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Submission to the

ATTORNEY-GENERAL'S DEPARTMENT

on the

AML/CTF DRAFT EXPOSURE BILL

GENERAL COMMENTS

The last public inquiry into the anti-money laundering regime in Australia created by the Financial Transaction Reports Act 1989 (FTRA) was conducted by the Senate Standing Committee on Legal and Constitutional Affairs in 1993. The Committee's report (to which the current Minster for Justice subscribed) warned in paras 11.26 and 11.27:

> *From time to time, law enforcement agencies in the proper discharge of their responsibilities seek further powers and greater jurisdiction from Government. Government should not readily grant them.*
>
> *Because law enforcement mechanisms are prone to impact heavily on the life and liberty of members of the community they must, in a free and open society, be instituted only after a* ***close analysis and with considerable caution. Other than in exceptional circumstances evidence on the basis of which they are established should be comprehensive, complete and compelling.*** [Emphasis added.]

The Committee went on to recommend a further review of the FTRA after three years. The Government accepted this recommendation. However, both the Committee's recommendation and its warning have been flagrantly ignored by the Government ever since.

Instead of the further public review of the FTRA scheduled for 1996, the Government in 2003 pre-empted any such review with a decision to embark on a wholesale revamp of the anti-money laundering regime. The stated justification for the revamp has been to bring the Australian regime into line with the Financial Action Task Force on Anti-Money Laundering 40 Recommendations (the FATF 40 Recommendations).

Upon analysis, however, the proposed revamp of the anti-money laundering regime, contained in the draft exposure Anti-Money Laundering and Counter-Terrorism Financing Bill 2005 and accompanying draft rules and guidelines, does not bring Australia into line with the FATF 40 Recommendations. It would, on the contrary, establish an anti-money laundering regime which departed from the FATF 40 Recommendations in a number of key respects, without any apparent justification. In other important respects the new regime would depart from the existing regime of the FTRA also without apparent justification.

For example, while the FATF 40 Recommendations and the FTRA focus on financial institutions, the Bill focuses on the provision of certain services. While the FATF 40 Recommendations stipulate a threshold transaction of over A$20,000, the Bill proposes one of A$10,000. The Bill's suspicious reporting requirements go far beyond the FATF 40 Recommendations and even substantially extend the already extensive obligations in the FTRA. The Bill contains novel requirements concerning funds transfers and registration of remittance service providers which are found nowhere in the FATF 40 Recommendations or the FTRA.

In short, the Government propaganda about its proposed revamp of the anti-money laundering regime is highly misleading. In truth, the proposed revamp would create a comprehensive financial surveillance regime whose tentacles reached into almost every corner of financial activity in Australia. One asks, almost in despair, what are the "exceptional circumstances" justifying such a regime or what is the "comprehensive, complete and compelling" evidence supporting its establishment of the kind called for by the Senate Committee in 1993?

Instead of such evidence, the Government offers a smokescreen of impressive-sounding international obligations and the trusty bogeyman of terrorism. This is not good enough. Liberty Victoria calls on the Government to carry out the "close analysis" of the proposed new regime and to exercise the "considerable caution" counselled by the Senate Committee in 1993.

REVIEW OF SPECIFIC PROVISIONS OF THE BILL

Title and objects – cl 3

Liberty Victoria calls on the Government to adopt a "truth in legislation" approach to both the title of the Bill and the objects clause. The Bill should be called the "Comprehensive Financial Surveillance Bill" and the objects clause should accurately state its objective to be the establishment of such a regime. The present cl 3, with its recitation of numerous international instruments, is just part of the Government's smokescreen obscuring the real purposes of the Bill.

Where in the present cl 3, for example, does one get any inkling that the legislation would be used to track down delinquent dads who have not paid their child support or petty social security cheats? From which of the enumerated international instruments can that be deduced?

