

The Senate

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Legal and Constitutional  
Legislation Committee

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Financial Transaction Reports Amendment  
Bill 2006

August 2006

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## ABBREVIATIONS

AAR	Allens Arthur Robinson
ABA	Australian Bankers' Association
ADIs	authorised deposit taking institutions
AML	anti-money laundering
AML/CTF Bill	Anti-Money Laundering and Counter-Terrorism Financing Bill
AT Act	<i>Anti-Terrorism (No. 2) Act 2005</i>
AUSTRAC	Australian Transaction Reports and Analysis Centre
Bill	Financial Transaction Reports Amendment Bill 2006
CTF	counter-terrorism financing
Department	Attorney-General's Department
EM	Explanatory Memorandum
FATF	Financial Action Task Force on Money Laundering
FATF Recommendations	FATF Forty Recommendations on AML
FTR Act	<i>Financial Transaction Reports Act 1988</i>
IFTIs	international funds transfer instructions
Special Recommendations	FATF Nine Special Recommendations on Terrorist Financing
SR VII	Special Recommendation VII
SWIFT	Society for Worldwide Interbank Financial Telecommunications
US	United States





# **RECOMMENDATIONS**

## **Recommendation 1**

**3.65 Subject to the committee's comments outlined above, the committee recommends that the Bill be passed.**



# CHAPTER 1

## INTRODUCTION

### Background

1.1 On 22 June 2006, the Senate referred the Financial Transaction Reports Amendment Bill 2006 ('the Bill') to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 1 August 2006.

1.2 The Explanatory Memorandum to the Bill explains that the Bill's primary purpose is to vary the amendments to the *Financial Transaction Reports Act 1988* (FTR Act) made by Schedule 9 of the *Anti-Terrorism (No.2) Act 2005* (AT Act). Schedule 9 of the AT Act comes into force on 14 December 2006. The EM states that the Bill needs to come into operation by that date. The amendments proposed by the Bill are to the new Division 3A which Schedule 9 of the AT Act inserted at Part II of the FTR Act.<sup>1</sup>

1.3 According to the EM, the FTR Act requires identification of persons opening or becoming a signatory to an account with a 'cash dealer'. It also requires reporting of certain transactions and transfers and creates certain record-keeping obligations. The purpose of the FTR Act is to reduce the incidence and facilitate the tracking of money laundering and terrorist financing.<sup>2</sup>

1.4 The Federal Government is currently considering a range of other reforms which are designed to improve and strengthen Australia's anti-money laundering (AML) and counter-terrorism financing (CTF) system, in line with international standards issued by the Financial Action Task Force on Money Laundering (FATF).

1.5 These international standards are contained in the FATF Forty Recommendations on AML, which were revised in June 2003 (FATF Recommendations), and the Nine Special Recommendations on Terrorist Financing (Special Recommendations) which were adopted following the terrorist attacks in the US on 11 September 2001.<sup>3</sup> Notably in the context of the Bill, Special

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1 p. 1.

2 p. 1.

3 The FATF Recommendations on AML are available at [http://www.fatf-gafi.org/document/28/0,2340,en\\_32250379\\_32236930\\_33658140\\_1\\_1\\_1\\_1,00.html#40recs](http://www.fatf-gafi.org/document/28/0,2340,en_32250379_32236930_33658140_1_1_1_1,00.html#40recs). The Special Recommendations on Terrorist Financing are available at [http://www.fatf-gafi.org/document/9/0,2340,en\\_32250379\\_32236920\\_34032073\\_1\\_1\\_1\\_1,00.html](http://www.fatf-gafi.org/document/9/0,2340,en_32250379_32236920_34032073_1_1_1_1,00.html). Also see Senate Legal and Constitutional Legislation Committee, *Exposure Draft of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2005*, April 2006, Chapter 1.

Recommendation VII (SR VII) requires that funds transfer instructions include customer information about the sender of the funds.<sup>4</sup>

1.6 As it currently stands, when Division 3A of Part II of the FTR Act comes into force on 14 December 2006, it will require cash dealers in Australia to include certain required information about the ordering customer with an International Funds Transfer Instructions (IFTI) when transmitting the IFTI out of Australia. It also creates offences for failure to include this information.<sup>5</sup>

1.7 The amendments in the Bill are designed to address concerns raised during the Attorney-General's Department's consultation in relation to the Exposure Draft of the Anti-Money Laundering and Counter-Terrorism Financing Bill (AML/CTF Bill).<sup>6</sup>

1.8 The proposed amendments to Division 3A of Part II of the FTR Act are:

- an amendment to the definition of 'account' for the purposes of Division 3A of Part II of the FTR Act;
- clarification of the definition of 'customer information' in section 17FA of the FTR Act;
- an amendment to the definition of 'customer information' for incoming IFTIs under section 17FB of the FTR Act; and
- an amendment to restrict the application of Division 3A of Part II of the FTR Act to Authorised Deposit-taking Institutions (ADIs) (which are, for example, banks).<sup>7</sup>

1.9 The EM states that the Bill's proposed measures will assist industry by reducing the number of systems changes required at an institutional level. In particular, the EM notes that, if the amendment to restrict the application of Division 3A of Part II of the FTR Act to ADIs is not made, then certain legitimate non-bank money remitters may be put out of business.<sup>8</sup>

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4 EM, p. 1.

