agencies involved in monitoring and investigating AML, Bitcoin, and encryption.
3. Regulatory and criminal Investigations concerning Bitcoin and AML are becoming increasingly international, as is demonstrated by this Bill.
4. Presently there is no overarching legal or regulatory framework in place which adequately addresses some of the emerging and novel human rights issues that this potentially raises for Australian citizens.



5. International/transnational investigations therefore have the capacity to unduly interfere with the rights of Australians who may be facing investigation, indictment and extradition in foreign jurisdictions or multiple jurisdictions simultaneously, for Bitcoin and AML related offences.
6. Although there is a clear need for legislative reform in the area of Bitcoin and AML regulation, proper regard should be given to the principle of proportionality when providing law enforcement officials and regulators with the necessary powers to fulfil the objectives of the legislation.
7. The fundamental common law principles upon which Australia's national criminal justice system operates, including the right against self-incrimination, protection from arbitrary search, seizure and arrest and the right to privacy should accordingly be considered more carefully.

#### Jurisdictional Issues not considered

8. It is clear that the *Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017* ("The Bill") seeks to enact the recommendations handed down by the Financial Action Task Force (FATF) in regulating digital currency exchange providers.
9. The Bill proposes to do this by requiring digital currency exchange providers to register and disclose personal details on a Digital Currency Exchange Register as outlined in Schedule 1 Part 2 of the Bill.
10. What is unclear is whether the legislative amendments capture a person who exchanges with a digital currency provider outside of Australia. The very nature of Bitcoin and other crypto-currencies are that they transcend Australia's national jurisdiction. It is not difficult to envisage a situation where an individual could circumvent the proposed legislative amendments by seeking to exchange with a currency provider extra-territorially.

11. Indeed, Mr. Keenan MP in the Second Reading Speech to the Bill noted:

*The bill regulates digital currency exchanges, as this is the point where digital currencies intersect with the regulated financial system.*

12. The proposed legislative amendments do not seem to contemplate for the likely scenario that an individual can simply choose to exchange with a digital currency provider outside of Australia's national jurisdiction, one where the rule of law and reporting requirements in accordance with FATF guidelines are not adhered to stringently. In light of the highly mobile nature of offshore criminal networks, this is a matter that does not appear to have been adequately considered.

#### Sharing of Information with Overseas Agencies

13. In the Second Reading Speech to the Bill, Mr. Keenan MP states that a new function of AUSTRAC will be:

*...providing access to, and the sharing of, AUSTRAC information to support domestic and international efforts to combat and disrupt money laundering, terrorism financing and other serious crimes*

14. The Bill is silent on how the sharing of Australian citizens' information will reconcile with the statutory protections in the *Privacy Act 1988* (Cth). There is also a lack of oversight from any organisation (nationally or internationally) that controls what information can lawfully be shared. This oversight is amplified considering an accused person has an entrenched human right to privacy.<sup>1</sup>

15. The proliferation of data between Australian agencies concerning Australian citizens must be carefully considered. Advising a bank in a jurisdiction which does not respect the rule of law, that an account holder may be involved in money laundering, may result in consequences for that individual and their families that would not be tolerated in Australian society.

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<sup>1</sup> *International Covenant on Civil and Political Rights*, Article 17.

16. Australia would benefit from a uniform approach to the dissemination of intelligence, evidence, and other assistance to foreign law enforcement, having regard to each particular jurisdictions approach to the rule of law. Express limits must be placed on the use of such information and its subsequent protection from misuse. The Bill is presently silent on this issue.
17. Further there appears to be no mechanism for Parliamentary oversight over these processes, notwithstanding the powerful way in which they can affect Australian citizen's lives, extending to reputation and freedom of movement, such as international travel.

#### Increase of Police Powers – Search and Seizure

18. Paragraphs [38] – [39] of the *Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017 Explanatory Memorandum* (“Explanatory Memorandum”) state:

*38. Police and customs officers do not currently have general search and seizure powers at the border under the AML/CTF Act...*

*39. Recommendation 12.4 of the Report recommends removing this gap and broadening the search and seizure powers under sections 199 and 200 of the AML/CTF Act to allow police and customs officers to search and seize physical currency and BNIs where there is:*

*(a) a suspicion of ML, TF or other serious criminal offences, or*

*(b) a breach of the cross-border reporting requirements under the AML/CTF Act.*

19. Particular attention is then drawn to s199(3) of the Bill:

#### *Powers of Examination and Search*

(3) *A police officer or a customs officer may, with such assistance as is reasonable and necessary, examine an article which a person has with him or her if:*

(a) *the person:*

(i) *is about to leave Australia or has arrived in Australia; or*

(ii) *is about to board or leave, or has boarded or left, any ship or aircraft; and*

(b) *either:*

(i) *the officer is seeking to find out whether the person has with him or her any physical currency in respect of which a report under section 53 is required; or*

(ii) *the officer has reasonable grounds to suspect that the person has with him or her any physical currency that may be of interest under subsection (14).*

20. The phrase “physical currency that may be of interest” has been given the following broad definition by the Bill:

**73 At the end of section 199**

...

**Currency of interest**

(14) *For the purposes of this section, physical currency may be of interest if the physical currency:*

(a) *may be relevant to the investigation of, or prosecution of a person for, an offence against a law of the Commonwealth or of a State or Territory; or*

(b) may be of assistance in the enforcement of the *Proceeds of Crime Act 2002* or regulations under that Act; or

(c) may be of assistance in the enforcement of a law of a State or Territory that corresponds to the *Proceeds of Crime Act 2002* or regulations under that Act.

