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 ELLISON (Western Australia—Minister for Justice and Customs) (4.45 pm)—I thank senators for their contributions. For that dedicated group of people who are anti-money-laundering aficionados and who have followed this very closely, this is an auspicious day. I summarise by saying that the primary purpose of the anti-money-laundering and counter-terrorism financing legislative package is to ensure that Australia has a financial sector that is protected from abuse by those seeking to engage in criminal activity and terrorism—at the outset, a very simple objective and a very important one.

The reforms to be implemented by the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 and Anti-Money Laundering and Counter-Terrorism Financing (Transitional Provisions and Consequential Amendments) Bill 2006 before the Senate today strike an important and appropriate balance between the government’s law enforcement and national security objectives on the one hand and the needs and operational reality for business on the other. Achieving this balance has required careful and assiduous policy making and drafting which in turn have been informed by extensive consultation with affected sectors, law enforcement and the wider community. I emphatically reject any suggestion that the government has taken too long in implementing the FATF recommendations. These important reforms respond to increased and more sophisticated criminal and terrorist activities across a wide range of sectors delivering complex products and services.

The need for thorough deliberation of these issues can be illustrated by the progress of FATF itself. Following its release of the revised 40 recommendations on money laundering in June 2003 and the nine special recommendations on terrorist financing in October 2004, the FATF has moved carefully in developing interpretive notes and guidelines. The last of these interpretive notes was only released in February this year. Given the importance and complexity of the issues involved, the government has moved with appropriate speed to introduce comprehensive and well thought out legislation. The breadth and responsiveness of the consultation process has been widely acknowledged and applauded by affected businesses. The Senate Standing Committee on Legal and Constitutional Affairs has acknowledged these consultation efforts. I do not apologise for the time spent in achieving this balance and limiting the burden on Australian businesses. This has been time well spent and I acknowledge the great work that has been done by the officials of the Attorney-General’s Department in this regard.

During this consultation period the government also had the benefit of the report on the FATF mutual evaluation of Australia’s compliance with the FATF recommendations. The FATF identified several strengths in Australia’s existing AML/CTF system including the effectiveness of AUSTRAC as a financial intelligence unit, the extensiveness and apparently effective confiscation schemes involving criminal and civil confiscation of proceeds of crime, and the comprehensiveness of measures to facilitate a wide range of international cooperation. Australia was only found to be non-compliant in one out of the nine special recommendations on terrorism financing and nine out of the 40 recommendations on money laundering. The special recommendations dealt with capturing information on electronic funds transfers, and this issue has now been addressed by recent amendments to the Financial Transactions Report Act 1988. It is worth emphasising that in making its findings the FATF noted:

The Australian Government recognises the need for an effective AML/CFT regime and is currently updating its legislation to implement the revised FATF Recommendations.

This government criminalised terrorist financing in 2002 as part of the Criminal Code and in 2003 moved the money-laundering offences from the Proceeds of Crime Act 1987 to the Criminal Code. The Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 will provide an updated, more effective and more comprehensive response to these matters.

The extensive consultation on this bill has also included two reports from the Senate Standing Committee on Legal and Constitutional Affairs and the Senate Standing Committee for the Scrutiny of Bills. The Legal and Constitutional Affairs Committee handed down its second report on 28 November 2006. The committee made
14 recommendations. I want to acknowledge the very good work carried out by that committee in relation to this bill and also acknowledge the work done by the Scrutiny of Bills Committee in relation to its consideration, and I will deal with that shortly.

In recommendation 1 the committee recommended that the bill be amended to delay the first stage of implementation until three months after the date of royal assent. The opposition and Democrats also moved an amendment for delay of commencement, although their proposed amendments will only result in delay of part 1 of the bill. The government does not believe that it is either appropriate or necessary to tie the commencement of obligations under this bill to the finalisation of the rules. Detailed draft rules negotiated with industry have been available since July 2006. All rules required for those provisions which commence the day after royal assent will be available on that date. The timetable for finalisation of the remaining rules will provide industry with sufficient time to reach compliance. In particular, the government is committed to finalising rules required for the definition of ‘designated business group’ by mid-January 2007. All other rules necessary for those provisions which come into effect 12 months after royal assent of the bill will be finalised by 31 March 2007.

The government has also agreed that, for a period of 12 months after commencement of the obligations under the bill, the Austrac chief executive officer will only take criminal or civil penalty action against a reporting entity where that reporting entity has manifestly failed to take steps towards compliance with its obligations. After discussion with industry the government is satisfied that the committee’s concerns about an adequate implementation time for industry can be met by extending this 12-month grace period to 15 months.