5 EM, p. 1.

6 See Senator The Hon. Eric Abetz, Minister for Fisheries, Forestry and Conservation, Second Reading Speech, *Senate Hansard*, 21 June 2006, p. 2; and Attorney-General's Department's *Anti-Money Laundering Reform Online* at <http://www.ag.gov.au/agd/WWW/agdhome.nsf/Page/RWP8B2E91AF7CF4CFCACA2570C900112F4C>, and in particular the *Background to the AML/CTF Reform Process* at <http://www.ag.gov.au/agd/WWW/agdhome.nsf/AllDocs/A6CEBB2B6C809A1CCA2571A3000984A9?OpenDocument>. A copy of the revised exposure draft of the AML/CTF Bill 2006, released on 13 July 2006, is available at [http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(85861BE64F280B2D8725056734D25146\)~Revised+exposure+draft+Bill+2006.PDF/\\$file/Revised+exposure+draft+Bill+2006.PDF](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(85861BE64F280B2D8725056734D25146)~Revised+exposure+draft+Bill+2006.PDF/$file/Revised+exposure+draft+Bill+2006.PDF).

7 EM, p. 1.

8 p. 2.

## **Conduct of the inquiry**

1.10 The committee advertised the inquiry in *The Australian* newspaper on 27 June 2006 and 5 July 2006, and invited submissions by 10 July 2006. Details of the inquiry, the Bill, and associated documents were placed on the committee's website. The committee also wrote to 54 organisations and individuals.

1.11 The committee received seven submissions which are listed at Appendix 1. Submissions were placed on the committee's website for ease of access by the public.

1.12 Due to the limited number of submissions and the largely technical nature of the matters raised, the committee decided to conduct the inquiry on the papers, and a number of questions were placed on notice to the Attorney General's Department. The Department's answers are Submissions 6 and 6A.

## **Acknowledgement**

1.13 The committee thanks those organisations and individuals who made submissions, particularly given the short time frame of the inquiry.



# CHAPTER 2

## OVERVIEW OF THE BILL

2.1 This chapter briefly outlines the main provisions of the Bill.

### **Main provisions of the Bill**

#### *Schedule 1*

##### *Item 1*

2.2 Item 1 inserts 'Division 3A of Part II' before the reference to 'Part VIA' in subsection 3(1) (definition of 'account') into the FTR Act. The purpose of the amendment is to restrict the new definition of 'account', inserted by item 2 of the Bill, to Division 3A of Part II of the FTR Act.

2.3 Division 3A of Part II of the FTR Act implements Special Recommendation VII (SR VII), which requires the inclusion, with funds transfer instructions, of customer information about the customer sending the funds. According to the EM, SR VII was developed with the objective of preventing terrorists and other criminals from having unfettered access to wire transfers for moving their funds and for detecting such misuse when it occurs.<sup>1</sup>

2.4 Currently, Division 3A of Part II of the FTR Act contains sections 17FA (Customer information in international funds transfer instructions transmitted out of Australia) and 17FB (Customer information in international funds transfer instructions transmitted into Australia).<sup>2</sup>

##### *Item 2*

2.5 Item 2 inserts a definition of the term 'account' into Division 3A for the purposes only of Division 3A of Part II of the FTR Act. New section 17FAA will define the term 'account' to include a credit card account, a loan account (other than a credit card account) and an account of money held in the form of units in either a cash management trust or a trust of a kind prescribed by the regulations. In order to avoid any doubt, it is immaterial whether an account has a nil balance or whether any transactions have been allowed in relation to an account.

2.6 It is intended that the new definition of 'account' should only be applicable, and confined, to Division 3A of Part II of the FTR Act. The other existing definitions of 'account' as defined as subsection 3(1) and section 40C (Part VIA) of the FTR Act

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1 p. 3.

2 EM, p. 4.

will be retained. That is, the meaning of account (as defined at subsection 3(1)) will still be applicable for all parts of the FTR Act except for Part VIA of the FTR Act and Division 3A of Part II of the FTR Act.<sup>3</sup>

### *Items 3-9 and 11-16*

2.7 Items 3-9 and 11-16 omit the reference to 'cash dealer' and substitute the term 'ADI' (Authorised Deposit Taking Institution) in paragraph 17FA(1)(a), paragraph 17FA(2)(a), paragraph 17FA(2)(b), subsection 17FA(3), paragraph 17FB(1)(a) and subsections 17FB(2), 17FB(4), 17FB(5) respectively. The term 'ADI' is defined in subsection 3(1) to mean:

- a body corporate that is an ADI for the purposes of the *Banking Act 1959*; or
- the Reserve Bank of Australia; or
- a person who carries on state banking within the meaning of paragraph 51(xiii) of the Constitution.

2.8 Item 4 repeals current paragraph 17FA(1)(b) and substitutes new paragraph 17FA(1)(b) to state that the ADI is acting on behalf of, or at the request of, another person who is not an ADI.

2.9 According to the EM, this amendment is intended to restrict the application of Division 3A of Part II of the FTR Act to ADIs only. The reason for this restriction is due to problems that have arisen with the current application of Division 3A of Part II of the FTR Act to non-bank money remittance businesses. Presently, the FTR Act does not distinguish between non-bank International Funds Transfer Instructions (IFTIs) which are 'same-institution' funds transfer instructions and non-bank IFTIs involving 'multiple' institutions.<sup>4</sup>

2.10 The EM states that it is impracticable to require IFTIs sent from one institution in one country to the same institution in another country to include originator information because, in effect, this would require the institution to 'pass on' the information to itself. In these situations, funds transfer requests are registered on a single internal system of the institution, while the actual transfer of funds is effected through net settlements between the institution's various accounts around the world.<sup>5</sup>

2.11 Presently, non-bank money remitters report IFTIs to the Australian Transaction Reports and Analysis Centre (AUSTRAC). This means that ordering customer information is currently available to law enforcement authorities. The

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3 EM, p. 4.

4 pp. 4-5.

5 p. 5.



