



FROM THE PERMANENT REPRESENTATIVE

AUSTRALIAN PERMANENT MISSION  
GENEVA

17 March 2016

Mr Christophe Peschoux  
Officer-in-Charge  
Special Procedures Branch  
Office of the High Commissioner for Human Rights  
United Nations Office at Geneva  
Palais Des Nations  
1211 Geneva 10  
Switzerland

Dear Mr Peschoux

**RE: Joint Communication from UN Special Procedures Mandate Holders: Termination of bank accounts of Somali money transfer operators by commercial banks in Australia as a consequence of government anti-money laundering and counter-terrorism measures**

I refer to the communication [AUS9/2015] concerning the termination of bank accounts of Somali money transfer operators (MTOs) in Australia, which accompanied your letter of 12 January 2016.

As requested, the communication was brought to the attention of the Australian Foreign Minister, the Hon Julie Bishop MP.

In December 2015, the Australian Transaction and Reports Analysis Centre (AUSTRAC), Australia's financial intelligence unit and counter-terrorism financing regulator, released a strategic analysis brief on '*bank de-risking of remittance businesses*'<sup>1</sup>. The brief found that there are still MTOs operating in the Somalia corridor. Although the Somali remittance sector has consolidated in recent years, with the number of MTOs sending funds to Somalia falling slightly, the value of money transmitted to Somalia remains constant.

Australia takes its obligations under international human rights law seriously. These obligations only apply to people within its territory and subject to its jurisdiction. Australia does not accept that it owes human rights obligations, such as the right not to be arbitrarily or unlawfully deprived of life and the progressive realisation of rights to an adequate standard of living, the highest attainable standard of health and education, to people living in Somalia. This is for the reasons acknowledged by the Special Procedures Mandate holders themselves, being that Somalia, as the relevant State Party, owes these obligations itself, consistent with the principle of State sovereignty.

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<sup>1</sup> <http://www.austrac.gov.au/bank-de-risking-remittance-businesses>

Australia also does not accept the suggestion of the Special Procedures Mandate Holders that it is impermissibly or unnecessarily interfering with Somalia's ability to fulfil its own human rights obligations.

Specifically, Australia makes the following observations about a number of human rights referred to in your correspondence.

- In relation to Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Australia considers that it is required to take steps, including through international assistance and cooperation, to achieve progressively the full realisation of the rights recognised in ICESCR in relation to people in its territory and subject to its jurisdiction. As the International Court of Justice has confirmed, 'the Covenant guarantees rights which are essentially territorial' although 'it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction' (Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory of 9 July 2004, 180 at [112]).
- Australia does not consider Somali-Australians to be migrant workers and is not a State Party to the International Convention on the Protection of the Rights of All Migrant Workers. The majority of Somali-Australians are Australian citizens, who came to Australia in the late 1980s, during the 1990s under Australia's Refugee and Special Humanitarian Program following the civil war in Somalia in 1991, and most recently arrived as family migrants.
- Somali-Australians, as an ethnic minority, have a right to enjoy their own culture, to profess and practise their own religion or to use their own language under Article 27 of the International Covenant on Civil and Political Rights. Australia promotes the rights of Somali-Australians to enjoy their own culture in a range of ways, including the publication of Australian Government forms in the Somali language, the provision of interpreter services and a Somali-language radio station, for example, while also ensuring that the cultures of all migrants are celebrated. While Australia agrees that 'culture' should be interpreted broadly, it does not accept that the right to culture encompasses a right for Somali-Australians to send overseas remittances.
- The Australian Government's legislative and other measures to counter money laundering and terrorism financing are not discriminatory. To the extent that such measures may have a disproportionate impact on the Somali-Australian community, as the Special Procedures Mandate holders assert, in Australia's view, such measures constitute legitimate differential treatment. These measures are aimed at achieving a legitimate purpose – preventing money laundering and terrorism financing.
- The Australian Government takes the view that the promotion of business and respect for human rights go hand in hand. Australia has endorsed the United Nations Guiding Principles on Business and Human Rights and co-sponsored UN Human Rights Council resolution 17/4 of 16 June 2011. The principles are based on the 'Protect, Respect, Remedy' framework – being the Government's duty to protect human rights, the corporate duty to respect human rights and the importance of access to remedy for victims of human rights violations. The Government's obligation to 'protect' extends to taking steps to prevent, investigate, punish and redress abuse by third parties, including through effective regulation. Australia reads these Guiding Principles consistently with its obligations under international human rights law.