Designated services – cl 6

As the Government has acknowledged, the Bill would effect a major change in the anti-money laundering regime by substituting services for persons as its criterion of operation. However, no impact study of this change has been undertaken, so that the Government is "flying blind" on this change. It is reasonable to conclude, particularly without the benefit of an impact study, that this change would introduce significant uncertainty into the operation of the anti-money laundering regime, increasing the likelihood that people will unwittingly fall foul of the law. Administrative discretion to excuse such breaches is no substitute for properly drawn laws.

Furthermore, the change is not required by the FATF 40 Recommendations. Those recommendations do not require that the provision of services be the criterion of operation of an anti-money laundering regime. On the contrary, numerous recommendations fasten on "financial institutions" as the criterion of operation: see nos 5, 7, 8, 9, 10, 11, 13, 14, 15, 21, 22 and 23. Other recommendations fasten on other businesses and professions: see nos 16, 20 and 24.

Liberty Victoria therefore submits that the Government has not established any justification for this change to the present regime.

A cursory review of the proposed designated services in cl 6 exposes the types of difficulties likely to be encountered if this change is implemented:

- Items 5, 7, 11 and 13 catch certain types of transactions, such as deposits, loans, leases and hire-purchase. However, they are cast so as to catch in addition to these transactions other transactions which are "in relation to" the nominated transactions. This could have a wide reach so that, for example, where a loan is made by a bank for the purchase of a house, the purchase could also be caught.

- Item 6: "making a loan in the course of business". This would operate beyond the business of money-lending and providing credit so that, for example, it would catch a shareholder in a proprietary limited company who provided capital to it by means of shareholder loans.

- Item 35: "acquiring and disposing of a bill of exchange". This is currently very vague – the definitions of "acquiring" and "disposing" have not yet been made available in the regulations. It could catch an office clerk who physically takes possession of cheques made in favour of his or her employer, for the purpose of banking them.

- Items 42, 48, 49, 52, 53: "giving advice". This imposes a burden on financial advisors who will also be required to consider at all times the "intent" of their advice, which may not necessarily be easily identifiable.

- Items 56 and 57: "guarantees". Giving a guarantee or making a payment under guarantee will be caught so that, where a parent guarantees a child's business debt, or makes a payment pursuant to such a guarantee, the parent will be a designated service provider and subject to customer identification and reporting obligations. The same will apply to a company director who guarantees the company's debts. It furthermore seems inconsistent that item 56 in linked to the carrying on of a business, and item 57 is not.

- Items 59, 60 and 61 deal with payroll functions but could apply to the clerical task of doing banking on behalf of a business. While employees who do such tasks would not be caught, independent contractors would.

The difficulties thus apparent from the attempt to designate services as the criterion of operation of the regime strongly suggest it should be abandoned in favour of a return to designated persons, in accordance with the FATF 40 Recommendations and the FTRA.

Identification Procedures - Part 2

Much of the detail concerning customer identification procedures is to be contained in the AML/CTF Rules, publication of which is still pending. Accordingly, we are unable to offer any detailed analysis of these provisions.

One point does, however, emerge from the draft rules proposed for cl 74 of the Bill. Draft rule 14 proposes a risk classification for customers. This needs serious consideration. It is likely a high risk classification would affect a customer's credit rating as it would increase the cost of providing services to the customers.

Pre-existing exemption - cl 27

We are unable to comment on this exemption in the absence of any detail as to what is a continuous relationship or what types of events will be deemed to break the continuity of the relationship.

Sub-clause (7) of cl 27 provides that it should be assumed for the purposes of cl 27 that Part 1 had been in force at all material times. The purpose and likely effect of this provision are unclear to us.

Low risk exemption - cl 28

Objective criteria should identify risk as much as possible. Risk indicators, which can too easily be predicated on subjective and prejudicial bases, should be fixed in the legislation.

Identification procedures - cl 29

The prohibition on provision of services unless customer identification has been conducted prior to the giving of the service (cl 29) and the requirement to cease providing a service where customer identification has not been obtained (cl 31) should contain an exception where the failure to provide the identification has been caused by the service provider. It would be unfair for customers who have been provided with a service under section 30 to have that service withdrawn without any default on their part.

