Australian Banking Association

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Executive Director
Office of the Commissioner,
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Dear Nicole

NSW organised crime reforms

The Australian Banking Association (**ABA**) welcomes the opportunity to comment on the organised crime reforms proposed by the NSW government. We note the package includes a range of reforms to tackle organised crime and confiscation of the proceeds of unexplained wealth.

Banks play a crucial role in the detection and reporting of potential criminal activity and continue to work in partnership with law enforcement at a federal state and territory level to disrupt and deter criminals from abusing Australia's financial system. While supporting these aims, banks are also responsible for maintaining the privacy and security of customer data and ensuring that they meet their obligations under laws to protect the safety and security of customers.

Given the limited consultation timeframe, the ABA is unable to provide feedback on all aspects of the *Draft Crime Commission Legislation Amendment Bill 2022* (the bill). This submission focuses on preliminary views on a few draft provisions of the bill most relevant to the banking industry. We welcome a fuller and more open consultation in which we can fully engage with the reforms and provide additional feedback.

Our view

The ABA supports better information sharing between banks and law enforcement where it leads to better outcomes in disrupting criminal activity. Banks comply with a range of requests for information to federal, state and territory law enforcement agencies, and make suspicious matter reports (**SMRs**) to the Australian Transaction Reports and Analysis Centre (**AUSTRAC**).

The proposed s48A and s51A and accompanying sections (Sections 49, 50, 51B, 51C) appear to be aimed at making it easier for law enforcement to obtain information and prevent funds (suspected of being illegally acquired) being moved before a court order is finalised. However, the ABA has serious concerns with the current framing of the draft and considers that longer consultations should be held to ensure the bill does not have unintended impacts for innocent parties and to ensure the provisions are workable from an operational perspective.

Key points

1. The bill should be consistent with other jurisdictions

We would request the NSW government closely align the legislation and operational practices with other jurisdictions to ensure consistency in operation and to minimise confusion for bank staff that need to comply with requirements across multiple jurisdictions. This would also ensure a smoother process, minimise the timeframe to comply and provide law enforcement with the best possible information.

For example, the forms should be designed in a consistent manner across jurisdictions and seek similar information. We note the timeframes align with the *Proceeds of Crime Act 2002* (Cth), which is appropriate, but processes should be closely aligned with other states' laws to minimise complexity.

2. Freezing orders should have appropriate legal oversight

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Under the draft s48A of the bill, the ‘Commissioner’ has the power to issue freezing notices to banks. Similar provisions in the *Proceeds of Crime Act 2002 (Cth)* and Victorian and South Australian legislation provide that an authorised officer must apply to a Magistrate for a freezing order (which is similar to the proposed freezing notices). This is appropriate given the significant impact that a freezing order has on the lives of individuals and the need for justifying such actions before a criminal conviction.

We therefore query the basis and appropriateness of a commissioner being given this power without judicial oversight and recommend that the bill be made consistent with other states and require authorised officers to apply to a Magistrate for the making of freezing notice under s 48A of the bill.

3. Consultations should be held with industry in designing the regulations

Section 48A(5) notes that the freezing notice must contain information prescribed by regulations. We request that consultations be held with industry in designing the information requirements to ensure an efficient and effective administration of these requests.

At a minimum, a notice issued under s 51A should clearly express the basis for the legal compulsion placed on a bank to provide documents and information. As well as setting out the offence provisions pursuant to s51A(1)(g) of the bill, notices should clearly articulate that a bank is compelled to comply with the notice. The notice should also provide detail of all relevant provisions including s51A (which provides the basis for issuing the notice), s 51B(3) (which provides a mechanism for an officer to vary the notice to provide further time), s 51C (which expresses the relevant offences and a defence for failure to comply) and s 52 (which details the protections afforded to the bank).

Further, a freezing notice under s 48A should only apply to the persons under investigation. However, if the intent is to capture any other accounts or all accounts in which the persons under investigation may have an interest, the notice should clearly state the name(s) of the individuals whose accounts should be frozen, including all those in a joint account or business account, even if they are not part of the active investigation. The notice should clearly state a bank is compelled to comply with the notice. This would ensure that banks have a clear defence in proceedings where they were compelled to freeze joint accounts and the account freezing impacted on individuals beyond the person(s) of interest.

4. Wider consultation should be undertaken ahead of enacting the bill

Finally, while it is clear that the bill aims to target criminal activity, we are of the view that both the information and freezing notices have the potential to significantly affect the privacy, safety or livelihoods of persons not subject to criminal investigation, such as spouses, children, and customers.

Given these potentially detrimental impacts for privacy, safety and well-being of third parties and the risks for banks to legal suit as a result of this legislation, the NSW government should consult with consumer advocates, the legal profession, AUSTRAC and the public ahead of making these changes.

Detailed feedback on key aspects of the bill and proposed solutions is presented in the following pages.

Thank you for the opportunity to provide feedback.

