

17 November

Ms Jackie Morris
A/Secretary Legal and Constitutional Affairs Committee
Department of the Senate

By email: Jackie.Morris@aph.gov.au



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Dear Ms Morris

AMTA’s submission on the Inquiry into provisions of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 (“Bill”).

AMTA is pleased to have the opportunity to make a submission on the Bill to the Senate Legal and Constitutional Affairs Committee.

As you are aware, AMTA has also made submissions to the Attorney-General’s Department (AGD) on the July 2006 draft of the Bill, and to AUSTRAC. Copies of these submissions were provided to you on 15 November. AMTA also attended the presentation by the Minister for Customs and Justice on 28 August 2006, and met with the AGD to talk through its concerns.

Application of the Bill to the telecommunications industry

We are concerned that the Bill continues to apply to services that are not provided by the financial sector or persons in direct competition with the financial sector.

The Attorney General has publicly stated on several occasions that the Bill is intended to “cover services provided by the **financial and gambling sectors, bullion dealers, and designated financial services provided by lawyers and accountants** in direct competition with the financial sector”(emphasis added).

The intention for the first tranche of the legislation to regulate only the financial and gambling sectors and those in direct competition with the financial sector has been reflected in the Department’s extensive consultation with these sectors through industry working groups. Other sectors, though potentially adversely and inadvertently impacted by the legislation, have not had the same level of consultation.

Contrary to its stated intentions, the Bill will regulate a number of AMTA members’ products including mobile telecommunications services and calling cards. These products are clearly telecommunications services and are in no way in competition with the financial sector. Further, these products have a low or negligible risk of money laundering or terrorist financing activity.

Because public statements about the Bill stated that it would cover the financial and gambling sectors, the implications of the Bill only came to the attention of AMTA and its members relatively recently. The submission to AGD was therefore completed in a very short timeframe. AMTA is concerned that this lack of direct consultation with the telecommunications industry is reflected in legislation that threatens to impose costs on the telecommunications industry that far outweigh any potential benefit (see the table on page 6 which summarises the expected impact on the products of AMTA members). The legislation is likely to impose significant costs and obligations on the telecommunications industry, despite the recognised low risk of telecommunication products being used for money laundering or terrorist financing activity.

The tables attached to this letter identify AMTA members' products that potentially come within the scope of the Bill and the potential impact of the Bill on AMTA members. We have also recommended amendments that could be made to the Bill to resolve this issue. AMTA submits that these amendments are consistent with the Financial Action Task Force's Forty Recommendations and the approach adopted in the United Kingdom and United States.


Support of solutions and recommendation of previous submissions

In making this submission we have focused on the amendments made to the July 2006 draft of the Bill given the Committee's stated intention to concentrate on issues arising from changes to the bill since the initial exposure draft. However, AMTA still has concerns with other aspects of the Bill and continues to strongly support the solutions and recommendations to in its previous submission.

Further consultation

AMTA supports the Government's decision to legislate in this area and is committed to working with the Government to develop measures that address the specific money laundering and terrorist financing risks faced by the telecommunications sector. However, AMTA submits that in its current form the Bill would impose onerous and impractical legislative obligations on the telecommunications sector without any clear anti-money laundering or counter-terrorism financing benefit.

