

Dear Committee Secretary,

We have raised concerns over the above Bill, which has been referred to the Senate Legal and Constitutional Committee. A copy of a submission to the Attorney-General is attached.

In summary, while we support the need for effective anti-terrorism laws, we are concerned about:

a.. Lack of industry consultation on the detail of the provisions relating to counter-terrorist financing

b.. Difficulties in the application of certain provisions, the key issue being changes in payment processing

c.. Possible inconsistencies in content and implementation timing with the forthcoming anti-money laundering requirements

We would be grateful for an opportunity to appear before the Committee, and make further submissions as required.

Regards,

Tony Burke

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Australian Bankers' Association Inc. ABN 49 313 780 950



**AUSTRALIAN BANKERS' ASSOCIATION INC.**

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28 October 2005

The Hon Philip Ruddock, MP  
Attorney-General  
Suite MF 40  
Parliament House  
CANBERRA ACT 2600

Dear Attorney-General,

**Anti-Terrorism Bill 2005**

The comments in this letter are made on the above draft Bill made public recently. We understand that this was not a formal release for public consultation, and that there may be new drafts, however we wish to take the opportunity to raise some issues for consideration in the further development of the legislation.

The International Banks and Securities Association of Australia (IBSA) have indicated their support for this letter.

**1. AML/CTF Legislation**

The ABA and many other finance industry representatives have been engaged in extensive consultation with the Minister for Justice, the Attorney General's Department, AUSTRAC and others on the development of Anti-Money Laundering (AML) and Combating Terrorist Financing (CTF) legislation. The draft Anti-Terrorism Bill (ATB)<sup>1</sup> appears to both overlap and in key areas be inconsistent with what we understood to have been agreed in principle with AML/CTF.

If ATB will in fact cover those areas, described in some detail in the draft Bill, we request early and detailed consultation, using the mechanisms and processes already in place.

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<sup>1</sup> From this point 'ATB' refers to the document posted on the web by the ACT Chief Minister, carrying the identifier: "B05PG201.v28.doc 7/10/2005 3:52 PM"

For practical, operational reasons it is essential that the requirements of the ATB exactly match requirements in the pending AML legislation as to scope and timing. It would be helpful for the Government to indicate, at this stage, how the ATB will relate to the draft AML legislation and whether measures relating to international funds transfers will be included in both pieces of legislation, or will be cross referenced.

We would also like to highlight an overriding concern on the proposed implementation time. ATB appears to allow for a maximum of 12 months from Royal Assent. We have consistently argued for an implementation period of 3 years for that which we understood to be covered by the possible AML/CTF legislation, part of which now appears to be covered by ATB.

Putting aside the complication of different Assent dates, banks and other financial institutions are potentially faced with two different pieces of legislation and compliance obligations, which may involve the same internal systems and processes, but with different requirements and dates of effect.

The impact on the finance industry is that all relevant systems and processes would have to be compliant by the earlier date than expected. A worse case situation would occur where the initial obligation (ATB) was later contradicted or watered-down by the AML Reform legislation.

## **2. Schedule 3**

We are concerned about the width and vagueness of the new serious offence of "financing a terrorist", in particular, the reference to a person making funds available to or collecting funds for or on behalf of another person being "reckless", as to whether the other person will use the funds to facilitate or engage in a terrorist act.

There is a lack of clarity in the meaning of "reckless" and the applicability of this section to legal persons such as financial institutions and directors, officers and employees of financial institutions in the normal course of business.

If applicable to legal persons, the addition of a statutory defence for financial institutions based on the financial institution demonstrating that they have implemented reasonable anti-terrorist financing policies, procedures and controls, and were not negligent, would appear to be sensible.

We also note that the penalty is life imprisonment, which would seem harsh based on the lesser *mens rea* standard of "recklessness".

## **3. Schedule 9**

This draft provision adds additional obligations for banks and other financial institutions where they are the sender or recipient of *international funds transfer instructions* (IFTIs), as defined in the Financial Transaction Reports Act (FTRA).

### **3.1 General comments**

There is some lack of clarity in the current drafting of ATB. For example, there are definitions introduced in various sections which seem to be inconsistent with each other and in some cases with the definitions of equivalent terms in FTRA. We expect that these and other drafting issues will be resolved in later versions of the Bill.

### **3.2 S8/9. Bearer negotiable instruments**

S8/9 amends Division 1A of FTRA to say that a person carrying a bearer negotiable instrument into or out of Australia may be asked to provide a report on the purpose of the instrument. As there is no amount mentioned, this seems to cover a wide variety of payment instruments.

Industry would be interested to discuss the impacts this may have on up-front disclosure when a customer seeks to purchase an International Cheque. For example, a customer may present at a branch and request an International Cheque for \$11,000.

In order to be compliant with the monitored Code of Banking Practice the bank would have to warn the customer in writing that they may be asked to make a declaration and produce this cheque as they leave Australia. This would also apply to sales of Traveller's Cheques, affecting many ordinary Australians.

Advice is also requested on the financial institution's liability if a person is apprehended with an International Cheque issued by that institution.

### **3.3 S10. Outgoing IFTIs**

#### **3.3.1 Inclusion of customer information in outgoing international payment instructions**

FTRA currently only requires that some details (name and business/residential address) be included in the reports of these instructions which are sent to AUSTRAC.

Practices vary from institution to institution. Name and address details are sometimes included in this kind of outgoing payment instruction, however account numbers are not. In large financial institutions, these payment instructions originate from various sources. ATB would place a considerable cost on institutions that handle payment instructions on behalf of other parties.

