

CHAPTER 5

COMMITTEE VIEW

Committee view

5.1 The committee acknowledges the efforts of the Department and AUSTRAC to consult extensively with stakeholders in relation to AML/CTF legislation. The majority of witnesses appearing before the committee indicated that they had been consulted in relation to the legislation and many considered that the Department and AUSTRAC had been receptive to addressing their concerns.

5.2 However, evidence received during this inquiry indicated that industry groups and stakeholders have continuing specific issues ranging from requests for technical re-drafting to issues regarding the intent and the scope of the Bill. In particular, stakeholders still have concerns in relation to the practical impact of some provisions as well as privacy and discrimination issues.

Key concerns for industry

5.3 Evidence received during this inquiry indicated that industry stakeholders were generally supportive of the Bill though some general, and several specific, issues remain unresolved.

5.4 Major criticism was expressed by stakeholders regarding the proposed timetable of the release of the AML/CTF Rules. Complaints concentrated on the lack of time available to adequately consider the Rules prior to the implementation of the Bill. Specific suggestions related to delaying the obligations immediately after Royal Assent and extending the transition periods to allow the development of necessary systems and support mechanisms.

5.5 The committee is concerned that reporting entities have adequate time to engage with AUSTRAC on the implications of the Rules and are able to analyse and process the content of the Rules to effectively carry out their obligations. Given that there has been some confusion in relation to the government's intentions with respect to the Rules which may have hampered the efforts of industry to prepare for compliance with the new regime, the committee recommends that the first stage of implementation should not commence until three months after the date of Royal Assent. In making this recommendation, the committee notes that the FATF recommendations are not a binding international agreement subject to a defined implementation timetable. The committee is also conscious of the importance of ensuring that the anti-money laundering and counter-terrorism financing regime functions effectively from the outset.

5.6 The committee also considers that it is imperative that the Department and AUSTRAC commence the proposed public education campaigns in relation to the new regime as soon as possible.

5.7 Another area of concern was the extent of power that AUSTRAC and the AUSTRAC CEO have under the Bill. The ability of AUSTRAC to make Rules prescribing matters and also exempt significant provisions of the Bill is an issue. The committee notes that AUSTRAC has in the past undertaken extensive consultation with stakeholders and intends to continue this approach in the future. In addition, the Bill imposes obligations of the CEO to consult with various persons in exercising the functions of CEO. The committee recommends that AUSTRAC when amending or making further Rules after commencement of the Act thoroughly consult with industry and other stakeholders.

5.8 Subclause 6(7) is a Henry VIII clause. A Henry VIII clause is defined as follows:

An express provision which authorises the amendment of either the empowering legislation, or any other legislation, by means of delegated legislation is called a Henry VIII clause. The Macquarie Dictionary of Modern Law defines a Henry VIII clause as a clause in an enabling Act providing that the delegated legislation under it overrides earlier Acts or the enabling Act itself; so named because of its autocratic flavour.¹

5.9 The Bill imposes extensive obligations on reporting entities in relation to the provision of designated services. Subclause 6(7) permits amendment of the definition of 'designated services' by regulation and thus undermines robust scrutiny of changes to the obligations of reporting entities by the Parliament. The committee considers that the definition of 'designated services' should not be amended by regulation and recommends that subclause 6(7) be deleted from the Bill.

5.10 The committee is concerned that the Department's intention to establish thresholds of \$10,000 in relation to customer identification obligations for some designated services provided by casinos is not consistent with FATF recommendation 12 which requires a threshold of USD 3,000.

5.11 Some evidence to the committee raised concerns about whether the safe harbour provisions for customer identification which are set out in the draft Rules would maintain reliable customer identification. The committee considers that the safe harbour provisions ought to be re-examined during the review of the legislation required under clause 251.

5.12 The committee is concerned that Part 6 of the Bill which deals with the register of designated remittance services providers does not provide the AUSTRAC CEO with a power to refuse registration or de-register providers who are involved in money laundering or terrorism financing. The committee suggests that the Department should consider whether there should be a capacity to exclude such providers from the register. Alternatively, it may be appropriate to establish a register of persons who are not permitted to provide designated remittance services.

1 Senate Standing Committee for the Scrutiny of Bills, *The Work of the Committee during the 39th Parliament November 1998 -October 2001*, p.77.

5.13 The committee considers that in clause 138 the offences relating to manufacturing false documents or equipment for producing false documents should be regarded as more serious than those relating to possession of false documents or equipment for making false documents. Accordingly the penalties for the possession offences ought to be decreased.

5.14 Several industry groups indicated to the committee that they have concerns that are specific to the operation of their business. For example, there are concerns that relate to services being caught unintentionally or inappropriately by the definition of 'designated services' in clause 6 and in relation to the possible exclusion of some community bank branches from the definition of 'owner managed branch' in clause 12. The committee is pleased to note that many stakeholders are working directly with the Department and AUSTRAC in order to resolve outstanding issues. The committee suggests that the Department and AUSTRAC, in consultation with industry stakeholders, continue their endeavours to address these technical drafting issues.