Despite the above, Australia recognises that remittances represent a major source of income for millions of people across the globe. However this benefit must be carefully weighed against the

risks posed by MTOs, to ensure that national security and financial system integrity are not compromised.

A low appetite for risk in the financial sector globally has resulted in some Australian financial institutions deciding to exit, or not enter into, banking relationships with MTOs (referred to as “de-risking”). Discussions with the Australian banking sector indicate that this has not been a blanket decision and that in some cases accounts have been closed after reviews have revealed very poor levels of regulatory compliance by the MTOs. No ethnic or minority groups have been singled out.

MTO accounts pose particular issues for financial institutions as they are ‘nested’ accounts – meaning that a single account can represent the means of transferring money for the many customers of the MTO and the bank has no visibility of the underlying customer. Accordingly, financial institutions are required to rely on the MTOs’ compliance with anti-money laundering and counter-terrorism financing (AML/CFT) obligations and sanctions laws in respect of their customers. Australian banks have expressed concerns that entities in the MTO sector do not apply proportionate risk management and controls and sufficient customer due diligence over their customers and their transactions. In particular, the lack of detail concerning the beneficiaries of transactions has been identified as a particular area of concern. If the MTO has not properly scrutinised its customers, this exposes the financial institutions to regulatory, legal and reputational risk.

The 2015 Financial Action Task Force (FATF) Mutual Evaluation Report of Australia notes that the ability to assess risk adequately varies widely within the MTO sector and that implementation of AML/CFT obligations varies greatly.

Whilst a number of banks have exited MTOs, it is important to note that a number of financial institutions within Australia continue to hold MTO accounts. Channels to send money overseas continue to be available, including to Somalia.

AUSTRAC tracks all money that is remitted in and out of Australia through international funds transfer instructions (IFTIs). Each ‘sender’ or ‘recipient’ of an IFTI must report the instruction to AUSTRAC within 10 business days. This information is then used to formulate data on international funds flows. A key finding of AUSTRAC’s de-risking strategic analysis was that, within Australia, bank de-risking activities do not appear to have had a significant impact on international funds flows through the remittance sector.

With respect to the specific questions asked of Australia in your correspondence, I provide the following information.

***Please indicate whether Australia has sought to identify ways in which legitimate measures to counter terrorism and money laundering could be reconciled in this context with measures to avoid violation of the economic, social and cultural rights, as well as civil and political rights, of those directly affected by the closure of bank accounts of Somali MTOs.***

The Australian Government has facilitated discussions between the banking and MTO sectors on how risks in the MTO sector and the risk appetite of banks can be aligned. Australia’s AML/CFT regime is also currently subject to a statutory review. The review is considering measures to enhance the supervision of MTOs, with stronger entry and compliance requirements to improve the capacity of the sector to understand and comply with AML/CTF obligations and increase the confidence banks have in the sector. These enhancements have been requested in consultations with MTOs.

A particular issue impacting on the remittance of money to Somalia is that there is no formal banking system in that country. This is an issue that Somalia needs to address and is outside Australia's responsibility.

***Is Australia contemplating taking emergency measures to facilitate the flow of remittances from the Somali diaspora in Australia to Somalia?***

The Australian Government maintains that emergency measures are not needed. As previously mentioned, there are still MTOs operating in the Somalia corridor, and the value being remitted remains constant.