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amendment to restrict Division 3A of Part II of the FTR Act to ADIs will not alter this position.<sup>6</sup>

### *Item 10*

2.12 Item 10 repeals current paragraph 17A(3)(b) and substitutes a new paragraph 17A(3)(b) to make clear that either an account number or an identification code can be used. The EM states that some customers sending money by an IFTI will not be an account holder with a financial institution and clearly in this instance an identification code should be able to be used.<sup>7</sup>

2.13 In practice, financial institutions can transmit multiple numbers of IFTIs in batch form and even if some or all are on behalf of account holders it is more practicable to use one identification code to cover all of the IFTIs being transmitted in a particular batch. This amendment is intended to clarify that an account number is only required to be included in, or with, the instruction when the instruction relates to transferring money directly from a single account held by the customer with the ADI. In all other cases, an identification code should be permitted instead of an account number.<sup>8</sup>

### *Item 17*

2.14 Item 17 omits the words 'if the ordering customer does not have an account with the ordering organisation' from subparagraph 17FB(6)(c)(ii) of the FTR Act. The effect of this amendment is that the customer's account number or the identification code is now given equal standing for incoming IFTIs received by Australian ADIs under section 17FB of the FTR Act. The purpose of the amendment is to overcome the potential practical difficulties faced by Australian ADIs and AUSTRAC in determining whether a foreign customer has an account with a foreign ordering organisation.<sup>9</sup>

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6 EM, p. 5.

7 p. 5.

8 EM, p. 5.

9 EM, p. 5.



# CHAPTER 3

## CONSIDERATION OF THE BILL

3.1 The committee received submissions which raised a number of concerns in relation to the changes proposed in the Bill. Most of the submissions received by the committee referred to the draft Anti-Money Laundering and Counter Terrorism Financing Bill (AML/CTF Bill) on which the Attorney-General's Department (Department) is currently consulting.<sup>1</sup> Therefore much of the discussion in this chapter is focussed on the Bill's interrelation with the draft AML/CTF legislation. The Department released a revised exposure draft of the AML/CTF Bill during the course of the committee's inquiry, and it is this revised draft of the AML/CTF Bill which is referred to in this report.<sup>2</sup>

3.2 This chapter covers the following issues:

- the impetus for the amendments in the Bill;
- the amended definition of 'account' inserted into Division 3A of Part II of the Financial Transaction Reports Act 1988 (FTR Act) by the Bill;
- the amended definitions of 'customer information' in sections 17FA and 17FB of Division 3A;
- the restriction of Division 3A to Authorised Deposit Taking Institutions (ADIs);<sup>3</sup>
- clarification of the obligations on ADIs routing messages through Australia; and
- the need for amendments to the definition of International Funds Transfer Instructions (IFTIs) in the FTR Act.

### **Reason for the amendments**

3.3 The committee raised with the Department its concern about the impetus for the amendments to the FTR Act proposed the Bill. In particular the committee sought advice as to why the proposed amendments were not contained in other legislation,

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1 See GE Money, *Submission 1*; Allens Arthur Robinson, *Submission 3*; Liberty Victoria, *Submission 4*; Australian Bankers' Association, *Submission 5*; Australian Prudential Regulation Authority, *Submission 7*.

2 A copy of the revised draft of the AML/CTF Bill, released 13 July 2006, is available at [http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(85861BE64F280B2D8725056734D25146\)~Revised+exposure+draft+Bill+2006.PDF/\\$file/Revised+exposure+draft+Bill+2006.PDF](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(85861BE64F280B2D8725056734D25146)~Revised+exposure+draft+Bill+2006.PDF/$file/Revised+exposure+draft+Bill+2006.PDF).

3 The committee notes that Division 3A does not take effect until 14 December 2006.

such as the *Anti-Terrorism Act (No. 2) 2005* (AT Act) or the draft AML/CTF Bill which the committee has considered.<sup>4</sup>

3.4 In responding to these concerns the Department noted that in late 2005, amendments had been introduced into the FTR Act to better implement the Financial Action Task Force on Money Laundering's (FATF) Special Recommendations VI, VII and IX on Terrorist Financing. The Department pointed out that the amendment to improve the implementation of Special Recommendation VII (SR VII) was contained in Schedule 9 to the AT Act. The Department stated that the amendments in Schedule 9 of the AT Act were 'intended to bring forward certain obligations from Part 5 of the proposed [AML/CTF] Bill in a way consistent with that Bill without making changes to the structure of the FTR Act'.<sup>5</sup>

3.5 Part 5 of the AML/CTF Bill is ultimately intended to replace Division 3A of Part II of the FTR Act. However, in consultation on the AML/CTF Bill it was found that there was an inconsistency between obligations in Division 3A of Part II of the FTR Act and Part 5 of the AML/CTF Bill, specifically in relation to the definition of 'account' in the two Bills.<sup>6</sup>

3.6 The Department also stated that there has been strong industry representation by non-bank money remitters that the coverage of Division 3A of Part II of the FTR Act would adversely affect their business viability if the Division were not restricted to ADIs.<sup>7</sup>

3.7 The Department noted that even if the AML/CTF Bill is passed by Parliament in the forthcoming sitting period, there is likely to be a transition period before it comes into force. The Department stated that the amendments in the Bill are intended as a short term solution to address inconsistencies between Division 3A of Part II of the FTR Act.<sup>8</sup>

### **Definition of 'account' in section 17FAA**

3.8 Item 2 of the Bill inserts a new definition of 'account' into Division 3A of Part II of the FTR Act. This definition of account will only apply to Division 3A, and the

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4 See Senate Legal and Constitutional Legislation Committee, *Inquiry into the Exposure Draft of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2005*, 13 April 2006. Attorney-General's Department, *Submission 6*, answers to questions on notice, pp 1-2.

