



AUSTRALIAN BANKERS' ASSOCIATION INC.

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Mr Owen Walsh
Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
CANBERRA ACT 2600

Dear Mr Walsh,

Anti-Terrorism Bill (No.2) 2005 (ATB)

I write to express our concern over evidence provided to the Senate Legal and Constitutional Committee ("the Committee") by the Attorney-General's Department ("the Department"). There are factual inaccuracies in some of the material, and in the answers to Questions on Notice provided by the Department.

These inaccuracies suggest an ongoing and fundamental lack of understanding of current commercial practice and the systems and processes which underpin them, despite considerable efforts over the last three years to provide information to the Department on the impact of AML reform.

The Department asserts that steps must be taken now to "safeguard Australian financial institutions from the possibility of them being barred from sending funds transfers to Europe and the US in the near future." ¹ ABA members have long standing commercial relationships with European and American banks and are not aware of any risk that any such barring may happen within the next six, twelve or even eighteen months. The Department's assertion appears to be without foundation.

In this regard, it should be noted the EU gave their member countries some eighteen months notice that similar requirements would become EU law in January 2007. In the US, FinCEN has warned financial institutions that it is conducting a study that will help them propose new regulations on wire transfer

¹ QON 18 November 2005 page 27

reporting that would need to be finalised by December 2007. Clearly, by comparison, Australia is not "lagging behind" in the implementation of FATF Special Recommendation VII as the Department appears to be arguing.

The ABA submissions to the Committee made two central points. The first, which the Department's evidence does cover, although by means of factually incorrect assertions, concerns the time needed to make the changes required by ATB. The second, which the Department has not answered directly, concerns the crucial issue of uncertainty. There are two key uncertainties for banks and other financial institutions in implementing ATB:

- (1) The timetable for the AML/CTF Bill, which will overlap with the relevant ATB provisions, is not known.
- (2) The content of the AML/CTF Bill is not known, but it is almost certain that it will change some aspects of the ATB provisions such as, for example, the definition of "account", which in any case (in its present form), is not able to be implemented.

Any changes to ATB provisions resulting from the AML/CTF Bill will probably require implementing costly changes to the same systems and processes as affected by ATB.

The following comments respond only to the key concerns we have in relation to the Department's evidence to the Committee, and should not be taken as exhaustive. We continue to rely on our own evidence to the Committee, and on the submissions lodged.

Scope of changes

The Department has advised that:

*"Those provisions will require industry to do that which they already do under the existing systems"*²

*"The amendments in Schedule 9 have been included in the AT Bill, because the changes can be implemented without further delay...."*³

*"There may be a need for some procedural adjustments"*⁴

*"The Department is of the view that the proposed amendments...will have a relatively small cost impact"*⁵

The first two statements are factually incorrect. The third is a serious oversimplification.

² Committee Hansard, 14 November 2005, p.23

³ QONs, 14 November 2005, Attachment A page 24

⁴ QONs, 14 November 2005, Attachment A, p.25

⁵ QONs, 18 November 2005, Attachment B, p.29

On its own evidence (see the fourth statement above), the Department has no basis on which it can assert that the proposed provisions will have a "relatively small cost impact". The Department's evidence is both inconsistent and misleading about the low cost and ease of implementation of sections 17FA and 17FB of Schedule 9:

"Consultation on the AML/CTF Bill will enable an assessment of overall costs".⁶

This advice suggests no costing has been done.

Due to the haste in which these provisions were introduced into the Parliament, there has been no opportunity for the ABA members to perform a detailed costing and scope analysis, but the changes are significant. The ABA provided supporting material in its second submission in this regard.

The ABA evidence to the Committee is unequivocal on the time needed for implementation - these provisions cannot be implemented within six months.

We note also that the Privacy Commissioner has recommended⁷ that a Privacy Impact Assessment be conducted on Schedule 9. Together with the RIS, this process should be completed before any provisions come into effect.

The Department has been provided with a wealth of information on systems and process implications for our sector, including for example a 60-page *summary* report on systems and processes for many financial transactions. While not specific to the proposed provisions, this report and the volumes of other material provided in writing and verbally should have allowed a more informed assessment on the scope of proposed changes.

Operation with other legislation

The Department and AUSTRAC have been provided with information explaining that the removal of these provisions from the AML Bill, and insertion into the current Financial Transaction Reports Act (FTR Act), has many (presumably) unintended consequences. These consequences are significant.

