

Financial Transaction Reports Regulations (Amendment) 1997 No. 303

EXPLANATORY STATEMENT

STATUTORY RULES 1997 No. 303

Issued by the Authority of the Minister for Justice

Financial Transaction Reports Act 1988

Financial Transaction Reports Regulations (Amendment)

The Identification Regime For Parties To Bullion Transactions

Introduction

The *Financial Transaction Reports Amendment Act 1997* (Act No. 33 of 1997) amended the *Financial Transaction Reports Act 1988* (the Act), inserting Part IIIA which, amongst other things, introduced a requirement for bullion sellers to identify their customers. That requirement was recommended by "*Checking the Cash: A Report on the Effectiveness of the Financial Transaction Reports Act 1988*", a report by the Senate Standing Committee on Legal and Constitution Affairs, 1993 (recommendation 19).

2. A bullion seller is defined in ss 3(1) of the Act as a person who carries on a business of selling bullion. Bullion sellers are cash dealers and have the same obligations that other cash dealers have under the Act, such as banks and other financial institutions. However, bullion sellers do not normally hold accounts for their customers and therefore the account opening identification regime that applies to persons who open accounts, does not apply to customers of bullion sellers. It was for that reason that the Act was amended to require bullion sellers to identify their customers.

3. The effect of the amendments is that a bullion seller must not enter into a bullion transaction unless the bullion seller has an **identification record** for the other party, or for each other party, to the bullion transaction. A bullion seller has an identification record for a party to a bullion transaction if the bullion seller is an identifying cash dealer and has carried out, and has a record of, the **prescribed verification procedure** or has carried out, and has a record of, a verification procedure to identify the party, being a procedure approved by the Director of AUSTRAC for the bullion seller.

4. These regulations set down the *prescribed verification procedure* which must be followed by bullion sellers when conducting bullion transactions (subregulation 1.1 is a formal clause that provides for the amending of the Financial Transaction Reports Regulations (the Regulations)).

Only Parties To Transactions Involving \$10,000 Or More In Cash Are Subject To The Identification Regime

5. The identification procedures will apply only where a bullion transaction involves \$ 10,000 or more in cash. If a bullion transaction does not involve cash of \$ 10,000 or more, an identification record does not need to be obtained by the bullion seller. New regulation 2A inserted by subregulation 3.1 limits the application of the identification regime to bullion transactions involving a significant cash transaction.

6. A "significant cash transaction" is defined in ss 3(1) of the Act and means "a cash transaction involving the transfer of currency of not less than \$10,000 in value". A "cash transaction" is defined in ss 3(1) of the Act as a "transaction involving the physical transfer of currency from one person to another."

The Identification Regime For Parties To Bullion Transactions That Are Not Companies: Adapting The 100 Point Regime

7. The identification regime that applies to bullion transactions is the existing 100 point identification regime, with some modifications, that applies to signatories to accounts. It is explained below.

The Existing Identification Regime For Signatories To Accounts

8. The Act makes provision for a cash dealer to obtain "signatory information" for each person who wishes to become a signatory to an account with the cash dealer. Signatory information includes an identification record as set down in s 20A of the Act.

9. Section 20A provides three methods by which a cash dealer may obtain an identification record for a signatory to an account. Those methods are

(i) the cash dealer has obtained an *identification reference* (refer paragraph 20A(1)(a) of the Act); or

(ii) the cash dealer has carried out the *prescribed verification procedure* (refer subparagraph 20A(1)(b)(i) of the Act); or

(iii) the cash dealer has carried out an *alternative verification procedure* which has been approved by the Director of AUSTRAC (subparagraph 20A(1)(b)(ii) of the Act).

10. The prescribed verification procedure referred to in (ii) above is set down in the Regulations and consists of the checks in regulation 4 or the alternative checks mentioned in regulations 5, 6, 7, 8, 9, 10A or 10B. That procedure is commonly known as the 100 point test as a signatory is taken to have been identified if the signatory rates at least 100 points (refer subregulation 3(2) of the regulations).

The Identification Regime For Parties To Bullion Transactions

11. The identification regime for parties to bullion transactions is similar. Under section 24C of the Act, a bullion seller must not enter into a bullion transaction unless the seller has an

identification record for the other party to the bullion transaction. Subsection 24C(2) is modelled on s 20A, providing two methods by which a bullion seller may obtain an identification record for a party to a bullion transaction. Those methods are

- (i) the bullion seller has carried out the *prescribed verification procedure* (refer paragraph 24C(2)(a) of the Act); or
- (ii) the bullion seller has carried out an *alternative verification procedure* which has been approved by the Director (refer paragraph 24C(2)(b) of the Act).

