Questions on Notice

Attorney General's Department

Question 1

Why were these changes not included the *Anti-Terrorism Act (No 2) 2005* which was only recently passed?

AGD Response:

In late 2005, the Government decided to introduce amendments to the *Financial Transaction Reports Act 1988* (FTR Act) to better implement the Financial Action Task Force on Money Laundering's Special Recommendations VI, VII and IX on Terrorist Financing. The amendment to better implement SR VII was contained in Schedule 9 of the *Anti-Terrorism Act (No 2) 2005* (ATA) which inserts a new Division 3A into Part II of the FTR Act. The amendment in relation to SR VII requires cash dealers to include customer information in IFTIs transmitted out of Australia. The amendment was intended to bring forward certain obligations from Part 5 of the proposed Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 (AML/CTF Bill) in a way consistent with that Bill without making changes to the structure of the FTR Act.

The AML/CTF Bill is the subject of ongoing industry consultation, during which an inconsistency was noted between obligations in Division 3A of Part II of the FTR Act and the proposed requirements of Part 5 of the AML/CTF Bill which are intended to ultimately replace them in due course. The AML/CTF Bill, even if passed in this year's Spring Sittings is likely to be subject to a transition period before it comes into force.

The particular inconsistency, as identified by industry, related to the different definitions of 'account' in the FTR Act and the AML/CTF Bill. Furthermore, 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 authorised deposit taking institutions. The proposed amendments in the FTR Amendment Bill 2006 serve as a short term solution to address these particular issues until the AML/CTF Bill comes into force.

Therefore, the proposed changes are included in the FTR Amendment Bill as a result of consultation that has been undertaken in relation to the AML/CTF Bill.

Question 2

Why were these changes not included in the review and exposure draft of the Anti-Money Laundering and Counter Terrorism Financing (AML/CTF) Bill currently underway?

AGD Response

AGD refers to its response to Question 1 and emphasises that the purpose of the proposed amendments is to provide a solution to the issues raised by industry and the non-bank money remittance businesses until the AML/CTF Bill comes into force.

Question 3

Is this a case of amendments being required to fix poor drafting?

AGD Response

See response to Question 1. The amendments are required to address issues raised by industry in the course of consultation in relation to the AML/CTF Bill.

Question 4

Allens Arthur Robinson (AAR) state that amending 'cash dealers' to 'ADIs' in sections 17FA and 17FB will make the *Financial Transaction Reports Act 1988* (FTR Act) inconsistent with the Financial Action Taskforce's Special Recommendation VII on Terrorist Funding (SRVII) (see pages 2-3 of the AAR Submission).

Does the Department believe that restricting Division 3A to ADIs will cause the FTR Act to be inconsistent with SRVII? If not, please explain why not. If the Department does believe there is an inconsistency – is there a particular reason for the inconsistency?

AGD Response

AGD understands the suggestion to be that as FATF SRVII refers to 'financial institutions' (which is a term which extends beyond ADIs), restricting Division 3A of Part II of the FTR Act to ADIs will result in non-compliance with SRVII.

The amendments made by Schedule 9 of the ATA to the FTR Act were designed to bring Australia more closely into compliance with SRVII on a short term basis. The limitations in the FTR Act framework meant that the SRVII obligations could only be applied to a more limited class than will be the case when the AML/CTF Bill is enacted at a later date. The provisions in the AML/CTF Bill comply with SRVII.

Question 5

AAR are concerned that amending 'cash dealers' to 'ADIs' will result in inconsistency between the FTR Act and the AML/CTF Bill (see pages 2-3 of the AAR Submission).

AAR's concerns relate to sections 58(6) and 59 of the first draft of the AML/CTF Bill released in December 2005, which impose an obligation on persons to collect appropriate 'originator information' in relation to funds transfer instructions. It appears to the committee that these sections remain the same in the draft of the AML/CTF Bill released on 13 July 2006 – could you please confirm that is correct?

How does the Department respond to AAR's concern about this inconsistency between the FTR Act and the AML/CTF Bill?