***Is Australia contemplating changing its existing AML/CFT laws and regulations to ensure that the negative consequences of restricting transfers through Somali MTOs are proportionate in light of the importance of not directly violating relevant economic, social and cultural rights, as well as civil and political rights?***

Australia's AML/CFT regime does not restrict transfers through Somali MTOs. Australia's AML/CFT regime is designed to protect the integrity of the Australian and global financial systems. The regime requires regulated businesses, including banks, to identify the risk of money laundering and terrorism financing associated with the provision of certain services, and implement appropriate measures to address those risks. This recognises that businesses are best placed to assess the risk posed by their customers and decide the measures that appropriately mitigate the identified risk.

The Australian Government maintains that decisions about risk should not be arbitrary and should be made on an individual basis. In November 2014 AUSTRAC released a public statement clarifying that it considers the banking sector should assess risks on a case-by-case basis<sup>2</sup>.

The alternative remittance sector is recognised, both by Australian agencies and internationally, as having high money laundering and terrorism financing risks. Financial institutions must be able to mitigate these risks. It is the unfortunate case that countries with limited systems of government and financial infrastructure present particular challenges for sending remittances, due to the increased money laundering, terrorism financing and sanctions risks.

All MTOs are subject to rules and obligations under Australian AML/CFT laws. If a financial institution does not believe an MTO is complying with these obligations, or that banking the MTO could open the financial institution to penalties, it may be an appropriate course of action to terminate the business relationship.

Additionally, money remitted overseas from Australia is often transmitted through foreign banks separate to those at the final destination. This means that the transfer is subject to those foreign banks' risk management strategies. In a number of instances, it has been reported that it is the correspondent bank with whom the Australian bank has a relationship that makes the negative assessment of risk. The correspondent foreign banks are then blocking transfers generated by the alternative remittance sector, on the basis of their AML/CFT risk assessments, meaning that Australian financial institutions are not able to complete transactions. It has further been reported that some Australian banks have been warned by their correspondent banks that if they continue to remit money on behalf of MTO customers, the correspondent relationship will be severed.

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<sup>2</sup> <http://www.austrac.gov.au/news/austrac-statement>

***Does Australia contemplate devising a comprehensive plan to clarify existing AML/CFT obligations of commercial banks and bring relevant stakeholders together, in Australia and abroad, specifically in relation to Somali MTOs?***

Australia has been working on de-risking for a considerable amount of time. The AUSTRAC statement confirming that risk assessments should be carried out on a case-by case basis also encouraged banks to engage with MTOs on the issue of account closures and risk.

In December 2014, the Australian Attorney-General's Department formed the Working Group on Remittance Account Closures. The Working Group brought together relevant stakeholders (Government, banking and MTO) and included representatives from the Somali Money Remitters Group. The Working Group met on a monthly basis, with a final meeting held in September 2015.

The Working Group came to a close for a number of reasons, including the outcomes of the AUSTRAC report. However, as mentioned in your correspondence, it was discovered that the existence of the Working Group was interfering with attempts by MTO representatives to meet one-on-one with the banks, as all requests for meetings were referred back to the Working Group. The Attorney-General's Department has now moved to facilitating conversations between the banking and MTO sectors with a view to aligning the risk appetite.

***What actions, if any, is Australia taking in the context of international organisations and fora, including, but not limited to, FATF, G7, G20, and World Bank, to address the issue of the closure of bank accounts of Somali MTOs?***

Australia is addressing the global de-risking phenomenon at an international level through its participation in various fora, including the FATF and the G20. Additionally, Australia has been a participant in global World Bank surveys on de-risking.

Under the Australian Presidency, the FATF released two statements addressing the issue of de-risking directly. The first in October 2014 clarified the application of the risk-based approach which underpins its global AML/CTF standards<sup>3</sup>. It confirmed that a case-by-case approach is required, where the risks associated with each customer are considered and that termination of the relationship should only occur where the risks cannot be mitigated. It confirmed that wholesale de-risking was not an excuse to avoid implementing a risk based approach.