12. The prescribed verification procedure under paragraph 24C(2)(a) referred to in (i) above is made up of two distinct components, as set down by new paragraph 3(1A)(b) of the amending regulations, namely

- * the 100 point regime (with some modifications) where the identification checks are applied to a person (other than a company) who is a party to a bullion transaction in the same way the checks are applied to a person who is a signatory to an account; and
- * the identification reference regime set down in s 21 of the Act modified to apply to a party to a bullion transaction (other than a company).

13. As a result, subject to some exceptions, the regime that applies to individuals that are signatories to accounts with cash dealers also applies to persons (other than companies) who are parties to bullion transactions.

The 100 Point Test Adapted - Persons Other Than Companies

14. New paragraph 3(1A)(b) of the Regulations sets down the identification regime for parties to bullion transactions that are not companies. The regime consists of the checks mentioned in the modified regulations 4 and 9, or an identification reference from an acceptable referee in accordance with the appropriately adapted s 21 of the Act.

15. Where a party to a bullion transaction rates at least 100 points, the party is taken to have satisfied the prescribed verification procedure of new subregulation 3 (1 A) by virtue of subregulation 3(2), amended by subregulation 4.2. The way in which points are attributed to particular documents or sources under regulation 4 as set down in subregulation 3(3) and subregulation 3(4) for signatories to accounts, is the same for parties to bullion transactions, by virtue of the amendments made by subregulations 4.4 and 4.7 respectively of the amending regulations.

16. The example following subregulation 3(3) is deleted and replaced with a modified example (refer subregulation 4.5 of the amending regulations) and the example following subregulation 3(5) modified by subregulation 4.9 of the amending regulations so that both examples apply to parties to bullion transactions as well as signatories to accounts. Subregulation 8.1 amends regulation 10 so that the particulars of the various identification documents under the 100 point regime that are required to be recorded by the bullion seller in relation to parties to bullion transactions are the same particulars that are required to be recorded by cash dealers when examining documents relating to signatories to accounts.

17. Regulation 4 is modified by subregulations 5.1, 5.2 and 5.5 by the addition of "or party to a bullion transaction" after references to "signatory" as detailed in those subregulations. In effect, where regulation 4 mentions the "signatory" in the sense of the person who operates an account, it is modified so that it is read in the same way as including "a party to a bullion transaction". The only exception to that is subparagraph 4(1)(j)(iii) which has not been modified to apply to parties to bullion transactions.

18. Regulation 9 (Aboriginal Persons and Torres Strait Islanders resident in an isolated area) is amended by regulation 7 of the amending regulations so that it applies to a party to a bullion transaction. Subregulations 7.2, 7.3 and 7.4 make the appropriate amendments to Regulation 9.

19. "Telephone service" in subregulation 2(1) is deleted by subregulation 2.1. Subparagraph 4(1)(d)(ii) is amended by subregulation 5.4 by replacing "telephone service" with "telephone number". Paragraph 3(3)(b), which deals with the limitation on the points attributable to a telephone service, is repealed by subregulation 4.3 and replaced by "telephone contact mentioned in subparagraph 4(1)(d)(ii)". Those amendments are technical amendments only and are made on account of the operation of multiple licensed telecommunications carriers and service providers.

20. Regulations 5, 6, 7, 8, 9, 10A and 10B provide alternative checks to those in regulation 4 to cater for the special circumstances of the signatories mentioned in those regulations. In the main, those regulations relax the requirements of regulation 4 to deal with the special circumstances of certain classes of persons. With the exception of regulation 9 (Aboriginal Persons and Torres Strait Islanders in an isolated area), those regulations have not been modified to accommodate a party to a bullion transaction. In the event that a person covered by any of those alternative checks is a party to a bullion transaction in cash of \$10,000 or more, and the person is unable to satisfy any of the checks mentioned in the amended regulations 4 or 9, the Director of AUSTRAC may approve an alternative verification procedure in accordance with paragraph 24C(2)(b) of the Act.