5 *Submission 6*, p. 1.

6 *Submission 6*, p. 1.

7 *Submission 6*, p. 1.

8 *Submission 6*, p. 1.

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existing definitions of 'account' as defined in subsections 3(1) and section 40C (Part VIA) of the FTR Act will be retained.<sup>9</sup>

3.9 The Department stated that the inconsistency between the current definition of 'account' that applies to Division 3A of Part II of the FTR Act and Part 5 of the draft AML/CTF Bill had been highlighted by industry in the consultation on the draft AML/CTF Bill.<sup>10</sup> The Department explained that this inconsistency between the FTR Act and the AML/CTF Bill could impact on the number of systems changes that financial institutions are required to make:

This [inconsistency] was seen to be a problem because of the need under section 17FA for a cash dealer to identify an account in some situations. It was suggested that some financial institutions may be required to identify one type of account when section 17FA comes into force and a different type of account when the AML/CTF Bill is enacted. If so, that could require successive sets of system changes instead of just one.<sup>11</sup>

3.10 The definition of 'account' inserted into Division 3A includes a credit card account. The Australian Bankers' Association (ABA) note that the effect of including a credit card account in the definition of 'account' for the purposes of Division 3A is that where international funds transfers are funded by credit card, a credit card account number must be included in the IFTIs.<sup>12</sup> The ABA is concerned that including a credit card account in the definition creates a heightened, and unintended, risk of fraud where such information is included on IFTIs being transmitted from Australia:

Credit card account numbers correspond to credit card numbers, i.e., the number which is used to signify transaction authorisation for non-signature based purchases, for example telephone and internet purchases. Disclosure of a credit card number creates a much greater risk of fraud than disclosure of other account numbers.

The [ABA] believes that the supply of credit card numbers with IFTIs would unacceptably compromise credit card security as there are no

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9 EM, p. 4. Section 3(1) of the FTR Act defines 'account' as: any facility or arrangement by which a cash dealer does any of the following: (a) accepts deposits of currency; (b) allows withdrawals of currency; (c) pays cheques or payment orders drawn on the cash dealer by, or collects cheques or payment orders on behalf of, a person other than the cash dealer; and includes any facility or arrangement for a safety deposit box or for any other form of safe deposit, but does not include an arrangement for a loan that sets out the amounts and times of advances and repayments, being amounts and times from which the borrower and lender may not depart during the term of the loan.

Section 40C of the FTR Act defines 'account' for the purposes of Part VIA of the Act as: any facility or arrangement through which a financial institution accepts deposits or allows withdrawals, and includes a facility or arrangement for: (a) an interest bearing deposit lodged for a fixed period; and (b) a safety deposit box.

10 *Submission 6*, p. 1.

11 *Submission 6A*, p. 1.

12 *Submission 5*, p. 2.

mechanisms available to ADIs to control or protect this information once it has been sent the destination institution.<sup>13</sup>

3.11 The ABA propose that credit card accounts be excluded from the definition of account, stating the practical effect would be that when credit, charge or debit card accounts are used to fund international funds transfers, an identification code can instead be used to satisfy the customer information requirements for the IFTIs.<sup>14</sup>

3.12 The committee asked the Department to respond to the ABA's concerns on this issue. The Department referred to the *Revised Interpretative Note to SR VII*, and stated that '[c]learly, SR VII exempts credit card transactions except where a credit card is utilised to affect a wire transfer'.<sup>15</sup> The Department noted that its understanding is that credit card accounts are not commonly used as a source of funds for wire transfers. However, the Department indicated its willingness to discuss the matter further with the ABA.<sup>16</sup>

### **The definition of 'customer information'**

3.13 Both Allens Arthur Robinson (AAR) and the ABA raised concerns over the amended definition of 'customer information' in section 17FA proposed by the Bill. AAR is concerned that the amendment means Division 3A will not comply with the *Interpretative Notes to SR VII on Terrorism Financing*. The ABA's concern is that the definition is not consistent with Part 5 of the revised draft AML/CTF Bill.<sup>17</sup>

3.14 AAR also considered that the amendments proposed to the definition of 'customer information' in the Bill may mean that section 17FB is not compliant with the *Interpretative Notes to SR VII*.<sup>18</sup>

### **'Customer information' in section 17FA**

3.15 Subsection 17FA(3) of Division 3A sets out the 'customer information' to be included in an IFTI transmitted out of Australia. The proposed definition of customer information in section 17FA of Division 3A means an IFTI being transmitted out of Australia will need the ordering customer's name and full business or residential address and either of the following:

- where the IFTI is from a single account of a customer of the ADI, the account number; or
- in any other case – the identification code of the instruction by the ADI.

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13 *Submission 5*, p. 2.

14 *Submission 5*, pp 2-3.

15 *Submission 6*, p. 8.

16 *Submission 6*, p. 8.

17 *Submission 5*, pp 3-4.

18 *Submission 3*, p. 6.

3.16 The current drafting of section 17FA provides that an identification code will be assigned to an IFTI when the customer does not have an account with the institution.

3.17 The EM states that the amendment is intended to clarify that either an account number or an identification code can be used as the customer information that is required to be transmitted with an outgoing IFTI:

an account number is only required to be included in or with the instruction when the instruction relates to transferring money directly from a single account held by the customer with the ADI. In all other cases, an identification code should be permitted instead of an account number.<sup>19</sup>

3.18 The EM also explains the practicalities of being able to use either an account number or an identification code:

Some customers sending money by an IFTI will not be an account holder with a financial institution and clearly in this instance an identification code should be able to be used.