AGD Response

There have been some changes to clauses 58(6) and 59. In the revised draft exposure AML/CTF Bill that was released on 13 July 2006, clause 58(6)(c) has been amended to make clear that the acceptance of the transfer instruction by the originating institution is a designated service *provided at or through a permanent establishment of the originating institution in Australia.* A similar amendment was made to clause 59(7) of the AML/CTF Bill.

Also see responses to Questions 1 and 4.

Question 6

AAR say that the amendments in the Bill create an inconsistency between Divisions 3 and 3A of the FTR Act, with International Funds Transfer Instructions (IFTIs) being treated differently depending on whether an organisation is a cash dealer or an ADI.

How does the Department respond to this observation?

AGD Response

See responses to Questions 1 and 4.

Question 7

The Australian Bankers' Association (ABA) seeks clarification of the obligations of an ADI which is 'routing' messages through a hub and spoke system, as distinct from passing on payment instructions as part of a payment chain (see pages 3-4 of the ABA submission).

Can the Department clarify if the intention of the Bill is to apply to messages routed through an Australian system? If the Bill is not intended to apply to these messages, are the recommendations made by the ABA on page 4 of its submission a suitable way to clarify this point?

AGD Response

AGD understands from ABA's submission that members who operate offshore branches typically operate hub and spoke payments messaging systems involving 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. ABA's members do not consider that they are the 'senders' of such messages for the purposes of section 17FA. In this regard, the ABA recommend that a statement be included in the Explanatory Memorandum to the effect that section 17FA is not intended to apply to payment instruction messages passing between

overseas financial institutions and offshore sites that are merely routed through computer systems in Australia.

AGD can confirm that section 17FA is not intended to apply in a situation where a wire transfer message passes through an Australian computer but has not specifically come through the Australian financial system. However, AGD has not discussed this issue with the ABA and would prefer to seek further input from the ABA before agreeing to any specific amendment.

The ABA has also made comments in relation to clause 58(7) of the AML/CTF Bill. Those comments do no affect the FTR Amendment Bill. AGD is happy to discuss those comments with the ABA in the context of the AML/CTF Bill.

Question 8

AAR recommends that instead of substituting 'cash dealer' with 'ADI', the definition of an IFTI should be amended so that it only applies to multiple-institution transfers (page 3 of AAR's submission). AAR say that this would address the impracticality identified in the Explanatory Memorandum of institutions passing on information to themselves.

GE Money (pp 2-3 of its submission) state that the definition of IFTI results in the focus of Division 3A being on the location of the sending and receiving entities, and not on whether the ADI has the capability of executing the IFTIs. As a result GE Money believes that an unintended consequence of the Bill is that IFTIs between internal treasury operations of an organisation (such as GE Money) will be caught by the FTR Act.

Both AAR and GE Money suggest amending the definition of IFTIs, albeit in slightly different ways. Could the Department please provide the committee with its views on the feasibility of these suggestions by AAR and GE Money.

AGD Response

AGD notes AAR's suggestion to amend the definition of an 'IFTI' in the FTRA so as to include 'only multiple institution transfers'. Such an amendment would require extensive changes to the existing IFTI reporting regime and would not be a practical way of resolving the issue identified by AAR in the short term.

AGD notes GE Money's suggestion that a regulation should be made pursuant to the definition of IFTI in section 3, which has the effect of carving out from that definition instructions given between related bodies corporate. AGD is not convinced at this point that a regulation is needed since the provisions in question will only apply to an entity which is an ADI and which is acting on behalf of, or at the request of, another person who is not an ADI. However, AGD is prepared to discuss this issue further with GE Money.

Question 9

At pages 4-5 of its submission, AAR state that the amendment to the definition of 'customer information' in section 17FA is inconsistent with Articles 5 and 7 of the Interpretative Notes to the SRVII.

AAR state that consistency with SRVII can be achieved only if the Bill restricts the use of unique identification codes to circumstances where no account number exists, or where there is a batch transfer from a single customer.

Does the Department agree with AAR's assessment? If not, would the Department provide the committee with an explanation of why the definition is not inconsistent with the SRVII?

AGD Response

AGD 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 SRVII. 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 FTR Amendment Bill. AGD considers that the term 'identification code' is consistent with the term 'unique reference number' which is used in the AML/CTF Bill.