The government accepts recommendation 2 of the committee, and Austrac will continue to consult with industry in developing AML/CTF rules under the bill. The government also accepts recommendation 3, which requires a review of the safe harbour provisions for customer identification during the review of the legislation under clause 251.

However, the government is not able to accept recommendation 4, which is that clause 6(7), referred to as the Henry VIII clause, be deleted from the bill. The opposition and Democrats have also moved the deletion of this clause. Clause 6(7) enables the table of designated services to be quickly amended by regulations where it appears that there is a structuring of products to get around items listed in the tables.

The history of the Financial Transaction Reports Act 1998 has shown that a lack of ability to respond, other than by amendment of the act, enables products to become entrenched before an amendment can be made. This creates a competitive imbalance in the market, causing greater financial impact if a service is added to the list at a much later stage. Clause 6(7) therefore provides important protection for reporting entities and will also assist Austrac. Regulations must be tabled and are subject to disallowances. The government commits publicly and without reservation clause 6(7) not being used for new designated services which relate to tranche 2 services without consultation with affected parties.

The government notes the concerns raised by the committee that led to recommendation 5, which is that the bill be amended to provide the Austrac CEO with powers to refuse registration as a designated remittance services provider and to de-register providers or to maintain a register of persons who are not permitted to provide remittance services. The government has decided to implement a registration scheme, not a licensing regime.

A registration scheme has a number of advantages, including the fact that it does not confer any authority or seal of approval on providers of these services. Furthermore, by not excluding persons, registration enables Austrac and law enforcement agencies to more easily identify and locate the providers of these services and to take effective action against those who do not register. The committee has, however, raised a legitimate question and it would be appropriate for a review of the registration scheme to be undertaken during the review of the legislation, which is provided for under clause 251.

The government is not able to accept recommendation 6, which is that penalties for the offence of possessing a false document with the intent of using it as customer identification in clause 138(3) and the offence of possessing equipment for making a false document in clause 138(5) should be reduced. The committee’s view is that these offences are far less serious than the offences of making a false document with the intent of using it as customer identification in clause 138(1) and the offence of making equipment for making a false document in clause 138(6).

The government considers that the types of conduct which make up all of the offences in clause 138 are of equal gravity. These offences, therefore, are the fundamental sanctions to the risk based regulatory regime proposed by the bill. The bill has civil penalty provisions only for failure to carry out regulatory obligations. The
conduct of possessing false documents or equipment for making false documents with the intent to use them for identification procedures cannot be regarded as less serious than making a false document or making equipment for making a false document.

A person who makes a false document with the intention of producing that false document in the course of an applicable customer procedure under the bill is actively engaged in an illegal activity. The government is happy to continue to work with industry groups and other stakeholders to resolve technical issues as recommended in recommendation 7.

In recommendation 8, the committee recommended that the government consider amending the bill to include threshold value limits to exclude low-risk, low-value services—for example, the provision of travellers cheques and foreign currency transactions—further amending the bill to include those services that I mentioned from the definition of designated services, and that consideration be given to indexing these thresholds every five years. The government agrees to consider threshold limits for low-risk, low-value services, but I want to stress that low value does not necessarily mean low risk, particularly for terrorism financing—and we have seen that in recent events where there have been low amounts of money involved in the financing of terrorist activity.

While products such as travellers cheques, money orders, foreign transactions and bank cheques may appear to be similar products, they can and do present different risk profiles. Amendments to the bill are not required to implement thresholds as these can be implemented by regulations under clause 6(7) and clause 252, which amend items in the tables in clause 6 and AML/CTF rules made under clause 39.

The government is continuing to consult with industry on the need for thresholds and will make regulations or AML/CTF rules where it is agreed that a product is both low value and low risk for money laundering and terrorist financing. The committee has raised the legitimate question of indexing. The government agrees to review the various threshold levels in the review of the legislation to be conducted under clause 251.

In recommendation 9, the committee has recommended that the Office of the Privacy Commissioner conduct audits of AUSTRAC’s compliance with privacy obligations in its administration of the bill. The government notes that, under section 27(1)(h) of the Privacy Act 1988, the Privacy Commissioner has the power to conduct audits of records of personal information maintained by agencies for the purposes of ascertaining whether the records are maintained according to the information privacy principles.

The committee recommended in recommendation 10 that division 4 of part 2 of the bill should be amended to restrict access to AUSTRAC held information for the purposes of responding to money laundering, terrorist financing or other serious crimes. The government is not able to accept this recommendation. The transaction information held by AUSTRAC is a valuable law enforcement resource for the identification of crimes under Commonwealth and state law. The information is collected to protect Australian businesses and the community from not only money laundering and terrorist financing but also the predicate offences to money laundering. Information which suggests that a crime is being committed should be available for use by appropriate authorities in accordance with the laws which govern their operations.