It would be more appropriate for the obligation to be a positive requirement to seek identification and the prohibition apply against providing the service or continuing to provide the service only where the customer fails to provide the information.

Agents - cl 34

The accreditation of agents authorised to identify customers is objectionable as it will allow those agents to build up databases of customer identification which may not be subject to privacy principles, may be cross-referenced or used for unauthorised purposes such as credit rating purposes.

This may have been proposed to assist banks and other financial institutions to contain the costs to them of the new regulatory regime. We do not think this justifies the compromising of their customers' privacy.

Reporting obligations - Part 3

Suspicious matters - cl 39

Clause 39 goes well beyond the requirements of the FATF 40 Recommendations and also represents a significant extension of the current suspicious reporting regime under s. 16 of the FTRA.

FATF Recommendation no 13 is as follows:

> *If a financial institution suspects or has reasonable grounds to suspect that funds are the proceeds of a criminal activity, or are related to terrorist financing, it should be required, directly by law or regulation, to report promptly its suspicions to the financial intelligence unit (FIU).*

Recommendation 1 says that the crime of money laundering should apply to all "serious offences" and the Interpretative Note to Recommendation 13 says that the criminal activity referred to in that Recommendation should be the predicate offences for the crime of money laundering.

Recommendation 11 deals with "complex, unusual large transactions, and ... unusual patterns of transactions, which have no apparent economic or visible lawful purpose". However, it does not propose an obligation to report such transactions, but rather to examine and record them, so that the records may be available "to help competent authorities and auditors".

The elements of the suspicious repeating regime proposed by FATF 40 Recommendations are therefore the following:

- It applies only to "financial institutions".
- It applies only where a financial institution receives funds.
- The financial institution must reasonably suspect those funds to be the proceeds of criminal activity or related to terrorist financing.
- The criminal activity must constitute a serious offence.

The regime proposed by cl 39 goes far beyond this, in the following respects:

- It is not confined to financial institutions, but applies to any person who provides a designated service.
- It does not arise upon the receipt of funds suspected to be the proceeds of criminal activity but upon receipt of certain information any time after the

designated service provider has been approached to provide a designated service.

- It is not confined to suspicion of a serious offence but to suspicion of **any** offence, serious or trivial, State or federal, and even offences against foreign laws are covered.

- The relevant suspicion need not be of the commission of such an offence, but merely that information received "may be relevant" to the investigation of an offence.

- A separate head of suspicion is that the service sought or provided is "preparatory to" the commission of a financing of terrorism offence.

Clause 39 even goes significantly beyond the existing regime in s 16 of the FTRA, which limits the reporting obligation to reports of suspicious "transactions". Under the Bill there need not be a transaction, only the receipt of information. Furthermore the period in which a service provider must be alert to the receipt of such information begins when it is approached for a service and continues indefinitely thereafter.

To portray cl 39 as an implementation of the FATF 40 Recommendations is nonsense. To portray it as a modification of the existing regime to conform with the FATF 40 Recommendations is equally untrue. It is, in truth, a wholesale revision of the suspicious reporting regime, which bears little or no resemblance to the FATF 40 Recommendations and extends the regime well beyond the current law. The Government should be asked to explain why this is necessary.

Foreign tax laws – cl 40

Clause 40(3) extends the suspicious reporting obligation to cases where it is suspected there is a breach of a foreign tax law. It cannot seriously be expected that most Australian providers of designated services would have any knowledge of foreign tax laws. Imposing an obligation to report suspected breaches of such laws is onerous and unreal.

Reporting thresholds (section 41)

The automatic reporting threshold of $10,000 is too low. Liberty Victoria has continually recommended that the amount be adjusted for inflation, at least every 5 years, yet the amount is the same as that set in the 1989. An amount of $10,000 in 1989 was worth approx $16,210 in December 2005. Looked at another way, $10,000 in December 2005 was worth approx $6,000 in 1989.