Yours sincerely



Chris Althaus
Chief Executive

APPLICATION OF THE BILL TO AMTA MEMBERS' PRODUCTS

PRODUCT	SOLUTION
<p>Premium content & information accessed using a post-paid mobile</p> <p>It is arguable that a mobile operator makes a “loan” each time a customer uses their mobile to access premium content and information.</p> <p>This is because under the payment arrangements for premium services the mobile operator pays the third party content or information provider before the customer pays the mobile operator.</p> <p>A loan is made under subparagraph (c) of the definition of loan at the time the mobile operator makes the payment to the third party because in doing so it extends credit to the customer.</p> <p>The exclusion of credit provided in the supply of goods and services from the definition of loan does not apply in these circumstances because the mobile operator (the credit provider) did not provide the good or service to which the credit relates.</p>	<p>Amend the definition of “business” to give effect to statements in the Explanatory Memorandum that a person carries on a loans business if lending is a “core activity”</p> <p>As a result of amendments made to the July 2006 draft Bill an entity now only provides the designated service of “making a loan” if the loan is made in the course of a “loans business”. Although this term is not defined in the Bill the Explanatory Memorandum to the Bill states that the result of this limitation is that “item 6 is limited to businesses where lending is a core activity”¹.</p> <p>While AMTA welcomes the amendment, the inconsistency between the stated intention of the limitation in the Explanatory Memorandum and the definition of “business” creates uncertainty for those seeking to rely on the limitation.</p> <p>The term “business” is defined broadly to include one-off transactions. Further the Explanatory Memorandum states that “the definition is intended to...be given a broad interpretation”² This is not consistent with the term “loans business” being limited to where lending is a core activity.</p> <p>AMTA submits that the following words should be inserted at the end of the definition of “business”</p> <p style="padding-left: 40px;">For the purposes of this act, a person carries on a business of providing a particular designated service if the provision of that service is the person’s sole or principal business activity.</p>
<p>Mobiles & calling cards</p> <p>It is arguable that providers of mobile phones “issue a debit card” when they sell pre-paid mobile phones and calling cards. This is because a pre-paid mobile phone or calling card may be an article that allows the customer to debit their account for the cost of phone calls and other services.</p>	<p>Limit the designated service of “issuing a debit card” to debit cards issued by a financial institution</p> <p>In its previous submissions AMTA has recommended that the designated service of issuing a debit card be limited to cards issued by ADIs. Although this amendment has not been made to the Bill, in discussing this service the Explanatory Memorandum provides that it “captures an account held with an ADI or bank that has a debit card facility attached to the account” (emphasis added).</p> <p>AMTA submits that the Bill should be amended to reflect the intention stated in the Explanatory Memorandum by consolidating items 18 and 19 of table 1, section 6 as follows:</p> <p style="padding-left: 40px;">issuing a debit card that enables the holder of an account to debit the account where the debit card is issued by:</p> <p style="padding-left: 40px;">(a) an ADI;</p> <p style="padding-left: 40px;">(b) a bank;</p> <p style="padding-left: 40px;">(c) a building society</p> <p style="padding-left: 40px;">(d) a credit union; or</p> <p style="padding-left: 40px;">(e) a person specified in the AML/CTF Rules</p> <p>This amendment is consistent with the designated services in items 1 to 5 and 17 of table 1, section 6 which are limited to services provided by ADIs, banks building societies and credit unions.</p>
<p>Transfers of value between pre-paid mobiles and calling cards</p> <p>A “remittance arrangement” is defined in the Bill to include any arrangement for the transfer of money or property regardless of whether the transfer results in the movement of money or property from one geographic location to another. As a consequence a mobile operator will provide a remittance arrangement, when it accepts money from the holder of a pre-paid mobile phone account or calling card account for transfer to the holder of another pre-paid</p>	<p>Limit the designated services relating to remittance arrangements to circumstances where the value of the money or property to be transferred is greater than \$1,000</p> <p>It is unclear why the Bill applies a monetary threshold of \$1,000 to some designated services, such as money orders and stored value cards, but not other designated services that are similar in nature, such as remittance arrangements.</p> <p>Further, under the FATF Forty Recommendations financial institutions are only required to undertake customer due diligence</p>

¹ Page 55.

² Page 27.

