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Financial Transaction Reports Amendment Bill 2006

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Financial Transaction Reports Amendment Bill 2006

Date introduced: 21 June 2006

House: Senate

Portfolio: Justice and Customs

Commencement: The formal provisions (clauses 1 and 2) commence on Royal Assent. Schedule 1 commences immediately after the commencement of item 10 of Schedule 9 of the *Anti-Terrorism (No.2) Act 2005*, which is to come into force on 14 December 2006.

Purpose

To vary the amendments to the *Financial Transaction Reports Act 1988* (FTR Act) made by Schedule 9 of the *Anti-Terrorism Act (No. 2) 2005* (AT Act) in order to correct drafting problems and to prevent unintended consequences.

Background

Schedule 9 of the *Anti-Terrorism Act (No. 2) 2005*

Schedule 9 of the AT Act was enacted to amend the money-laundering rules in the FTR Act and better implement some of the Financial Action Task Force special recommendations on combating the financing of terrorism. It is to come into force on 14 December 2006.

The Financial Action Task Force (FATF) is an international organisation chiefly concerned with strengthening anti-money-laundering (AML) provisions in the global financial system, including through individual countries implementing appropriate legislative and enforcement measures. To this end it developed a series of 40 AML recommendations in 1990, which have been revised twice since.[1] In the aftermath of the 11 September 2001 attacks, it also adopted nine special recommendations on combating the financing of terrorism (CFT).[2]

Australia's principal anti-money-laundering legislation—the FTR Act—was previously updated in a significant way through the *Proceeds of Crime (Consequential Amendments and Transitional Provisions) Act 2002* and, in relation to terrorism, through the *Suppression of the Financing of Terrorism Act 2002*. However, following the revision of the FATF AML/CFT recommendations in 2003–04, the Australian Government committed itself to a further overhaul of the FTR Act and associated legislation.[3] The consultative process has been a lengthy and difficult one, with industry groups raising concerns such as compliance costs and competitive neutrality between different sectors.[4]

The Government has split the implementation of the overhaul into a number of different initiatives:

- the amendments contained in Schedule 9 of the AT Act, which address three of the FATF CFT special recommendations (SRs): SR VI (remittance services), SR VII (wire transfer funds services), and SR IX (cash couriers)
- an exposure draft Anti-Money Laundering and Counter-Terrorism Financing Bill 2006, to cover a broad range of FATF AML and CFT recommendations,[5] and
- consultation with the states and territories about the enactment of laws to address a fourth FATF CFT special recommendation, that of preventing the use of non-profit or charitable organisations for the financing of terrorism.[6]

Division 3A—Customer information to be included in international funds transfer instructions

Item 10 of Schedule 9 of the AT Act inserted the new 'Division 3A—Customer information to be included in international funds transfer instructions', into Part II of the FTR Act. The purpose of Division 3A is to strengthen the various existing reporting and recording-keeping obligations contained in existing Part II of the FTR Act and to implement SR VII. In particular, section 17FA provides that when a cash dealer is given an instruction for a transfer of funds *out of* Australia, the dealer must ensure the instruction includes information about the customer. A failure to do so carries a maximum penalty of up to two years imprisonment, or in the case of corporations, a fine of approximately $50,000. In relation to funds transfers *coming into* Australia, section 17FB in certain situations allows the AUSTRAC Director[7] to direct a cash dealer to request the ordering customer to include customer information in all future incoming transfers.

The amendments in the current Bill relate specifically to Division 3A.

Senate Legal and Constitutional Legislation Committee Report

On 22 June 2006, the Senate referred the Bill to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 1 August 2006.[8] The Senate Committee Inquiry received seven submissions, some of which raised a number of concerns in relation to the changes proposed in the Bill.

During the inquiry, the Senate Committee raised with the Attorney-General's Department its concern about the impetus for the amendments proposed in this Bill and inquired why the amendments had not been contained in either the AT Act or in the exposure draft AML/CTF Bill.[9]

In responding to these concerns, the Department noted that in late 2005, amendments had been introduced into the FTR Act to better implement the FATF Special Recommendations VI, VII and IX on terrorist financing. The Department pointed out that the amendment to improve the implementation of 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'.[10]

It is of note that 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 exposure draft AML/CTF Bill, specifically in relation to the definition of 'account' in the two Bills.

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 Authorised Deposit-taking Institutions ('ADIs'—i.e. banks).[11]

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 therefore intended as a short-term solution to address inconsistencies between Division 3A of Part II of the FTR Act and the proposed AML/CTF Bill.[12]

The Senate Committee Report recommended that the Bill be passed, subject to certain comments.

Senator Joseph Ludwig, Labor Senator from Queensland, while supporting the majority Report, made some additional comments criticising the Government over its handling of Schedule 9 of the AT Act.[13]

This Digest draws on material from the Senate Committee Report and refers the reader to that Report for further information.

Financial implications

The Explanatory Memorandum (EM) states that the Bill will assist industry by reducing the number of systems changes required at an institutional level. There appear to be no significant financial implications for Government.

Main provisions

Schedule 1—*Financial Transactions Reports Act 1988*

Definition of account

Item 2 inserts **new section 17FAA** with the effect of altering the definition of 'account' under the FTR Act. The new definition of 'account' will apply only to Division 3A of the

Act— the division dealing with international funds transfer instructions (IFTIs). Under **new section 17FAA** an account includes:

- 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:
  - a cash management trust, or
  - a trust of a kind prescribed by the regulations.