The Identification Reference Adapted

21. As with the 100 point regime for account opening and signatory verification, "identification references" as set down by s 21 of the Act are adapted to apply to persons (other than companies) who are parties to bullion transactions. New subparagraph 3(1A)(b)(ii) of the regulations states that a bullion seller will have satisfied the verification procedures of the Act by obtaining an identification reference. New subregulation 3(1B) states that an identification reference is obtained by adapting s 21 as if references to "a signatory to an account" were references to "a party to a bullion transaction", references to "the signatory" were references to "the party" and references to "the account" were references to the bullion transaction".

22. In other words, s 21 of the Act, which authorises an acceptable referee to provide a written reference for a signatory to an account, applies in the same way to a party to a bullion transaction that is not a company.

The Alternative Verification Procedure Approved By The Director

23. There may be occasions where a party to a bullion transaction is unable to satisfy the identification requirements of regulations 4, 5A, 9 or provide an identification reference. The Director may approve an alternative verification procedure for a bullion seller to identify the party. That is authorised by paragraph 24C(2)(b) of the Act.

A Party To A Bullion Transaction Who Is A Signatory To An Account With The Bullion Seller

24. It is possible that a party to a bullion transaction (other than a company) is a signatory to an account with a bullion seller, for example, if the bullion seller is also a financial institution. If that is so, and the bullion seller has obtained an identification record in accordance with s 20A of the Act in relation to the signatory, then the bullion seller does not have to obtain an identification record under s 24C of the Act, provided the method or procedure by which the record was obtained is recognised under the bullion seller identification regime.

25. For example, if the bullion seller has previously identified the signatory (who is to be a party to a bullion transaction) under paragraph 4(1)(a) of the Regulations, the bullion seller has an identification record for the purposes of paragraph 24C(2)(a) because that method of identification has been modified to apply to bullion transactions by virtue of new subparagraph 3(1A)(b)(i) of the Regulations. However, if the bullion seller has obtained an identification record by virtue of the alternative checks mentioned in regulations 5, 6, 7, 8, 10A or 10B, the bullion seller does not have an identification record for the purposes of ss 24C(2) because those alternative checks are not recognised under the bullion seller identification regime.

26. The authority for recognising certain identification records obtained in connection with accounts, under the bullion seller identification regime, is found in ss 24C(2) of the Act which states that a verification procedure is valid "whether or not the procedure was carried out in connection with the transaction". That same rider appears in s 20A of the Act and therefore, where a bullion seller has obtained an identification record for a party to a bullion transaction and that party seeks to become a signatory to an account with the bullion seller, the bullion seller does not have to obtain an identification record under s 20A, provided the method by which the record was obtained is recognised under the account identification regime.

27. A company may hold an account with the bullion seller, for example, if the bullion seller is a financial institution, but it cannot be a signatory to an account (see below). Thus, as far as companies are concerned, there is no scope for an identification record obtained under the account opening identification regime being recognised for the bullion seller identification regime, or *vice versa*. However, where a company has provided a certificate of registration (or incorporation) to the bullion seller in connection with the opening of an account with that bullion seller, that certificate is recognised under the bullion seller identification regime that applies to companies (see below). A bullion seller that has retained a certified copy of a certificate of registration under the bullion seller identification regime would not need to obtain another copy for the purposes of obtaining account information were the company to open an account with it.

The Identification Regime For Parties To Bullion Transactions That Are Companies

28. Under the Act, a company is not able to be a signatory to an account. The signatory is the natural person or persons (eg directors, officers and employees of the company) on whose instructions the cash dealer conducts transactions in relation to the account held by a company (refer to the definition of "signatory" in ss 3(1) of the Act). In contrast, a company may be a party to a bullion transaction. As there is no identification regime for companies that are signatories to accounts to be modified or adapted for bullion sellers, it was necessary to create a unique identification regime for companies.

29. For the purposes of new paragraph 3(1A)(a) (inserted by subregulation 4.1), the verification procedure for companies is set down in new regulation 5A, inserted by subregulation 6.1 of the amending regulations. A company is defined by new subregulation 5A(6) as a body that is registered (or taken to be registered) under Part 2.2 of the Corporations Law, or a registrable body registered under Part 4.1 of the Corporations Law (foreign companies and registrable Australian bodies).