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<p>mobile phone account.</p>	<p>measures in carrying out occasional transactions above USD/EUR 15,000. In the United Kingdom, the Money Laundering Regulations 2003 also contain an exemption from the requirement to perform identification procedures for one-off transactions below 15,000 Euros.</p> <p>AMTA submits that the designated services relating to remittance arrangements should be limited to circumstances where the value of the money or property to be transferred is greater than \$1,000 by amending the definition of remittance arrangement in section 10(2) as follows:</p> <p style="padding-left: 40px;">A reference in this Act to a remittance arrangement is a reference to an arrangement that is for the transfer of money or property <u>where the value of money or property is not less than \$1,000</u>, and includes a reference to an arrangement that, under the regulations, is taken to be a remittance arrangement for the purposes of this Act.</p> <p>Limit the designated services relating to remittance arrangements to circumstances where the money or property is transferred from one geographic location to another.</p> <p>AMTA submits that it is inconsistent with international practice for the Bill to apply to services for the transfer of money or value even if the money or value is not transferred to another location. For example:</p> <ul style="list-style-type: none"> • FATF's definition of a money or value transfer requires that the money or value is accepted in one location and paid to a beneficiary in another location;³ and • the Asia Pacific Working Group on Money Laundering (of which Australia is a member) defines an alternative remittance system as a system for moving money or other forms of stored value between countries.⁴ <p>AMTA submits that the designated services relating to remittance arrangements should be limited to circumstances where the money or property is to be transferred from one country to another by amending the definition of remittance arrangement in section 10(2) as follows:</p> <p style="padding-left: 40px;">A reference in this Act to a remittance arrangement is a reference to an arrangement that is for the transfer of money or property <u>into or out of Australia</u>, and includes a reference to an arrangement that, under the regulations, is taken to be a remittance arrangement for the purposes of this Act.</p>
<p>Trade promotions & other games</p> <p>AMTA members runs trade promotions. For example, one member is currently running a promotion whereby purchasers of their pre-paid mobile phones can be entered a draw to win a car. This is arguably similar to a lottery as that term is commonly understood.</p> <p>AMTA members also use various other games to promote their businesses. Many of these are similar to lotteries, in that a winner is drawn randomly by computer from all eligible entries.</p> <p>Sometimes, however, those games may involve a mix of chance and skill. For example, in order for an entry to be eligible for entry in to a draw, a question must be answered correctly, or other skill-based criteria must be met.</p>	<p>Include a definition of "lottery"</p> <p>As a result of amendments made to the July 2006 draft Bill lotteries have been excluded from the definition of a "game".</p> <p>While AMTA welcomes this amendment the Bill does not define the term "lottery". AMTA submits that this will lead to considerable uncertainty as there is no single, authoritative legal definition of lottery. Various definitions are adopted under State and Territory legislation regulating lotteries, and there is an additional definition at common law. Any of these definitions might be applicable, and they differ in several important ways:</p> <ul style="list-style-type: none"> • under the common law definition, and arguably under the applicable ACT and NSW statutory definitions, a lottery can only distribute prizes based wholly on chance (and without any element of skill). In contrast, the statutory definitions of lottery in other States and Territories provide that a lottery need only distribute prizes based either wholly, or partly, on chance.

³ Interpretive Note to Special Recommendation VI: Alternative Remittance. A money or value transfer system is defined as, a **financial service** that accepts cash, cheques, other monetary instruments or other stores of value **in one location** and pays a corresponding sum in cash or other form to a beneficiary **in another location** by means of a communication, message, transfer or through a clearing network to which the money/value transfer service belongs (emphasis added)

⁴ Asia Pacific Group on Money Laundering, Alternative Remittance Regulation Implementation Package (July 2003) at page 10