Yours sincerely,

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Key issues and proposed solutions

Specificity of freezing notices

The reference in s48A(1)(b), and ss(2) to a person's financial account assumes there is a single account held by that individual. In many cases, individuals can have several accounts: e.g., transaction account, savings account, loan account, business account. Without clearly marking which account(s) the notice applies to, banks will have difficulty in actioning the request and may be inadvertently viewed as non-compliant.

Banks have also observed that current law enforcement requests often do not contain the required information to justify the making of the request and can be seeking information on a person who is not a customer.

Recommended solution: Given the significant penalties for non-compliance and the lack of oversight by a Court, freezing notices should be preceded by early engagement with banks and utilise s51A notices ahead of a freezing notice) to determine a) whether the individual has an account, b) the account numbers they hold in the bank, c) the accounts which are to be frozen. The law should reflect that is the information required by banks, in order to comply with the notice, includes, the details of the accounts which should be frozen. We further suggest that a prescribed form of a freezing notice is included in a schedule to the *Criminal Assets Recovery Regulations 2017*.

We also recommend that further information on the background to the request (if available) should be provided to enable the FI to consider its AML/CTF obligations. For example, if the notice relates to a victim, it should clearly be identified in the notice. While providing additional information or context may sit outside the bounds of the legislation it should be part of established process to help expedite timely and comprehensive responses.

Impact on third parties

Should the account requiring freezing of a joint account or a business account, there is also the risk that individuals not subject to a criminal investigation (e.g., spouses, children, or other vulnerable customers) could be impacted adversely, and in turn this can expose banks to significant legal risks. Particular cohorts within these groups such as those subject to domestic violence, or other vulnerabilities will require careful consideration.

Further, we understand the protections from suit in relation to these provisions (s52) are from the perspective of law enforcement but do not protect banks from suit by impacted persons as a result of complying with a freezing order.

Recommended solution: Carve out joint or business accounts for the purposes of freezing and allow only for accounts where the relevant person holds an account on their own to minimise impact on third parties, particularly where no court order exists.

Limitation on the number of freezing notices

The reference to the time period of 2 days in s48A(3) appears justified on the basis that there is no court order in place and individuals need to be constrained from moving or disposing of suspected criminal assets . However, the fact that subsequent orders can be issued indefinitely in 2-day blocks once a restraining order has been applied for or until the Supreme Court makes a determination, is problematic and exposes banks to significant legal risks, particularly if the Court ultimately decides not to grant the order.

Recommended solution: Limit the number of subsequent orders to a maximum period or a maximum number of renewals. We suggest no more than 1 renewal or 4 days in total.

Limitation of notices to persons subject to proceedings under the Act

Section 51A is a very broad power and does not need to apply to any particular type of criminal offending. The requirement that the notice be issued 'to determine whether to take action under this Act' places no limit and could be used gratuitously. Given the broad nature of this provision and the ease of making requests without the oversight of courts, the volumes of requests may easily grow unchecked and without clear rationale. This is a concern from a civil liberties and privacy perspective, but this also has resource implications for banks.

Recommended solution: Limit notices to persons subject to proceedings under the Act. This will ensure that the notice relates to an alleged crime. A similar mechanism is included in Chapter 75 of the Anti-Money Laundering and Counter Terrorism Financing (AML/CTF) Rules, and it is appropriate to include it here.

Specificity of notice under s 51A of the Act

The framing under s 51A may create additional work if there is no match in bank systems.

Recommended solution: Ahead of making the formal notice, law enforcement should engage before lodging the formal notice with banks and provide a name (including aliases) and date of birth (DOB) details for the person(s) of interest. This would reduce red tape, so law enforcement does not need to issue a notice where there is no name or DOB match in bank systems and also more efficiently allow bank staff to get information ready promptly when the formal notice arrives.

A notice should provide the financial institution with a high degree of specificity in relation to the documents and information sought. The proposed s 51A details the scope of information which may be sought under a notice. It may also assist financial institutions if a prescribed form of a notice is inserted in a schedule to the *Criminal Assets Recovery Regulations* 2017 requiring as much specificity as possible.

Protections afforded to Banks for disclosures under s 51A

It appears that banks are not afforded any protections under s 52 of the bill when disclosing information in compliance with a notice under s 51A. The proposed s 51A compels a bank to give information and documentation. However, as presently drafted, the protection for making such disclosures, under the proposed s 52, appears to apply only to information given under s 51 of the Act.

The NSW Government's consultation paper suggests that banks will be protected by existing protections under s 51(2) of the Act. However, s 51(2) of the Act has been omitted as per [19] of the bill. In any case, s 51(2) relates to information given voluntarily (i.e., not information compelled under s 51A).

Recommended solution: Clarification is required regarding whether this was intended, or whether this was an oversight. If this was an oversight, it should be corrected to ensure protections are afforded for s 51A disclosures.

Jurisdiction of s 51A and s 48A notices

It is unclear whether notices under the s 51A and s 48A can be issued in relation to financial institutions outside NSW. The consultation paper suggests that the NSW Crime Commission (NSWCC) and NSW Police (NSWPol) will be empowered to give notice to 'financial institutions in NSW.' However, no such limitation appears in the bill. Clarity is required as to whether s 51A and s 48A apply only to financial institutions in NSW (regardless of where their customers are located) or whether these provisions are intended to apply nationally.