The ATB requirements as currently stated are not consistent with the practical day-to-day operation of a financial institution. For example, a customer may have two or more accounts with a financial institution, and may pay for their payment instruction with cash, particularly where these are small amounts. In this case, their institution would not know which account number to put on the outgoing payment message.

In the case of processing a payment for a company, it is generally accepted that the business name and address will be used for the originator information. However, confirmation is requested that there is no requirement to verify the identity of the company representative making this payment.

Conversely, a customer may order a payment instruction and have the amount debited from their account. This account may or may not be an 'account' as defined in FTRA: this would need to be determined before the institution could include an 'account' number on an outgoing instruction.

A customer may not have an FTRA-defined 'account'. It is understood that this definition will change under new AML/CTF legislation, but any necessary changes to information required on payment instructions should be first subject to a cost/benefit analysis. Such analysis must also consider the requirement for level playing field in the market for financial services, as some service providers currently do not require an account number.

It is suggested that providing name, residential or business address, and an identifying number, may in fact provide enough information on outbound instructions to meet Government's desired policy outcome, and that these should be seen as an alternative to the provision of an account number. We seek early consultation to arrive at an appropriate solution.

### **3.3.2 Payment processing**

Some banks (and others) process a vast number of payments for other institutions. In such arrangements, the proposed ATB raised several issues, for example:

- How does the processing bank confirm that the originating bank has performed customer due diligence on the original sender?
- Can the processing bank rely on the originating bank to have performed customer due diligence and identification?
- For these payments, does the processing bank use the originating bank's name or do they need the original sender's details?
- If the latter, how does the processing bank confirm these details to be correct?

Some institutions perform bulk transfers of multiple payments for organisations such as Travelex. Advice is requested on the obligations of institutions performing these services and how the "originator" information will be reported.

This is of particular concern for smaller financial institutions that do not have the capability to process these payments. If reliance is not allowed by a large institution, the originating customer will need to present at a branch of that organisation.

### 3.3.3 Customer Issues

There are issues of privacy of customer information of the originator:

- What would the institution's responsibility be if the customer objects to providing originator information or having it sent to the destination?
- Should the institution refuse or freeze funds?

### 3.3.4 Risk of fraud in overseas jurisdictions

Name, Address and Account Number are seen as private information by customers, and sending this information overseas may expose the customer to the risk of identity fraud.

### 3.3.5 One-off IFTIs

S10 applies to two or more IFTIs transmitted to an Australian financial institution by a particular organisation and at least one of the IFTIs does not include customer information. This implies that a single IFTI received by an Australian financial institution, which does contain the required customer information, will not be subject to the ATB provisions. However, how is the financial institution to know, when it receives a single IFTI, that it will not be followed by others? Would it not be easier for this section to cover all incoming IFTIs?

## 3.4 Incoming IFTIs

The provisions in ATB appear to be consistent with the position agreed in the AML/CTF discussions, but some issues remain, including:

- A need to assess the impact of these requirements on non-SWIFT proprietary funds transfer systems
- The risk of relationship damage with correspondent banks where excessive requests are made for this information. It would also require AUSTRAC to keep a register of who has been asked and their response.
- The need for clarification on:
  - What is actually intended by the new section 17FB(5) - a cash dealer "may make" available the funds? Does this represent a discretion? Are there circumstances where it may be expected that the cash dealer will freeze the transaction? The utility of this requirement is not clear, not only because it is possible that the ordering organisation may not supply the information (which is covered) but also because the cash dealer has no way of verifying the information it may receive from the ordering organisation.

- The commencement of operation of the section. A cash dealer may receive an incoming IFTI which does not contain the requisite customer information, and then may not receive another IFTI from that ordering organisation for months (or longer). What records are to be maintained to ensure that when the next IFTI is received, containing the right information, that there are two related IFTIs, one of which is deficient, thus triggering the section?

There are some detailed operation issues raised by ATB on incoming IFTIs that require further industry analysis.

### **3.5 S11. 'Providers of Remittance Services'**

Such providers must advise the Director of AUSTRAC, who will keep a Register of Providers of Remittance Services, which will be open to inspection on the internet.

This provision applies to non-ADI<sup>2</sup> cash dealers, including dealers who 'package' overseas funds transfers and 'hawala' type transactions. It will be possible to monitor the AUSTRAC site and identify customers who may be 'packaging' transfers for AML "Know Your Customer" and risk assessment purposes, but some issues remain:

- Will there be a SUSTR regime where an Alternative Remittance Dealer ('ARD') is not listed?
- If a financial institution confirms from the website that the ARD is registered, but seems to be conducting odd transactions, is there an obligation to report as a SUSTR?
- If this applies (as it probably should), does the same apply to a Cash Dealer who sends payments through a major financial institution where the financial institution has formed a suspicion due to lack of information?

## **4. Definition of "Negotiable Instruments"**

There are definitions of "negotiable instruments" in a number of provisions of ATB. Clarification is requested on the relationships between these definitions:

- Collections under schedule 3 (s1)
  - Cash Letters - covering clean cheques into and out of Australia
  - Import and Export Documentary Collections - covering transport documents supported by Bills of Exchange

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<sup>2</sup> APRA-regulated Authorised Deposit-Taking Institution

- Overseas Trade - payables and receivable invoice payments
- Cheques under schedule 9 (s1)
  - International drafts drawn on Australian banks by Overseas banks
  - International drafts Australian banks draw on overseas banks
- Negotiable instruments schedule 9 (s8/9)
  - Cash Passport
  - Travellers Cheques
  - Money Orders - postal, Western Union

We recognise and support the important national security objectives in the Bill, and look forward to the formal commencement of consultation.

Yours faithfully

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**Tony Burke**

**Cc:** Senator the Hon Christopher Ellison, Minister  
for Justice and Customs