In practice, financial institutions can transmit multiple numbers of IFTIs in batch form and even if some or all are on behalf of account holders it is more practicable to use one identification code to cover all of the IFTIs being transmitted in a particular batch.<sup>20</sup>

3.19 AAR understand Articles 5 and 7 of the *Interpretative Notes to SR VII* to only allow the use of a identification code as part of the customer information accompanying an IFTI where:

- there is no account number for a single transfer; or
- there is a batched file of transfers from a single customer.

3.20 AAR argue that the amendments to the definition of 'customer information' in section 17FA(3) allow for ADIs to use identification codes in circumstances not set out in the *Interpretative Notes to SR VII*, in particular, where there are batch files being transmitted from a number of different customers.<sup>21</sup>

3.21 AAR also makes the point that, contrary to Articles 5 and 7 of the *Interpretative Notes to SR VII*, the amendments to the definition of 'customer information' in section 17FA(3) do not require the identification code for an IFTI to be 'unique' to that instruction.<sup>22</sup>

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19 p. 5.

20 p. 5.

21 *Submission 3*, p. 5.

22 *Submission 3*, p. 4.

3.22 Finally, AAR are concerned that the changes to the definition of customer information in section 17FA will mean that financial institutions will need to undertake two systems changes in order to comply with both the Bill and the requirements in section 67 of the revised draft AML/CTF Bill with respect to 'full originator information' accompanying funds transfer instructions.<sup>23</sup> In AAR's view, the only way to avoid making two systems changes is for financial institutions to adopt a practice of giving every IFTI a unique identification code, even if the instruction is part of a batched file.<sup>24</sup>

3.23 The ABA's submission states that subsection 17FA(3) differs in wording to Part 5 of the draft AML/CTF Bill and the ABA believe it is important that the two pieces of legislation be aligned:

The [ABA] considers it fundamentally important that both pieces of legislation be aligned to ensure that there is no change at all in the obligations of its members as the FTRA is replaced by the AML/CTF Bill when it passes into law. Any change in these obligations may require costly system reengineering.<sup>25</sup>

3.24 The Department disagreed with assessments that the amended definition of 'customer information' in section 17FA would be inconsistent with the *Interpretative Notes to SR VII*:

[The Department] does not consider that the definition of 'customer information' in section 17FA is inconsistent with Articles 5 (cross border wire transfers) and 7 (domestic wire transfers) of the now *Revised Interpretative Notes to SR VII*. The use of the term 'identification code' is used both in the FTR Act and FTR Regulations and this term was carried over to the [Bill].<sup>26</sup>

3.25 The Department noted that it considers that the term 'identification code' is consistent with the term 'unique reference number' which is used in the AML/CTF Bill.<sup>27</sup>

3.26 On the issue of the cost of complying with obligations in Division 3A of Part II of the FTR Act and Part 5 of the AML/CTF Bill, the Department noted that it had endeavoured to minimise the compliance costs on those bodies affected by the Bill:

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23 Subsections 67(c) and (d) of the revised draft of the AML/CTF Bill provide that the full originator information for a funds transfer instruction includes: (c) if the money is to be transferred from an account held by the originating entity—the account number; and (d) if the money is not to be transferred from an account held by the originating entity—a unique reference number for the transfer.

24 *Submission 3*, p. 5.

25 *Submission 5*, p. 4.

26 *Submission 6*, p. 5.

27 *Submission 6*, p. 5.



the Government agreed to make the proposed amendments in order to address issues raised by industry and non-bank money remittance businesses.

In particular, industry participants in the AML/CTF Bill consultation process indicated that if the definition of 'account' in Division 3A of Part II of the FTR Act is made consistent with the term 'account' in the AML/CTF Bill, this will assist industry by requiring only one systems change at an institutional level rather than multiple changes. Multiple systems changes would increase industry's compliance costs.<sup>28</sup>

***'Customer Information' in section 17FB***

3.27 Subsection 17FB(6) of Division 3A sets out the 'customer information' of the person ordering the transfer which is to be included with IFTIs being transmitted into Australia. The amendments in the Bill provide that the following customer information is to be included in incoming IFTIs:

- (a) the ordering customer's name;
- (b) any one of the following: the ordering customer's full business or residential address; the ordering customer's date and place of birth; a unique identification number given to the ordering customer by a foreign government; or the identification number given to the ordering customer by the ordering organisation; and
- (c) either:
  - (i) the number of the ordering customer's account with the ordering organisation; or
  - (ii) the identification code assigned to the instruction by the ordering organisation.

3.28 AAR raise a specific concern in relation to paragraph (c) above which allows for the IFTI to include either the ordering customer's account number, or an identification code.<sup>29</sup>

3.29 In the current drafting of Division 3A, IFTIs can only include an identification code where the ordering customer does not have an account number with the institution sending the instruction. The EM gives the following explanation for the amendment:

The effect of this amendment is that the customer's account number or the identification code is now given equal standing for incoming IFTIs received by Australian ADIs under section 17FB of the FTR Act. The purpose of the amendment is overcome the potential practical difficulties faced by

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28 *Submission 6*, p. 6.

29 *Submission 3*, p. 6.

Australian ADIs and AUSTRAC in determining whether a foreign customer has an account with a foreign ordering organisation.<sup>30</sup>

3.30 In AAR's opinion, the proposed amendment to the definition of customer information in section 17FB will allow for the use of identification codes in circumstances not permitted by the SR VII.<sup>31</sup>

3.31 AAR refer to Article 14 of the *Interpretative Notes to SR VII* and argue this permits unique identification codes to be used only when an account number does not exist. AAR suggest that the following terminology, taken from the revised draft of the AML/CTF Bill should be adopted:

- (c) if the money is to be transferred from an account held by the originating entity – the account number; and
- (d) if the money is not to be transferred from an account held by the originating entity – a unique reference number for the transfer.