The government supports the principle behind recommendation 11 but does not believe it is necessary to make the amendment to clause 235 which is suggested. The AML/CTF bill does not permit or authorise breaches of the Racial Discrimination Act 1975. The explanatory memorandum clearly states that the AML/CTF bill is not intended to override the Racial Discrimination Act, and there is nothing in its operative provisions which could be interpreted to have that effect. Making this amendment could invoke legal interpretation rules which would require all other possible exclusions to be listed.

In recommendation 13, the committee recommended that clause 251 be amended to provide for review of the legislation in four years and for that review to incorporate consultation with industry and other stakeholders. The opposition and the Democrats have moved this as a proposed amendment. It is important to note that the legislation will not be fully operational for three years and three months for tranche 1 sectors. The timetable for tranche 2 sectors is not yet settled. Reducing the period in clause 251 to four years will result in a full-scale review of tranche 1 after only nine months of fully implemented operation and an unknown but almost certainly shorter period of operation for tranche 2 sectors. This could impose unreasonable costs on affected industry sectors in the community. The bill includes in clause 6(7) and the rule-making powers an appropriate mechanism to address any unexpected and unintended impacts which arise within that seven-year period. If major operational issues arise prior to the seven-year review which will require an amendment to the bill, they can be progressed in advance of any review under clause 251.
Labor senators have made an additional recommendation that Austrac be subject to oversight by the Australian Commission for Law Enforcement Integrity upon its establishment. The issue of coverage of the Australian Commission for Law Enforcement Integrity—or ACLEI, as it is known—was extensively considered by the government and the parliament during the passage of the law enforcement integrity act 2006 in June this year. ACLEI covers sworn police officers serving in the Australian Federal Police and sworn police officers working under the auspices of the Australian Crime Commission. The law enforcement integrity act 2006 includes the ability to extend ACLEI’s jurisdiction in the future should a need arise. No present need has been identified to extend these arrangements to Austrac and it is appropriate that any decision to extend be considered in the context of the ACLEI legislation.

I once again thank the Senate Standing Committee on Legal and Constitutional Affairs for producing this report in a short period of time. The committee has done a very good job, given the complex nature of these bills. As I said earlier, I also thank the Senate Standing Committee for the Scrutiny of Bills for its consideration of a number of matters. That committee has raised some issues about the application of absolute liability rather than strict liability to some elements of offences under clauses 136, 137, 139, 140 and 141. The government intends to amend these clauses to replace the application of absolute liability with strict liability. I believe this addresses the concerns expressed by the Scrutiny of Bills Committee. We will address that in the autumn session, early in the new year.

The government is currently discussing with industry some other technical issues which might also result in amendments to the bill. As I have just said, I intend to bring forward a bill making the amendments arising out of the Scrutiny of Bills Committee report—and any other technical amendments—in the 2007 autumn sittings of the parliament. I thank senators for their contribution to the debate on these bills. Since commencing the process of implementing reforms to Australia’s anti-money-laundering and counter-terrorism financing reforms, I have been constantly impressed with the interest of industry and its willingness to participate in the consultation process. The level of industry and community participation in the development of these reforms not only has contributed to the development of a workable AML/CTF solution but also has provided a strong platform for ongoing cooperation between industry, the wider community and government in continuing with the detection and prevention of crime and terrorism.

I can assure the Senate that the government is committed to ongoing consultation with industry, as reflected in the legislation itself. Clause 212 requires the Austrac chief executive officer to consult with industry in performing his or her functions. I believe that is further demonstration of the consultative process that we have adopted—and, of course, we stand on our record. The feedback I have had from industry is that they have been satisfied with the process and that they want it to continue. I certainly acknowledge, in the numerous meetings and the roundtables we have had, the constructive approach which has been adopted by industry and others. In that regard I wish to acknowledge the efforts of Tony Burke of the ABA, in particular, in relation to resolving what have been very complex issues.

Finally I might say that, although we have this bill here today, the challenge implementation still lies ahead, and we still have tranche 2. There is much work to be done. But I point out that, from recent visits to the United Kingdom and the USA, they too are undergoing the same process and face much work in this regard. The balance, as always, is to achieve security—appropriate anti-money-laundering measures which will counter terrorism and organised crime—but not to overburden industry with regulation. I commend these bills to the Senate.

Question agreed to.

Bills read a second time.