THE SENATE

ANTI-MONEY LAUNDERING
AND COUNTER-TERRORISM
FINANCING BILL 2006

ANTI-MONEY LAUNDERING
AND COUNTER-TERRORISM
FINANCING (TRANSITIONAL
PROVISIONS AND CONSEQUENTIAL
AMENDMENTS) BILL 2006

Second Reading

SPEECH

Thursday, 7 December 2006

BY AUTHORITY OF THE SENATE
Senator LUDWIG (Queensland) (1.24 pm)—I rise to speak in the second reading debate on the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 and the Anti-Money Laundering and Counter-Terrorism Financing (Transitional Provisions and Consequential Amendments) Bill 2006. The object of these bills is outlined in clause 3 and basically aims to bring Australia into line with international compliance regarding measures to combat money laundering by criminals and the financing of terrorism. This bundle of regulatory action is known more generally as anti-money-laundering and counter-terrorist financing or, in short, AMLCTF.

The bills derive their impetus from the OECD’s financial action task force recommendations which consist of, in two parts, 40 recommendations on anti-money-laundering—these were first released in 1990 and have since been revised a number of times, the latest having occurred in 2003—and nine special recommendations on counter-terrorist financing. The bulk—that is, eight out of nine—of these were released immediately after the September 11 attacks in October 2001. The ninth was released in October 2004.

Clause 3 also lists a number of other international obligations and resolutions which I will not go into in detail. After much delay, the government is legislating to ensure Australia’s compliance with the FATF regime. However, it is still in two tranches. The first tranche is these bills currently before the parliament. They cover financial, gambling and bullion-dealing industries, in addition to lawyers and accountants, but only to the extent that they are in competition with the finance industry. The second tranche, which covers other activities of lawyers and accountants, as well as the jewellery and real estate industries, is yet to be released. The government has not yet announced a target date for completion of the second tranche.

The history of these bills is one of delays, failed consultations and subsequent international embarrassment. The Howard government is negligent in leaving Australia inadequately protected from criminals and terrorists who use our financial system to launder money. Only now, five years after 9-11, has it implemented the special recommendations, eight out of nine which were released in the aftermath of those horrendous attacks.

Let us make no bones about the importance of this legislation. It is needed to fight organised crime and terrorism. In September 2002, Senator Ellison, in a press release, made pointed reference to the fact:

... criminals and terrorists ... will continue to take advantage of jurisdictions where the law enforcement and regulatory powers are the weakest.

That statement was made, as I said, in 2002, and the recommendations were released in 2003. It is now five years since the September 11 attacks, five years since the special recommendations were first released, three years since the revised general recommendations were released and three years since the new laws were promised. Yet we are only now seeing them in their final form—and only the first tranche of that, not finally completed.

It has been a botched consultation process. Just as Senator Ellison’s handling of the Customs cargo management re-engineering project was a lesson in how not to manage an IT project, his handling of the AML/CTF legislation has been a lesson in how not to manage the implementation of a complex new legislative regime such as this. The first serious problem was the botched consultation process undertaken through the 2004 and 2005 years. Industry was not fully consulted, or not consulted properly, about the proposed laws and the government has essentially attempted to jam everything through in a one-size-fits-all approach.

The minister attempted to persevere with this approach but, in mid-2005, faced the humiliating result of being rolled by cabinet after a concerted campaign by industry and told to go back to the drawing board and start again. By then we had, in 2005, a FATF report. It was an international humiliation. There were two reports which slammed our response on money laundering and terrorist financing.

Firstly, you had the release in May of that year of a report by the US State Department in which Australia had the dubious honour of being named as a ‘major money laundering country’ and a ‘country of primary concern’.

...
This government’s status as a soft touch on money-laundering and terrorist financing was confirmed later in that year following an investigation and the release of a country report by the financial action task force, which found that Australia was fully compliant with only 12 of the 40 recommendations—and, even more alarmingly, was not fully compliant with a single one of the nine special recommendations relating to terrorist financing. Two years after Senator Ellison had promised the laws, Australia was given a big fat zero.

In the meantime, between the announcement of the laws and the current bill, the government has been forced to rush through a number of bandaid solutions to keep up the appearance of compliance with the recommendations. This has been, let me say, an excruciatingly painful process, when there was no need for it. It has been compounded by the government’s own errors as well.

The first of the bandaids contained in the Anti-Terrorism Act (No. 2) 2005 was passed last year in what can best be described as a slow panic in response to the FATF report. It implemented a number of the FATF recommendations but, before these even commenced, the government was forced to amend a number of these in a later act, the Financial Transaction Reports Amendment Act 2006. It was forced to introduce these amendments because, to quote directly from the explanatory memorandum:

If the amendment to restrict the application of Division 3A of Part 11 of the FTR Act to ADIs is not made, then certain legitimate non-bank money remitters assert that they could be put out of business.

That is the government in its own words admitting that its legislation was so poorly drafted that it would have put people out of business. It is quite extraordinary, and that is no surprise. The government, in answers to questions on notice from the Senate Legal and Constitutional Affairs inquiry into the Anti-Terrorism Bill (No.2) 2005, had admitted that it did not consult with industry on the final version of that act. So it was forced to continue piling bandaid upon bandaid onto its legislation.