Question 10

The ABA also raise concerns about the inconsistency between section 17FA(3) and Part 5 of Division 2 of the AML/CTF draft Bill (page 4-5 of ABA's submission). The ABA suggests that the terminology in section 68 of the AML/CTF Bill should be adopted in the Bill and should apply to both domestic and international transfers.

Has the Department previously discussed these issues with the ABA? If so, could you provide the committee with some of the detail of those discussions.

Does the Department believe that there is an inconsistency between section 17FA(3) and Part 5 of Division 2 of the AML/CTF draft Bill? If yes, could the Department tell the committee the reasons for this inconsistency? If no, please explain why there is no inconsistency.

What consideration has the Department given to aligning the procedures for including information in domestic and international transfer instructions?

AGD Response

AGD agrees that there will be different identification requirements under the AML/CTF Bill in relation to domestic wire transfers and international wire transfers. In the case of domestic wire transfers an ADI will be able to choose between using an account number and a unique identifier. In the case of international wire transfers the

ADI will only be able to use a unique identifier if, in effect, there is no account number that can be used.

The reason for the difference is that FATF SRVII imposes different requirement in relation to domestic and international wire transfers. This is set out in the revised Interpretative Note to SR VII. The relevant paragraphs are paragraph 5 (which deals with international wire transfers) and paragraph 8 (which deals with domestic wire transfers).

Question 11

At page 5 of its submission AAR say, in relation to the amendment of the definition of customer information in section 17FA:

> If the AML/CTF Bill stays in its current form then financial institutions will need to make two systems changes in order to comply with the [Financial Transaction Records Act] changes and another to comply with the new AML/CTF law. We understand one of the objectives of the Bill is to avoid this (although financial institutions could in practice avoid this by adopting from the start unique identifiers for each transaction even if the transaction is batched).

The ABA also raises the issue of the cost of systems changes as a result of inconsistency between the AML/CTF draft Bill and the Bill.

What consideration has the Department given to minimising the compliance costs on those effected by the Bill?

AGD Response

AGD has endeavoured to minimise the compliance costs on those bodies affected by the FTR Amendment Bill. Hence, 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 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.

Question 12

AAR say that amendment to the definition of 'customer information' in section 17FB is inconsistent with the Interpretative Notes to SRVII (see page 6 of AAR's submission). AAR suggest that the terminology in section 67(c) and (d) of the AML/CTF Bill should be used instead to ensure consistency.

Is AAR's suggestion a feasible alternative? If not, why not?

AGD Response

AAR's suggestion is not 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.

Question 13

In section 29(4)(ba) of the FTR Act, should the term 'cash dealer' be replaced by 'ADI'? If not, why not?

AGD Response

The Department agrees with this comment and will arrange to make the appropriate amendment.

Question 14

The ABA are concerned that including credit card accounts in the definition of 'accounts' in section 17FAA of Division 3A will heighten the risk of fraud because credit card account numbers will be required to be included in IFTIs being transmitted from Australia (pages 2-3 of the ABA submission).

Does the Department share the concerns expressed by the ABA in relation to the inclusion of credit card account numbers in IFTIs being transmitted from Australia?

Has the Department considered excluding credit card accounts from the definition of account in section 17FAA? If so, why haven't these accounts been excluded from the definition of account?

AGD Response

According to Article 10 of the FATF Revised Interpretative Note to SR VII, SR VII is not intended to cover the following types of payments:

(a) any transfer that flows from a transaction carried out using a credit or debit card so long as the credit or debit card number accompanies all transfers flowing from the transaction. However, when credit or debit cards are used as a payment system to effect a money transfer, they are covered by SR VII, and the necessary information should be included in the message

(b) Financial institution-to-financial institution transfers and settlements where both the originator person and the beneficiary person are financial institutions acting on their own behalf.

Clearly, SR VII exempts credit card transactions except where a credit card is utilised to affect a wire transfer. In other words, if a credit card account is used as the source of funds for an international wire transfer, SR VII will apply and the account number will have to be included in the message.

It is AGD's understanding that credit card accounts are not commonly used as a source of funds for a wire transfer. However, AGD is happy to discuss this issue further with the ABA.