3.32 The Department rejected AAR's suggested amendment, stating that it would not be feasible in practice:

An Australian institution which receives an incoming IFTI will be able to determine whether it includes reference to an account number or a unique identifier. However, if there is only a unique identifier, there will be normally no way for the institution to know whether it was open to the sending institution to use an account number. The AAR proposal would set a test that an Australian institution would normally not be able to meet.<sup>32</sup>

### **Restriction of Division 3A of the FTR Act to Authorised Deposit Taking Institutions**

3.33 Many of the amendments in the Bill involve replacing the term 'cash dealer' with the term 'ADI', effectively restricting the application of Division 3A to ADIs.

3.34 The EM states that the reason for this amendment is 'due to problems that have arisen with the current application of [Division 3A] to non-bank money remittance businesses'.<sup>33</sup> The FTR Act does not distinguish between non-bank International Funds Transfer Instructions (IFTIs) that are 'same-institution' and those non-bank IFTIs which are 'multiple institution'. According to the EM:

[i]t is impracticable to require IFTIs sent from one institution in one country to the same institution in another country to include originator information because in effect this would require the institution to 'pass on' the information to itself. In these situations, funds transfer requests are

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30 EM, p. 5.

31 *Submission 3*, p. 6.

32 *Submission 6*, p. 7.

33 p. 4.

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registered on a single internal system of the institution, while the actual transfer of funds is effected through net settlements between the institution's various accounts around the world.<sup>34</sup>

3.35 The Department stated that the impetus for this amendment is that 'certain non-bank money remitters made strong representations to the Government that coverage under Division 3A of Part II would adversely affect their business viability if it is not restricted to [ADIs]'.<sup>35</sup>

3.36 By way of background, the Department provided the committee with the following explanation of how international transfers operate in relation to the Australian financial system:

Financial institutions use messaging systems when they conduct international business or have direct relationships with foreign institutions and need to settle transactions. In the Australian financial services sector, it is primarily the larger ADIs who conduct the volume of international business to warrant the subscription costs to access [Society for Worldwide Interbank Financial Telecommunications (SWIFT)]-styled systems. In effect a small number of banks act as conduits for the processing of funds transfer traffic into the international banking system on behalf of second tier banks and other financial institutions.<sup>36</sup>

3.37 The Department noted that some non-ADIs operate remittance services which fit the description of being an international fund transfer for the purpose of the FTR Act, but which do not use the SWIFT-style systems. The Department argued that it would be difficult for an operator in that position to send identification details with each transfer without making major system changes, and in most cases it would 'serve no real purpose'.<sup>37</sup>

3.38 The AAR submission raised concerns that restricting the application of Division 3A to ADIs would be inconsistent with:<sup>38</sup>

- SR VII;
- the revised draft of the AML/CTF Bill; and
- Division 3 of the FTR Act.

3.39 The Department responded to these concerns stating that the amendments in Schedule 9 of the AT Act are a short term measure intended to bring Australia more closely into compliance with SR VII. However, limitations in the FTR Act framework

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34 p. 5.

35 *Submission 6*, p. 1.

36 *Submission 6A*, Attachment A, p. 2.

37 *Submission 6A*, p. 2.

38 *Submission 3*, pp 2-3.

have meant that SR VII obligations can only be applied to a more limited class than will be the case when the AML/CTF Bill is enacted. The committee notes that Part 5 of the AML/CTF Bill is ultimately intended to replace Division 3A of Part II of the FTR Act.<sup>39</sup> The Department has informed the committee that the provisions of the AML/CTF Bill will comply with SR VII.

3.40 The ABA noted that replacing the term 'cash dealer' with 'ADI' will create a competitive imbalance as non-bank remittance providers would be subject to less onerous requirements than banks (which are ADIs) that are providing the same service. However, ABA were prepared to accept the amendment as a temporary measure, until the proposed AML/CTF legislation has passed:

We have been assured in discussions with the [Department] that this situation is a temporary measure and that competitive neutrality will apply once the draft AML/CTF legislation becomes law and all money remitters – whether banks or non banks – will be obliged to conform with the same law. We accept these provisions on the basis of this assurance from the Government.<sup>40</sup>

### **Obligations of Authorised Deposit Taking Institutions routing messages through Australia**

3.41 ABA sought clarification on whether Division 3A applied to ADIs which were routing messages through a hub and spoke system, as distinct from passing on payment instructions as part of a payment chain.<sup>41</sup> The ABA described the hub and spoke messaging system that their members operate, and raised concerns that these systems may be caught by section 17FA(1)(b):

... hub and spoke payments messaging systems [involve] a hub computer located in Australia and spoke connections to their offshore branches and subsidiaries. Payment instruction messages sent by other financial institutions to such offshore sites (or vice-versa) are routed through hub computer systems in Australia.

...

Our members are concerned that in passing on payment instructions as part of a payment chain, Part II Division 3A of the [FTR Act] may treat them as 'senders' of the message, and require inclusion of full originator information even though our member is not the originating institution, and unable to collect the information directly from the sender of the payment. This is because s.17FA(1)(b) only grants an exemption where the ADI sending the message acts on behalf or, or at the request of another ADI. The definition of 'ADI' in section 3 of the FTRA does not extend to overseas or international financial institutions. The practical effect of this would be to

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39 *Submission 6*, p. 2.

40 *Submission 5*, p. 6.

41 *Submission 5*, pp 3-4.