The changes to the definition of 'account' bring this section into line with that in the exposure draft AML/CTF Bill and were brought about due to concerns of industry.[14] It is argued that industry will only have to go through one rather than multiple system changes.[15]

The Australian Bankers Association (ABA) in their submission to the Senate Committee Inquiry expressed concern about including a credit card account in the definition of account. The ABA argues 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. The Attorney-General's Department, in response to this argument, pointed out that the inclusion of a credit card account in the definition is in keeping with the requirements of SR VII. However, the Department also indicated it is willing to discuss the matter further with the ABA.[16]

Definition of customer information

Customer information in section 17FA

An 'IFTI' or international funds transfer instruction is 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.'[17]

Subsection 17FA(3) of Division 3A sets out the 'customer information' to be included in an IFTI transmitted *out of* Australia (i.e. when a bank sends an instruction for the transfer of funds to another institution overseas). 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.

Item 10 repeals and replaces subsection 17FA(3)(b) in order to change the definition of 'customer information'. The proposed definition of customer information 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.

The purpose is to allow a greater latitude for the use of ID numbers attached to international funds transfer instructions. Currently, every time a bank sends an instruction for the transfer of funds to another institution overseas, a range of information must be included. The effect of item 10 is to allow for a greater use of identification numbers rather than account numbers. Account numbers will now only be required to be included when the instruction relates to the transfer of money directly from a single account held by the customer. In other cases an identification number will suffice. This amendment is designed to simplify the transfer of IFTIs and provide a more practical option for financial institutions.

Customer information in section 17FB

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 **item 17** of the Bill provide that the IFTI may include *either* the ordering customer's account number *or* an identification code. In contrast, the current Division 3A provides that 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 Australian ADIs and AUSTRAC in determining whether a foreign customer has an account with a foreign ordering organisation.[18]

Restriction of Division 3A to Authorised Deposit Taking Institutions (ADIs)

Items 3–9 and 11–16 omit the reference to 'cash dealer' and substitute the term 'ADI' in sections 17FA and 17FB. The effect of these amendments is to restrict the application of Division 3A to ADIs. The term 'ADI' (authorised deposit taking institution) is defined in the FTR Act 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.[19]

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'.[20]

The FTR Act does not distinguish between non-bank 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 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.[21]

In its submission to the Senate Committee Inquiry, the Attorney-General's 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]'.[22]

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.

The Senate Committee Report goes on:

> 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'.

The Allens Arthur Robinson submission to the Senate Committee Inquiry raised concerns that restricting the application of Division 3A to ADIs would be inconsistent with SR VII, with the exposure draft AML/CTF Bill, and with Division 3 of the FTR Act. The Committee Report noted that:

> 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 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. […] Part 5 of the AML/CTF Bill is ultimately intended to replace Division 3A of Part II of the FTR Act. The Department has informed the Committee that the provisions of the AML/CTF Bill will comply with SR VII.[23]

The ABA, in their submission, 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.[24]

The Committee Report quotes the ABA reponse:

> 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.[25]

Item 4 repeals and replaces 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.

Endnotes

1. Financial Action Task Force, 'FATF Documents on the Forty Recommendations', http://www.fatf-gafi.org/document/28/0,2340,en_32250379_32236930_33658140_1_1_1_1,00.html, accessed on 8 September 2006.
2. Financial Action Task Force, 'Nine Special Recommendations on Terrorist Financing', http://www.fatf-gafi.org/document/9/0,2340,en_32250379_32236920_34032073_1_1_1_1,00.html, accessed on 8 September 2006.
3. Hon. Chris Ellison, *Australia endorses global anti-money laundering standards*, media release, 8 December 2003.
4. Kelly Mills, 'Business holds up anti-laundering law', *The Australian*, 17 May 2005, p. 31.
5. A revised version of the exposure draft bill, dated 28 June 2006, was released on 13 July 2006: http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(85861BE64F280B2D8725056734D25146)~Revised+exposure+draft+Bill+2006.PDF/$file/Revised+exposure+draft+Bill+2006.PDF.
6. Sue Harris Rimmer and others, 'Anti-Terrorism Bill (No. 2) 2005', *Bills Digest*, no. 64, Parliamentary Library, Canberra, 2005–06, p. 49.
7. AUSTRAC or the Australian Transaction Reports and Analysis Centre is the Commonwealth agency with operational responsibility for anti-money-laundering matters.
8. Senate Legal and Constitutional Legislation Committee, *Financial Transaction Reports Amendment Bill 2006*, Canberra, August 2006.

9. ibid., paragraph 3.4.
10. ibid.
11. ibid., paragraph 3.6.
12. ibid., paragraph 3.7.
13. See Senate Legal and Constitutional Legislation Committee, op cit., Additional Comments.
14. ibid., p. 11.
15. ibid.
16. ibid. pp. 11–12.
17. Section 3 of the FTR Act.
18. Explanatory Memorandum, p. 5.
19. Subsection 3(1) of the FTR Act.
20. Explanatory Memorandum, p. 4.
21. ibid., p. 5.
22. Senate Legal and Constitutional Legislation Committee, op cit., paragraph 3.35.
23. ibid., paragraph 3.39.
24. ibid., paragraph 3.40.
25. ibid.

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