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	<ul style="list-style-type: none"> • under the common law definition, and under most State and Territory legislation, a competition conducted to promote trade is capable of being a lottery. However, the Tasmanian statutory definition specifically excludes certain competitions conducted to promote trade. As a vast number of competitions are conducted in Australia to promote trade, it is necessary to clarify whether such competitions would be considered lotteries for the purposes of the Bill. • the scope of the definitions differ. For example, under the NSW legislation applicable to lotteries conducted to promote trade, a lottery must be determined by lot, whereas under the equivalent WA legislation, a lottery may be determined in any manner howsoever involving a degree of randomness or chance. <p>AMTA submits that this uncertainty should be removed by including the following definition of "lottery" in the Bill.</p> <p>lottery means</p> <ul style="list-style-type: none"> (a) a trade promotion; and (b) a game, scheme or device for the distribution of a prize, in which: <ul style="list-style-type: none"> (i) the prize consists of any real or personal benefit or any real or personal thing; and (ii) the distribution of a prize depends, either entirely or partly, on chance. <p>trade promotion means a game, scheme or device for the distribution of a prize by way of gift or otherwise where:</p> <ul style="list-style-type: none"> (a) the prize consists of any real or personal benefit or any real or personal thing; and (b) the game, scheme or device is for the promotion of a business. <p>Limit the gambling services in table 3 to circumstances where the amount of the bet, winnings or value of the game is greater than \$1,000</p> <p>The FATF Forty Recommendations only apply to "casinos". Further, as discussed above, under the FATF Forty Recommendations financial institutions are only required to undertake customer due diligence measures in carrying out occasional transactions above USD/EUR 15,000. The UK Money Laundering Regulations 2003 also contain an exemption from the requirement to perform identification procedures for one-off transactions below 15,000 Euros.</p> <p>For consistency with international standards and in recognition of the low money laundering and terrorism financing risks associated with low value transactions, AMTA submits that a \$1,000 threshold should be included in relation to the gambling services described in table 3 of section 6.</p> <p>Games should only be regulated if the customer pays to enter</p> <p>The December 2005 draft of the Bill only applied to games where the customer "gives or agrees to give consideration to play or enter the game". This requirement has been removed from the current draft of the Bill.</p> <p>It is difficult to see how money could be laundered using a game where there no opportunity to use the criminal proceeds to pay an entry fee. AMTA submits that due to the negligible money laundering risk associated with such games a subparagraph (e) should be included in items 6 and 9 as follows:</p> <ul style="list-style-type: none"> (e) the customer of the designated service gives or agrees to give consideration to play or enter the game (and the consideration does not relate to the acquisition by the customer of any other good or service).

IMPACT OF THE BILL ON AMTA MEMBERS' PRODUCTS

AML / CTF Obligation	Impact
Develop and comply with AML/CTF program to monitor the provision of designated services to identify and materially mitigate the risk that mobile operators, through the provision of telecommunication services, might be involved in, or facilitate a transaction that is connected with, the commission of a money laundering or a financing of terrorism offence	Additional compliance costs that are disproportionate to the risk
Identify high risk customers, services and service delivery methods and risks associated with dealing with them	Additional compliance costs that are disproportionate to the risk
Customer due diligence obligations: <ul style="list-style-type: none"> • know your customer • risk classification of customers • ongoing monitoring of customer transactions • apply enhanced customer due diligence where a customer is determined to be a high risk • identify and report suspicious matters 	ID requirements extend beyond existing arrangements for the provision of telecommunications services. These requirements would increase the costs of providing such services, place restrictions on the distribution and availability of these services to consumers Additional compliance costs that are disproportionate to the risk
Employee risk awareness training: <ul style="list-style-type: none"> • at appropriate intervals • cover the consequences of the risks faced by operators • processes in the AML/CTF program relevant to operations • retrain if and when risks or obligations changes 	Additional compliance costs that are disproportionate to the risk
Employee screening obligations	Additional compliance costs that are disproportionate to the risk
Third party due diligence when operators enter into third party arrangements for the provision of telecommunications services and if a material risk has been identified, a serious officer must decide whether the third party is suitable to carry out the relevant task	Additional compliance costs that are disproportionate to the risk
Having independent review	Additional compliance costs that are disproportionate to the risk
Keep records to demonstrate program that program complies with the rules	Additional compliance costs that are disproportionate to the risk
Requirements to terminate service in event that suspect on reasonable grounds that the customer is not who they claim to be, or where suspect that providing the service may be relevant to an investigation relating to financing terrorism or money laundering.	Affects customer contracts and experience. Would be difficult for operators to balance potential liability arising from failing to provide service against liability for breach of AML regulations
Distribution and sales agents would need to make copies of ID documents for all purchasers of mobile telecommunications services and provide them to operators – this is not currently done.	May no longer be commercially viable to certain distribution channels and agents to sell products; this would reduce the availability of these services to the Australian community