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require ADIs to block or hold over serial payments until the customer information can be completed.<sup>42</sup>

3.1 The ABA does not believe it is the intention of the Bill to apply Division 3A to messages which are simply routed through their members Australian systems.

3.42 The Department confirmed that section 17FA of Division 3A of Part II of the FTR Act is not intended to apply in situations where a wire transfer message passes through an Australian computer, but has not specifically come through the Australian financial system.<sup>43</sup> However, the Department noted that it would like to seek further input from the ABA before any amendments were made to the Bill to clarify this situation.<sup>44</sup>

### **The definition of International Funds Transfer Instructions**

3.43 Both GE Money and AAR suggested that the definition of IFTI in the FTR Act should be amended.<sup>45</sup> IFTIs are defined in the FTR Act as 'an instruction for a transfer of funds that is transmitted into or out of Australia electronically or by telegraph, but does not include an instruction of a prescribed kind'.<sup>46</sup>

3.44 AAR stated that to overcome the problem identified in the EM of non-bank money remittance businesses effectively being required to pass information to themselves (in the case of single institution transfers) the definition of IFTIs should be amended to include only multiple institution transfers.<sup>47</sup>

3.45 In support of this suggestion, AAR emphasised that SR VII applies to cross-border and domestic wire transfers that occur *between* financial institutions.<sup>48</sup>

3.46 When asked about the feasibility of AAR's suggested amendment to the definition of IFTI, the Department informed the committee that such an amendment would require extensive changes to the IFTI reporting regime and would not be a practical way of resolving the issue in the short term.<sup>49</sup>

3.47 GE Money is concerned that the current definition of IFTIs applies to messages passed between its corporate groups and so the amendments in Division 3A will not remove the impracticality of GE Money entities effectively passing

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42 *Submission 5*, p. 3.

43 *Submission 6*, p. 4.

44 *Submission 6*, p. 4.

45 *Submission 1*, p. 3; *Submission 3*, p. 2.

46 FTR Act, section 3.

47 *Submission 3*, p. 3.

48 *Submission 3*, p. 2, emphasis in original.

49 *Submission 6*, p. 4.

information 'to itself about itself'. GE Money's submission outlined how its own group treasury activities operate:

Group treasury activities that underlie the GE corporate group's management of funds and general business activities involve intra-group funds transfers to and from group members, which may be located in Australia or overseas. Intra-group international funds transfers may be performed on instructions that originate from a GE entity that is in Australia or in a foreign jurisdiction. The instructions may be given to another GE entity or financial institution that is located in a different jurisdiction. In the case of instructions that are given to a GE entity that is located in a foreign jurisdiction, the GE entity that receives the instructions may then communicate those instructions to the bank with which the relevant account is held in order to effect the actual transfer to funds.<sup>50</sup>

3.48 Therefore, GE Money supported amending the definition of IFTI, suggesting regulations to exclude from the definition of IFRI instructions that are sent between related bodies corporate.<sup>51</sup>

3.49 The Department was also asked to consider an amendment to the definition of IFTI in order to address the situation outlined by GE Money. The Department stated that it is not convinced that such regulations are required at this point. However, the Department did indicate its willingness to discuss the matter further with GE Money.<sup>52</sup>

### **Other issues**

3.50 There were several other issues that submissions drew to the committee's attention, including:

- the different customer information requirements for domestic and international funds transfer instructions;
- the need for further consultation on the AML/CTF Bill;
- the need for a public awareness campaign; and
- technical issues.

### ***Domestic and international funds transfer instructions***

3.51 The ABA submission raised the issue of the different customer information requirements for domestic and international funds transfer instructions, which occurs in both section 17FA(3) and Division 2 of Part 5 of the AML/CTF Bill:

At present, the Government proposes separate standards of originator information for domestic and international payments respectively. Under

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50 *Submission 1*, p. 3.

51 *Submission 1*, p. 3.

52 *Submission 6*, p. 4.

the AML/CTF Bill as drafted, members must include, as part of the 'appropriate originator information', an account number if it exists or alternatively a unique reference number (as defined in clause 5). The preference for an account number is not mandatory for domestic payments, in relation to which our members may choose either an account number or a reference number.

In the view of our members, the distinction is unwarranted.<sup>53</sup>

3.52 The Department agreed that there would be different requirements for domestic and international wire transfers under the AML/CTF Bill.<sup>54</sup> However, the Department noted that this distinction arose because SR VII imposes different requirements in relation to domestic and international wire transfers.<sup>55</sup>

### ***Consultation on the AML/CTF Bill***

3.53 Liberty Victoria's submission focussed on concerns that it has about the obligations imposed on non-bank money remitters by the proposed AML/CTF Bill.<sup>56</sup> Liberty Victoria called for a public inquiry into the specific issues relating to non-bank money remitters that arise from the AML/CTF Bill.

3.54 The committee notes that the Department is in ongoing consultation on the AML/CTF Bill. The committee itself has inquired into, and reported on, the exposure draft of the AML/CTF Bill.<sup>57</sup> That report detailed the consultation process the Department had undertaken, the concerns that the industry had relating to the consultation, and the Department's response to those concerns.<sup>58</sup> The report also noted that while consumer and advocacy groups were not involved in the ministerial advisory group on the AML/CTF Bill, those groups were involved in parallel discussions on the Bill.<sup>59</sup>

3.55 The committee believes that these parallel discussions being conducted by the Department in relation to the AML/CTF Bill would be the appropriate forum in which Liberty Victoria could express the concerns it has on the issues for non-bank money remitters.

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53 *Submission 5*, p. 5.

54 *Submission 6*, p. 5.

55 *Submission 6*, p. 6.

56 *Submission 4*.

57 See Senate Legal and Constitutional Legislation Committee, *Exposure Draft of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2005*, April 2006.