For example, The FTR Act contains a restricted definition of 'account'. Schedule 9 only requires that originator information, including account numbers, is contained on outgoing international funds transfers where a customer has a product that is defined as an 'account' in the FTR Act. By no means do all customers use a product that meets this definition. This means that industry will be required to include this particular originator information in some cases and not others, which will be difficult to explain to our correspondent banks, and technically very difficult to implement.

When the provisions are 'reinserted' into new AML legislation, because FATF uses and its standards require a non-restricted definition of 'account', industry will then

⁶ QONs, 18 November 2005, Attachment B, p.29

⁷ OPC submission: Inquiry into Anti-Terrorism Bill (No. 2) 2005, p.12

be required to make a second set of changes to these very same systems, to then allow a customer account number to be included in more, but still not all of these outgoing transfers.

Developing systems which can 'decide' whether or not a customer account number is required to be inserted on a SWIFT or other proprietary system message is complex, and will make the unnecessary, additional (to those necessary under the forthcoming AML/CTF laws) changes required by the Bill as it stands expensive.

Implementation time

The Department has advised that:

*"The Department is of the view that a six month period from Royal Assent...is sufficient for industry"*⁸

Industry does not share this view, and the Department has adduced no evidence to support its contention. In fact the Department has advised the Committee that will not know the full cost impact until a RIS is conducted as part of the four-month consultation period on the AML CTF Bill. The ABA's proposal in relation to the commencement date would resolve both the implementation time issue and the uncertainty issue (mentioned above) left untouched by the Department.

We also note that Customs will be given 12 months to "train its officers, and develop procedures and forms"⁹ in order to comply with ATB. The finance sector employs some 333,000 people in Australia, compared with less than 5000 in Customs. Our training, procedures and forms tasks are no less onerous than Customs under ATB.

Australian practice

The Department has given evidence that:

*"the proposed amendments requiring customer information to be included with IFTIs are consistent with industry practice on the collection of customer information for inclusion in IFTI reports to AUSTRAC."*¹⁰

This is incorrect. What must be reported to AUSTRAC today has no relationship with the industry practice in relation to what is sent overseas in SWIFT messages.

International practice

The Department's evidence implies that Australian banks and other financial institutions are out of step with international practice on wire transfers. As described in detail in our submissions, and in advice to the Department and AUSTRAC, this is not the case.

⁸ QONs, 18 November 2005, Attachment B, p.27

⁹ QONs, 14 November 2005, Attachment A, p.29

¹⁰ QONs 14 November 2005 Attachment B page 25.

While SWIFT standards, for example, *allow*¹¹ for the provision of customer information, including account numbers, there is no consistency in practice internationally. The broad international industry practice has been, until very recent times, to include some data, but not account numbers. This is why the EU for example is introducing new requirements.

It is a radical change from a non-mandatory system for providing data, to a mandatory system for including specified information, with penalties attached.

The EU, in its third AML directive, gave the EU financial services industry some 18 months notice of the new law.

The Department advises that:

*"US AML/CTF legislation already requires the inclusion of customer information with wire transfers"*¹²

This is so, however it is our understanding, from discussions with US banking industry associations that FinCEN, the US AML regulator, is considering regulations for reporting requirements on wire transfers that might be in place by December 2007.

Industry agreement

While there has been consultation on AML/CTF reform, and agreement-in-principle on a number of high level issues, there was no consultation on ATB and its impacts.

There was certainly no agreement (to which the ABA was a party), as seems to be implied in the Department's evidence, that the measures in ATB "could be effectively implemented by industry and the Government relatively quickly."¹³

The Department advises that:

*"the Minister advised in general terms that the AT Bill would include amendments on wire transfers."*¹⁴

The last roundtable meeting with the Minister was on 9 September. We had no knowledge of the content of ATB until its posting by Chief Minister Stanhope following COAG.

¹¹ "Allow" is also the locution used by the Department - QONs, 14 November 2005, Attachment A, p.25

¹² QONs, 14 November 2005, Attachment A, p.29

¹³ QONs, 14 November 2005, Attachment A, p.30

¹⁴ QONs, 18 November 2005, Attachment A, p.33

Recommendation

The ABA requests an amendment to ATB, as proposed in its submissions to the Committee:

“The simplest solution, which would involve minimal changes to the Bill, would be to increase the implementation time, by changing the date of commencement of the new sections 17FA and 17FB to “a date to be proclaimed”. The date to be proclaimed should be the same as the date of commencement of related provisions in the new AML laws currently being drafted.

Sections 17FA and 17FB of ATB should also be repealed in 2006, on the date of Royal Assent for the new AML laws, and replaced by provisions in the AML legislation.”

Yours sincerely

Tony Burke