Recommended solution: Guidance should be provided as to the extra-jurisdictional effect of s 51A and s 48A. Alternatively, the bill should clarify whether the amendments are proposed to have effect across all Australian jurisdictions.

Suppression of disclosure of freezing notice

The bill contemplates that a bank which is subject to a freezing notice must not disclose the existence or operation of the notice other than to an authorised person. This is likely to cause tension for banks who will invariably receive complaints from the account holders regarding the freezing of their accounts and could lead to further action by customers which puts banks in a position where they can't defend themselves due to the existence of the suppression.

It is also unclear how long the suppression of a freezing notice will be in place. For example, is it intended that the suppression would expire when the freezing notice ceases to be in effect; or is it proposed that the suppression is a continuous obligation imposed on banks? In our view, an ongoing obligation will be more burdensome for banks.

Furthermore, the bill appears to not allow for banks to disclose the existence of a freeze notice to AUSTRAC through SMRs. This would create an inconsistency for banks whereby they are required to report suspicious matters to AUSTRAC under Commonwealth laws, but not allowed to under state law. It is potentially true that Commonwealth law may trump state law, but it would remove uncertainty if the bill could be clear in allowing disclosure to AUSTRAC in particular.

Recommended solution: Disclosure should be permitted to the account holder, once the account is frozen. We note that freezing orders made under the *Proceeds of Crime Act* 2002 (Cth) may be served on the account holder. Under the South Australian and Victoria legislation a bank is permitted to disclose the existence and operation of a freezing order to the account holder. It is unclear why such disclosure is not permitted under this bill.

Disclosure to AUSTRAC should also be permitted and this should be clear on the face of the law to remove uncertainties.

Interaction of freezing notices with Ch 75 of the AML/CTF Rules

Freezing notices may cut across other law enforcement operations or the intention of notices issued under Chapter 75 of the AML Rules[1] (**Ch 75 Notices**). Particularly if the NSWCC or NSWPol have not adequately engaged with other law enforcement bodies (or the relevant banks) before issuing the freezing notice. Ch 75 Notices provide that reporting entities assisting law enforcement authorities may be exempt from certain requirements under the AML/CTF Act.

For example, an exemption may be sought in respect of s 142 of the AML/CTF Act (which relates to structuring transactions to avoid threshold reporting requirements). In this scenario, it may be that the law enforcement authority is seeking to monitor a suspect's depositing activity. A relevant bank will require an exemption to assist the law enforcement authority. An issue arises if the NSWCC or NSWPol issue a freezing notice and a question arises regarding which provision a financial institution should comply with.

Recommended solution: NSWCC and NSWPol should engage closely with AUSTRAC and the Commonwealth government to appropriately align and co-ordinate requests in a manner that does not lead to conflicting outcomes. As a complex legal issue, further consideration is essential to avoid legal uncertainties and ensure criminal investigations are not disrupted.

Disclosure of freezing notices by inference

The proposed section 50(5) of the bill creates new offences and provides that disclosure of a freezing notice may arise if information is disclosed from which a 'person could reasonably be expected to infer the existence or operation' of the freezing order.

The concept of a 'reasonable inference' is quite broad and may pose challenges to a bank. An 'inference' could be interpreted or applied differently depending on one's understanding of what

[1] *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument* 2007 (No. 1)

amounts to an inference. Indeed, a customer can infer that their account has been frozen immediately when they recognise they are unable to use the account.

Recommended solution: As noted earlier, disclosure to account holders of the existence of a freezing notice once the account is frozen should be available to avoid the uncertainty of inference.

When does a freezing notice come into effect?

The Consultation Summary refers to the 'immediate' freezing of funds in an account, however, the bill does not specify when a freezing notice comes into effect. Similar legislation in other States and the *Proceeds of Crime Act 2002 (Cth)* provide that a freezing order will come into effect once given to a bank. The bill only states that a freezing notice may specify a period of no more than two days. An issue may arise if a freezing notice is made but is not given to a bank in a timely manner.

For example, if a freezing notice is served several hours after being made, it would consume the time available for the relevant bank to comply. Further, if the expectation is that a bank would be able to freeze an account the moment the notice is received, that poses significant operational challenges because a number of actions must be undertaken by staff following its receipt to give the notice effect.

Recommended solution: A clear timeframe for implementing a freezing order is required and early engagement with banks would be essential to ensure timely freezing would be possible.

Variation of freezing notices

The proposed s 51B(3) provides a mechanism for an officer to vary a notice to a bank to give further time to provide information. This provision does not expressly provide that a bank may request further time to comply with a notice.

Recommended solution: we consider that s 51B(3) should expressly state that officers, employees or agents of a bank may request an extension of time to provide information and that the NSWCC or NSWPol may vary the notice, provided that a reasonable excuse has been provided. In respect of the method of responding, it would be beneficial if NSWPol had a list of key contacts from every bank to ensure such requests are directed to the right team. It is also important that the final version of the Crime Commission Bill maintain the reference to 'business days', particularly as this will avoid any slippages arising during weekends and public holidays.