58 Senate Legal and Constitutional Legislation Committee, *Exposure Draft of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2005*, April 2006, pp 15 – 20.

59 Senate Legal and Constitutional Legislation Committee, *Exposure Draft of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2005*, April 2006, p. 59.

### ***Public awareness campaign***

3.56 The ABA in its submission noted that the changes introduced by Division 3A of the FTA Act will require financial institutions to disclose potentially sensitive customer information on IFTIs. The ABA strongly urged that a public awareness campaign be carried out to ensure that adverse customer reaction to the change be minimised.<sup>60</sup>

3.57 The committee notes that the Department has previously given a commitment to conduct a public relations campaign in relation to the AML/CTF Bill, although the appropriate time for such a campaign is yet to be determined.<sup>61</sup>

3.58 The committee suggests that the Department consider whether the awareness campaign in relation to the AML/CTF Bill might also be an appropriate vehicle in which to raise awareness of the effects of Division 3A of the FTR Act.

### ***Technical issue***

3.59 The committee notes that AAR's submission draws attention to the need to replace 'cash dealer' with 'ADI' in section 29(4) of Division 3A to ensure consistency.<sup>62</sup> The committee has raised this with the Department and the Department indicated that the appropriate amendments would be made to section 29(4) of Division 3A.<sup>63</sup>

### **Committee view**

3.60 The committee notes that in late 2005, the Government took steps to better implement SR VII through amendments to the FTR Act, specifically through the introduction of Division 3A of Part II of the FTR Act, which requires cash dealers to include customer information in IFTIs transmitted out of Australia.

3.61 The committee also notes that Division 3A of Part II of the FTR Act commences on 14 December 2006, and that certain non-bank money remitters have made representations to the Government that Division 3A will adversely affect their business viability if it is not restricted to ADIs.

3.62 Given that there is the potential for the viability of non-bank money remitters to be adversely affected by the operation of Division 3A if it continues to apply to 'cash dealers', the committee concurs with the need for the amendments in the Bill. However, the committee does consider that the amendments made by the Bill are an

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60 *Submission 5*, p. 6.

61 Senate Legal and Constitutional Legislation Committee, *Exposure Draft of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2005*, April 2006, pp 68-69.

62 *Submission 3*, p. 6.

63 *Submission 6*, p. 7.



unfortunate complication to an already complex and drawn out process for achieving compliance with the Special Recommendations.

3.63 The committee notes that in the course of the inquiry the Department has indicated that it is willing to have further discussions with the ABA and GE Money in relation to specific concerns those organisations have about the Bill. The committee urges the Department to pursue these discussions.

3.64 Finally, the committee notes that the Department has indicated its intention to seek an amendment to the Bill with respect to section 29(4) of Division 3A of Part II of the FTR Act. The committee agrees that this additional amendment is necessary.

### **Recommendation 1**

**3.65 Subject to the committee's comments outlined above, the committee recommends that the Bill be passed.**

**Senator Marise Payne**

**Committee Chair**



## **ADDITIONAL COMMENTS BY SENATOR LUDWIG**

1.1 I support the majority report but would like to add the following additional comments.

1.2 As a Labor Senator on the committee, I find it extraordinary that not a year from passage of the *Anti-Terrorism Bill (No. 2) 2005* that the Senate is already returning to fix the Howard Government's sloppy legislation.

1.3 Be under no illusion of what this Bill amends – despite the innocuous sounding title this Bill represents a significant re-write of dormant provisions of the *Anti-Terrorism Bill (No. 2) 2005* which are yet to take effect. To that extent this is a back-door revisitation of the Prime Minister's joint communiqué with the States and territories at the Special COAG Meeting on counter-terrorism.

1.4 These measure themselves were brought forward from the Government's long delay in bringing forward the anti-money laundering regime due to botched consultation with affected industries, and were themselves perhaps prompted by the Howard government's failure to meet the international Financial Action Task Force mutual evaluation on anti-money laundering and counter-terrorism financing, in which the Government scored just 9 out of 40 on anti-money laundering, and 0 out of 9 on counter-terrorism financing.

1.5 It strikes me as more than a little odd that for all the talk about the importance of combating terrorism, the Prime Minister and the Attorney-General have proven themselves singularly incapable of providing a legislative response that is adequate.

1.6 I note that the Parliament was recalled at great expense to fix the improperly drafted anti-terror legislation by changing one word, and in this context am extremely critical of the Government for putting Australia's national security at risk through its shoddy drafting and casual approach to legislation.

1.7 I also note that the Howard Government initially attempted to give *the Anti-Terrorism Bill (No. 2) 2005* a one-day Senate Inquiry, and that the Government finally allowed only a shortened inquiry

1.8 This Bill and its consumption of parliamentary sitting time could have been completely avoided if the Executive would

- (a) draft its legislation properly, or
- (b) allow the Senate adequate time for scrutiny of the legislation, or
- (c) consult meaningfully with stakeholders before rushing unworkable and error-riddled legislation through the Senate.

1.9 If the Attorney-General and the Prime Minister are unwilling to do their job properly by ensuring properly drafted and workable legislation is laid before the Parliament then they should cease the Government's abuse of the Senate and ensure the Government instead leaves the Senate's traditional role as a house of review unfettered.

**Senator Joseph Ludwig**

**Labor Senator for Queensland**

# **APPENDIX 1**

## **SUBMISSIONS RECEIVED**

- 1 GE Money
- 2 Platinum Asset Management
- 3 Allens Arthur Robinson
- 4 Liberty Victoria
- 5 Australian Bankers' Association
- 6 Attorney General's Department
- 7 Australian Prudential Regulation Authority (APRA)