In addition, the threshold amount is substantially below the amount recommended in the Interpretative Note to FATF 40 Recommendations 5, 12 and 16. That amount is US$15,000 (A$20,330) or €15,000 (A$24,330).

It is furthermore unacceptable that the already too low threshold amount may be lowered by regulation: see para (c) and (d) of the definition of "threshold transaction" in cl 5.

The reporting threshold should be set in the legislation at $20,000 and adjusted for inflation from time to time, at least every 5 years.

The threshold amount should also apply to sections 49 (1) (b) and (2) (c) and 51(1)(b) and 31(a) (see below).

Reports of movements of money into and out of Australia – Parts 4 and 15

As noted above, cls 49 and 51 should be changed to refer to the threshold amount so that the obligation to report movements of currency in and out of Australia is consistent with the reporting requirement.

In addition, the obligation under cl 161 to make a declaration of how much currency a person is taking out of or bringing into Australia should also apply where the amount is not less than the threshold amount. Otherwise cl 161 could be used oppressively to harass or intimidate anyone leaving or entering Australia.

Clauses 55 and 162 introduce broad powers concerning movements of travellers cheques into and out of Australia which go well beyond anything within the FATF 40 Recommendations or the present regime under the FTRA.

The operation of cl 162 is unacceptably invasive. It provides that a police officer or customers officer may require a person leaving Australia or arriving in Australia to provide details of any negotiable instruments (most commonly travellers cheques) which the person is carrying and the amount of the cheques. There is no threshold amount so that a person carrying travellers cheques worth very little could be required to make disclosure. If the officer suspects that a person has made a false declaration as to these matters they may search the person for no other reason than for the purpose of finding out whether they have any such negotiable instruments. The person may then be required to make a report to AUSTRAC, the police officer or the customs officer "about" the negotiable instruments.

This is an unacceptable invasion of personal liberty when there are no other grounds to suspect a crime (other than the suspicion of the making of a false declaration under cl 162 which may simply be a mistake or ignorance rather than criminal intent).

Clause 162 should be removed or, at least, the ability to search should be limited to when an officer has reasonable grounds to suspect that the person is carrying negotiable instruments with a face value of more than the threshold amount and has concealed that fact. Furthermore the power to arrest without a warrant should only apply in those circumstances.

Funds transfers - Part 5

Part 5, which requires the recording of certain information relating to funds transfers, is novel. There is nothing comparable to it in the FATF 40 Recommendations or in the FTRA.

We await an explanation from the Government of what has necessitated this further intrusion into financial activities.

Register of remittance service providers - Part 6

This is also novel. Once again we await an explanation for it from the Government. In particular, why is such a register needed in addition to reports of international funds transfers?

Record keeping requirements - Part 10

Liberty Victoria recommends 5 years as the retention period for records created pursuant to the Bill. Anything outside of this period is likely to be of limited value in money laundering or terrorism offences which are far more likely to occur contemporaneously with the transaction. This accords with FATF Recommendation 10.

Disclosure of information - Part 11

Clause 95 deals with the offence of "tipping off". The terminology objectionable, as it implies criminality although a report need not have any connection to a crime.

The operation of cl 95(3) is not clear. Why does the exclusion in (c) relate only to lawyers? The Bill is not to affect professional privilege (cl 201), so no report would be made of information obtained in a privileged communication. Where lawyers are obliged to report, it is only in respect of the provision of non-legal services, in respect of which lawyers are treated like other service providers. So why is the exclusion in sub-clause (3) confined to lawyers? Should it not apply to all service providers?

Audit - Part 13

There should be no power to ask questions in cl 119(2) except such questions as are incidental to the carrying out of the search. A general power of examination should not be wrapped up in this way with a power to search.

Before a search is permitted by consent under cl 121, the person in control of the premises should be told the consent may be withdrawn at any time.

Clause 131 is onerous in its scope and should be limited to specified classes of documents.

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