Privacy and Discrimination

5.15 The committee welcomes the Privacy Impact Assessment undertaken by the Department. The committee notes that approximately two thirds of these recommendations were not accepted by the Department and that reasons for this were given in the Department's formal response as well as in evidence provided at the public hearing. Achieving an appropriate balance between a consumer's right to privacy with legislation intended to combat money laundering and prevent terrorism financing is inherently difficult.

5.16 Privacy concerns mainly centre on the gathering, reporting and retention of customer information which is of a personal, financial and sensitive nature. The committee acknowledges the concerns of stakeholders regarding the scope of financial services caught under the Bill. The committee believes that further consideration should be given to excluding low value transactions which represent a low risk in the context of money-laundering and terrorism financing from the definition of 'designated services'. It may also be appropriate to make provision for periodic indexing of the thresholds applied by the Bill.

5.17 The ability for AUSTRAC held data to be accessed by a wide range of designated agencies is also of concern to the committee. The committee considers that Division 4 of Part 11 of the Bill should be amended to restrict access to AUSTRAC held information to access for the purposes of responding to money laundering, terrorist financing or other serious crime. In addition, the committee recommends that the Office of the Privacy Commissioner should audit AUSTRAC's administration of the Bill with respect to compliance with privacy obligations, particularly as they relate to the distribution of AUSTRAC information to other agencies.

5.18 Concerns remain regarding the risk of discrimination from reporting entities performing customer risk-assessments and suspicious matter reports with a risk-based approach which results in high levels of discretion and potentially subjective criteria.

The committee considers that it should be placed beyond doubt that clause 235 does not exclude the operation of federal, state or territory anti-discrimination legislation. The committee also recommends that AUSTRAC work with stakeholders to ensure reporting entities and their staff are able to perform these obligations based on non-discriminatory, objective criteria.

5.19 Overall the committee is generally satisfied with the provisions of the Bill. Nevertheless, specific issues remain, of which some are significant, and these need to be addressed. The committee has made a number of recommendations to address these concerns and encourages the Department and AUSTRAC to continue to consult and engage with stakeholders.

5.20 Given the complexity and scale of the new regime, the committee considers that review of the legislation, as provided for in clause 251, should occur in four years rather than seven years. The review should include further consultation with industry and other stakeholders.

Recommendations

Recommendation 1

5.21 The committee recommends that the Bill be amended to delay the first stage of implementation until three months after the date of Royal Assent.

Recommendation 2

5.22 The committee recommends that AUSTRAC when amending or making further Rules after commencement of the Act thoroughly consult with industry and other stakeholders.

Recommendation 3

5.23 The committee considers that the AML/CTF Rules which provide safe harbour provisions for customer identification should be re-examined during the review of the legislation required by clause 251.

Recommendation 4

5.24 The committee recommends that subclause 6(7) be deleted from the Bill.

Recommendation 5

5.25 The committee recommends that the Department consider whether Part 6 of the Bill should be amended to provide the AUSTRAC CEO with powers to refuse registration as a designated remittance services provider and to de-register providers; or to maintain a register of persons who are not permitted to provide remittance services.

Recommendation 6

5.26 The committee recommends that the penalties for the offences in subclauses 138(3) and (5) which relate to possessing false documents or possessing equipment for making false documents be reduced.

Recommendation 7

5.27 The committee recommends that the Department continue to work with industry groups and other stakeholders to resolve technical drafting issues including:

- (a) the exclusion of services relating to stored value cards by the drafting of items 21-24 of table 1 in clause 6;
- (b) the capture of fund managers selling securities on an exchange by item 35 of table 1 in clause 6; and
- (c) the exclusion of some community bank branches from the definition of 'owner-managed branch' in clause 12.

Recommendation 8

5.28 The committee recommends that the Federal Government consider amending the Bill to include further threshold value limits, to exclude low risk, low value services (such as the provision of travellers cheques and foreign currency transactions) from the definition of 'designated services' and that consideration be given to indexing these thresholds every five years.

Recommendation 9

5.29 The committee recommends that the Office of the Privacy Commissioner conduct periodic audits of AUSTRAC's compliance with privacy obligations in its administration of the Bill.

Recommendation 10

5.30 The committee recommends that Division 4 of Part 11 of the Bill should be amended to restrict access to AUSTRAC held information to access for the purposes of responding to money laundering, terrorist financing or other serious crime.

Recommendation 11

5.31 The committee recommends that clause 235 be amended to provide that protection from liability does not extend to actions which breach federal, state or territory anti-discrimination laws.

Recommendation 12

5.32 The committee recommends that AUSTRAC work with stakeholders to develop an objective, non-discriminatory model for assessing the risk of money laundering and terrorism financing to assist reporting entities in performing their obligations.

Recommendation 13

5.33 The committee recommends that clause 251 be amended to provide for review of the legislation in four years and for that review to incorporate consultation with industry and other stakeholders.

Recommendation 14

5.34 Subject to the preceding recommendations, the committee recommends that the Bill be passed.

Senator Marise Payne

Chair