30. The bullion seller must obtain from the company a certified copy of its certificate of registration issued under the Corporations Law. There are four ways of complying with that obligation and they are

- (i) obtaining a copy issued by the ASC (subparagraph 5A(2)(a)(i) of the Regulations); or
- (ii) obtaining a copy of an original certificate of registration issued under the Corporations Law certified by a person before whom statutory declarations may be made under paragraph 8(b) of the *Statutory Declarations Act 1959* (subparagraph 5A(2)(a)(ii) of the Regulations); or
- (iii) obtaining a certified copy of the document referred to in (i), that is, a copy of an ASC issued copy, which is certified by a person before whom statutory declarations may be made under paragraph 8(b) of the *Statutory Declarations Act 1959* (subparagraph 5A(2)(a)(ii) of the Regulations); or
- (iv) obtaining a copy of an original certificate of registration issued under the Corporations Law certified by the bullion seller as being a true copy (having sighted the original) and endorsed to that effect (paragraph 5A(3)(a) of the Regulations).

31. Companies that were incorporated prior to the commencement of the Corporations Law, are taken to be incorporated under the Corporations Law by virtue of Division 2 of Part 2.2 and are allotted individual registration numbers by the ASC. The ASC does not, as a matter of course, issue certificates of registration to those companies. Therefore, under new paragraph 5A(2)(b), Division 2 of Part 2.2 companies may provide certified copies of their certificates of incorporation. Similarly, under paragraph 5A(3)(b), those companies may have their certificates of incorporation certified by the bullion seller.

32. The copy under subparagraph 5A(2)(a)(ii) or paragraph 5A(2)(b) must be certified by a person before whom statutory declarations are authorised to be made. Under the Statutory Declarations Regulations, there are two categories of persons before whom declarations

may be made. The first is a person who is authorised under a law in force in a State or Territory to practise as a member of a profession that is listed in Part 1 of the Schedule to the Regulations. That is, a person who is authorised to practise as a chiropractor, dentist, legal practitioner, medical practitioner, nurse, patent attorney, pharmacist or veterinary surgeon. The second category of person before whom declarations may be made and who may certify copies of certificates of registration is those within certain employment classes or professions listed in Part 2 of the Schedule to the Statutory Declarations Regulations. They include judges, justices of the peace, police officers, full-time teachers and permanent employees of the Commonwealth, State, Territory or local governments with 5 or more years continuous service.

33. The person who certifies the copy of the certificate of registration does not have to use any specific form of words to do so but simply certifies that the copy is a true copy of the relevant certificate of registration as sighted by him/her.

34. If the company holds an account with the bullion seller, the bullion seller, as a cash dealer, may have obtained "account information" in relation to that company. Under ss 3(1) of the Act, "account information" includes a copy of the company's certificate of incorporation (companies incorporated under the Corporations Law are issued with certificates of "registration" and provide that document to the cash dealer instead). Under paragraph 5A(3)(b) of the Regulations, if the bullion seller has obtained (and retained) a copy of the certificate of registration (or incorporation as the case may be), the bullion seller does not have to obtain it again (notwithstanding that it may not have been a certified copy) when engaging in a bullion transaction with the company.

35. The bullion seller must also obtain the following information concerning the company

- * its registration number allotted by the ASC (either an ACN or ARBN; subparagraph 5A(2)(c)(i));
- * the address of its registered office (subparagraph 5A(2)(c)(ii)); and
- * the address at which its principal business activities are conducted (subparagraph 5A(2)(c)(iii)).

Transactions Conducted By Employees On Behalf Of A Company

36. As noted above, the company may be a party to a bullion transaction but individuals (natural persons) nevertheless conduct the bullion transactions on its behalf. Paragraphs 5A(2)(d) and (c) of the Regulations seek to obtain information concerning those persons.

37. If the person conducting the transaction is an employee of the company, the bullion seller must obtain the full name of the person and position held by him or her in the company (refer subparagraphs 5A(2)(d)(i) and (ii)).

Transactions Conducted By All Other Persons On Behalf Of A Company

38. If the person conducting the transaction on behalf of the company is not an employee of the company, the bullion seller must obtain the following information (refer paragraph 5A(2)(e))

- * the person's full name and workplace address (subparagraph 5A(2)(e)(i));
- * the person's relationship to the company *eg* director, shareholder, accountant, solicitor *etc* (subparagraph 5A(2)(e)(ii));
- * the authority under which the person is conducting the transaction *eg* authorised agent (subparagraph 5A(2)(e)(iii));
- * the person's usual occupation (subparagraph 5A(2)(e)(iv)).