The farce of the government’s poor drafting continued even after the legislation was tabled before parliament. We saw one explanatory memorandum released then withdrawn. We then saw another explanatory memorandum released. Finally, we have seen yet another round of amendments to the EM. All in all, there are over 500 changes to the original EM. Even at the 11th hour, the government are still fiddling with their legislation. I suspect they have not really stopped; they have just paused. My guess is they will be back next year, fiddling with it again. They do not even seem to be able to get the explanatory memorandum right. In addition, this is only the first tranche of the legislation. There are serious holes left in the regime which we are told will be fixed by further reforms.

Labor has called upon the government to release the timetable in which it expects to complete the further reforms. Until they are completed, and Australia is compliant with all of the recommendations in all areas, you have what is essentially a maginot line—that is, a set of scary and imposing set of defences which can easily be outflanked and circumvented by a determined enemy. That is what these crooks who launder money can be. While these are long overdue steps in the right direction, it cannot be emphasised enough that they are only part of what is required. Until Australia completes the second tranche, we will be left defenceless.

I will now turn to the Senate Standing Committee on Legal and Constitutional Affairs and the report into the bill that was completed. There were a range of areas covered and a range of recommendations which the committee made. I do not intend to examine all of those in detail, but some are worth highlighting. I will highlight those that appear to be the most salient and important points. Two areas which the Senate committee report touched on in detail were the issues of consultation and the implementation times for the legislation. That really underscores this whole exercise by the government. On consultation and implementation times, this government stuffs up all the time, in many bills that come before the Senate, particularly the bills in this area. This is another example of that.

For consultation, we saw industry repeating concerns similar to those which it had raised earlier—specifically, I am thinking of the Anti-Terrorism Act. In that case, industry’s concerns were later shown by the amendments to the Financial Transaction Reports Act to be quite valid. They were not properly consulted on the final text. In a similar vein, we saw lacklustre consultation during the early stages of the draft, which resulted in the unusual situation of a minister being rolled in cabinet and told to go back to the drawing board and start again. So consultation problems are not a new concern with this bill, and industry has every right to be wary of any perceived lack thereof. I note from the Senate report, however, that AUSTRAC and the department have taken some steps to allay these concerns. I continue to encourage that.
The implementation period was also of concern. While industry, as noted in the report, was generally happy with the implementation times, an important exception was the use of a staggered approach, particularly as the rules have not yet been finalised for most situations. The report indicates that small businesses and others not currently significantly regulated by the Financial Transaction Reports Act feel especially impacted by this. Certainty is what business needs in this area. I encourage the government to ensure that it can deliver certainty by ensuring that it meets those deadlines and finalises the rules so that business can have certainty and associations and industries can provide advice to their members.

In response, the department has indicated that it will have the rules available by 31 March next year. We can only wait and watch. The Labor Party will continue to monitor this, particularly given the minister’s track record of not giving industry sufficient time to implement required changes, such as was the case in the botched implementation of the Customs cargo management re-engineering project.

Finally, the last area of concern addressed in the report that I will mention—although there were others addressed in the report itself—is the range of sanctions which apply to the offences in the act. Simply put, a number of stakeholders believed these penalties were far too onerous for most of the offences, which were, they said, offences for crimes of omission rather than commission, and that lesser penalties, or other statutory powers for AUSTRAC, were more appropriate.

In its recommendations, the committee and the government backbenchers picked up a lot of the concerns which had been aired by stakeholders during the inquiry. Recommendations 1 to 3 took up the concerns of industry relating to the drafting of rules and other parts of the legislation, as I mentioned earlier, and recommended more consultation in future when AUSTRAC is making or amending rules. What I do not want to see is a Senate committee faced with an Attorney-General’s Department and the minister again saying, ‘We haven’t consulted in respect of this bill’. My recollection is that we have had it more than just once—more than was needed—in respect of this bill and other bills. If the minister can take one lesson from this it is that consultation can avoid a lot of harm and heartache.

Labor supports the other recommendations which call for the government to amend sections of the bill relating to low-risk, low-value solutions; periodic audits of AUSTRAC by the Privacy Commissioner; and to subject portions of the bill to state, territory and Commonwealth discrimination laws, amongst others. Labor supports these recommendations, and we urge the government to adopt them. These are changes which are supported by Labor and supported by the government’s own backbench. In addition, I will foreshadow at this point that I will be moving a range of amendments on behalf of Labor. We will be moving amendments to implement recommendations 4, 5 and 13 as well as additional recommendations that were not in the committee report.

But let me make this point clear: the Labor Party supports this bill. We will be moving amendments to improve it, but we fundamentally support it, as we support all reasonable legislation designed to protect Australia and fight terrorism and crime. Our concerns about this bill arise primarily from the fact that such an important piece of legislation has simply taken so long to reach parliament. Our concerns are about a minister who refused to consult and work with industry to achieve a decent outcome. It is imperative with this style of legislation, where it impacts upon business and requires business to put in systems and processes, that you consult with business about how best to effect it while still maintaining a hard line about what you need to fight terrorism and crime.

Senator Ellison has been a repeat offender at botching consultation with industry, as his efforts to implement the new Customs cargo system showed us at about this time last year. It is important legislation. It is high time it was brought before parliament. It is a black mark against the Howard government that it has taken so long to bring it forward. Along with the amendments that I will move in the committee stage, I commend the bill to the Senate.