21. We note that “article” is left undefined by the Bill, with no definition apparent in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (NSW) (“The Act”).

22. Given the breadth of the expression such articles could include:

- a. Laptops;
- b. Smart phones;
- c. Tablets; or
- d. Smart watches

23. Notwithstanding entrenched human rights principles of a person’s right to the presumption of innocence<sup>2</sup> and the right to privacy,<sup>3</sup> it cannot be Parliament’s intention that Police can have unchecked and unlimited powers to search, seize, and force disclosure of a suspected person’s personal information (such as passwords, or disclosure of pseudonym identities) without a warrant.

24. It is readily envisaged that material obtained pursuant to such searches would be susceptible to court actions seeking to declare the searches invalid and unlawful.

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<sup>2</sup> *International Covenant on Civil and Political Rights*, Article 14(2).

<sup>3</sup> *International Covenant on Civil and Political Rights*, Article 17.

25. It is further suggested that the specific assistance that could be caught by the broad expression “*with such assistance as is reasonable and necessary*” be expressly articulated to ensure that the officers conducting the examinations are adequately protected and do not unknowingly engage in searches that may ultimately be characterised as beyond power. Additionally, it is suggested that the kinds of classes of articles that are intended to be searched be referred to expressly in the legislation, given the potential of the legislation to unduly interfere with property and privacy rights.
26. Accordingly as these powers trespass on personal rights and liberties they should be further defined.
27. In its present form, the Bill, Explanatory Memorandum and Second Reading Speech are unclear whether police powers would extend to a scenario where an identified suspect would be forced to disclose personal passwords and identification information to allow police to access their personal information without any judicial oversight.
28. Considering this, paragraph 42 of the Explanatory Memorandum states:

*The measures are proportionate because they broaden existing powers in order to deter ML and TF, **do not constitute a radical departure from current search and seizure powers** and assist authorities in ensuring that Australia’s AML/CTF framework is robust in the face of the threat of serious crime and terrorism.*

**Emphasis Added**

29. It is clear that should the Bill pass in its current form, then implementing police search, seizure and disclosure powers without any limitations would violate Australia’s obligations under the *International Covenant of Civil and Political Rights* pursuant to Article 17 and 14(2).

## Refusal to Answer Police Questions – Civil Penalties

30. The Explanatory Memorandum at paragraph 14 states:

*Give police and customs officers broader powers to search and seize physical currency and bearer negotiable instruments (BNI) **and establish civil penalties for failing to comply with questioning and search powers***

### **Emphasis Added**

31. Indeed, the Bill provides at proposed amendment 73:

#### **73 At the end of section 199**

*Add:*

*Civil penalty*

*(12) If a person is subject to a requirement under subsection (1) or (2), the person must not engage in conduct that breaches the requirement.*

*(13) Subsection (12) is a civil penalty provision.*

32. Subsections 199(1) and (2) of the Act state:

#### **Person leaving Australia**

*(1) A person who is:*

*(a) about to leave Australia; or*

*(b) in an embarkation area for the purpose of leaving Australia;*

*must, if required to do so by a police officer or a customs officer:*

*(c) declare whether or not the person has with him or her any Australian currency or foreign currency; and*

*(d) declare the total amount of any Australian currency or foreign currency that the person has with him or her; and*



- (e) declare whether or not, to the best of the person's knowledge and belief, a report under section 53 has been given in respect of any Australian currency or foreign currency that the person has with him or her; and*
- (f) produce to the officer any Australian currency or foreign currency that the person has with him or her.*

*Person arriving in Australia*

- (2) A person who arrives in Australia must, if required to do so by a police officer or a customs officer:*
  - (a) declare whether or not the person has with him or her any Australian currency or foreign currency; and*
  - (b) declare the total amount of any Australian currency or foreign currency that the person has with him or her; and*
  - (c) declare whether or not, to the best of the person's knowledge and belief, a report under section 53 has been given in respect of any Australian currency or foreign currency that the person has with him or her; and*
  - (d) produce to the officer any Australian currency or foreign currency that the person has with him or her.*

33. Undoubtedly, the inclusion of such an amendment contravenes the common law privilege against self-incrimination.<sup>4</sup> This privilege entitles a person to refuse to answer any question if that answer could potentially incriminate that person. The proposed inclusion of civil penalties for those that refuse to answer police questions is in direct violation of entrenched principles afforded to an accused person.

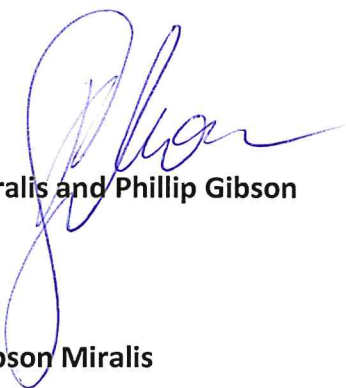
34. It cannot be Parliament's intention to infringe on an accused's right against self-incrimination.

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<sup>4</sup> *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, at 335.

Conclusion

35. We hope our submissions will assist the inquiry in striking an appropriate balance between the need to detect and prevent criminal activity concerning Bitcoin and AML and the equally powerful public interest in ensuring compliance with the rule of law and the principle of legality.



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