39. The person who conducts the transaction on behalf of the company is the person who has authority to bind the company in a contractual sense. It does not include a person who merely acts as a courier.

Example

A company seeks to buy bullion for \$25,000 in cash from a bullion seller. The managing director of the company authorises the company's external accountant to conduct the transaction for the company. The external accountant arranges for the purchase of the bullion by contacting the bullion seller and placing an order by telephone and fax and providing it with various documents as necessary. Once the transaction has been arranged with the bullion seller, the accountant arranges for one of his staff to physically conduct the transaction *ie* exchange the cash for the bullion, provide the certificate of registration and other information required by new regulation 5A. Apart from the information required by paragraphs 5A(2)(a) and (c), the bullion seller would need to obtain the following information in accordance with 5A(2)(e)

- * the name and workplace address of the external accountant (subparagraph 5A(2)(e)(i));
- * the relationship of the accountant to the company (in the example the relationship is "accountant for the company", subparagraph 5A(2)(e)(ii));
- * the authority under which the external accountant is conducting the transaction (in the example, the authority is that of the managing director of the company, subparagraph 5A(2)(e)(iii));
- * the accountant's usual occupation (in the example that is simply "accountant", subparagraph 5A(2)(e)(iv)).

40. Once the checks in subregulation 5A(2) have been conducted the company's identity is taken to have been verified (subregulation 5A(4)) and the company is taken to have "scored" 100 points by virtue of subregulation 5A(5).

Other Minor Amendments Made By These Regulations

41. In the course of amending the regulations to prescribe the bullion seller identification regime, some unrelated and minor amendments were made to update the regulations, replace superseded terminology and correct minor drafting oversights. Those "technical" amendments are explained below.

Updating "Telecom" to "Telstra"

42. "Telecom", as used in subparagraph 4(1)(d)(i) is updated to "Telstra" (refer subregulation 5.3). The definition of Telecom in subregulation 2(1) is deleted by subregulation 2.1 and a definition of Telstra inserted by subregulation 2.2.

Definition of "Exempt Superannuation Fund"

43. Subregulation 2(1) defines "exempt superannuation fund" by reference to ss 3(1) of the *Occupational Superannuation Standards Act 1993* (OSSA). OSSA was substantially amended in 1993 (the definition of superannuation fund in ss 3(1) was deleted) and OSSA was renamed the *Superannuation Entities (Taxation) Act 1993*.

44. The term "exempt superannuation fund" as defined by subregulation 2(1) is deleted by subregulation 2.1 and replaced by "superannuation fund" by subregulation 2.2. "Superannuation fund" is defined by reference to the definition of "superannuation fund" in ss 10(1) of the *Superannuation Industry (Supervision) Act 1993* (the SIS Act). The word "exempt" denoted that a superannuation fund was a trust that was exempted from the account information requirements that applied to trust accounts, as set down in subregulation 11A(1). In that sense, it was an "exempt trust".

45. All superannuation funds that fall within the definition of "superannuation fund" in the SIS Act are exempted from the requirements of subregulation 11A(1) of the Regulations. A body that is not exempt from subregulation 11A(1) could not, by definition, be a "superannuation fund" within the meaning of the SIS Act. It is on that basis that the word "exempt" is removed. The term "exempt superannuation fund" is replaced by the term "superannuation fund" in subregulation 2(3) and paragraph 11 (2)(a) of the Regulations by virtue of subregulations 2.3 and 9.1 respectively.

Account Blocking Consequential Amendment

46. Section 34 of the *Financial Transaction Reports Amendment Act 1997* repealed ss 18(5) of the Act. Consequently, subregulation 11B(1), which prescribes a period for the purposes of ss 18(5) is redundant and is deleted by subregulation 10.1.

Correction Of Minor Drafting Errors

47. Subregulation 4.6 amends subregulation 3(4) by removing the parenthesis surrounding the "4", correcting the reference to paragraph 4(1)(g).

48. Similarly, subregulation 4.8 amends the example following subregulation 3(5) by removing the parenthesis surrounding the "4", correcting the reference to paragraph 4(1)(g).

49. Subregulation 7.1 corrects paragraph 9(1)(d) of the Regulations by the addition of the word "of" which had been inadvertently omitted.

50. The regulations commenced upon gazettal.