In June 2015 the FATF released a further statement which clarified that, except in high risk scenarios, the FATF Recommendations do not require banks to perform customer due diligence on the customers of their correspondent banks when establishing and maintaining correspondent banking relationships<sup>4</sup>.

The FATF has also committed to undertaking work on guidance and policy to clarify AML/CTF obligations that may contribute to de-risking. Australia actively participates in the development of FATF guidance and papers relating to de-risking. The FATF recently published the '*Guidance for a Risk-Based Approach for Money or Value Transfer Services*'<sup>5</sup> and has another paper on correspondent banking in development. The paper currently under development includes input from banks and MTOs and Australia ensured that our domestic MTO representatives were included in FATF consultations.

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<sup>3</sup> <http://www.fatf-gafi.org/publications/fatfgeneral/documents/rba-and-de-risking.html>

<sup>4</sup> <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/derisking-goes-beyond-amlcft.html>

<sup>5</sup> <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/rba-money-or-value-transfer.html>

***In addition to earlier efforts by the Australian Government, is Australia contemplating addressing the issue of the closure of bank accounts of MTOs through bilateral or multilateral cooperation with the most affected States, including Somalia, the United States, the United Kingdom, as well as other States through the FATF and the Asia/Pacific Group on Money Laundering.***

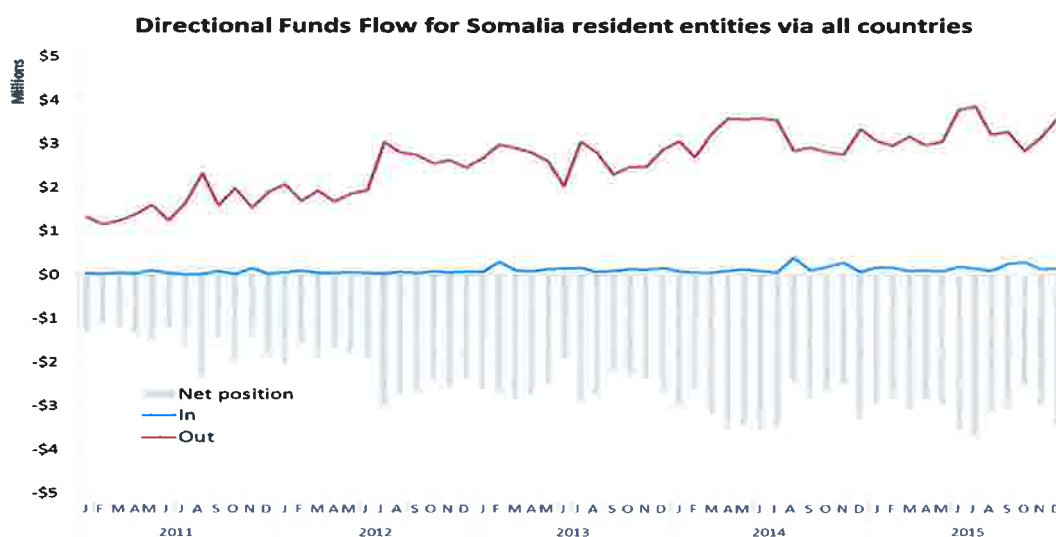
Australia will continue to discuss the global de-risking issue through bilateral discussions with the UK and USA as well as multilateral discussions through the FATF and the Asia/Pacific Group on Money Laundering (APG).

***Could you provide us with an overview of the flow of remittances from Australia to Somalia over the last five years?***

AUSTRAC has analysed the number and value of IFTIs reported over the five years between January 2011 and December 2015 where Somalia was reported as the originating or destination country, or the ordering customer or beneficiary is identified as having an address in Somalia.

Overall, remittances to Somalia and Somali-based parties have increased over the five year period. The Australian remittance sector facilitates over 95 percent of these funds transfers.

By analysing IFTI reports where the ordering customer or beneficiary is identified as having an address in Somalia, it is possible to identify relevant funds flows that have been transferred via other countries (eg Australia – UAE – Somalia). The vast majority (over 90 percent) of funds sent to or from Somali-based parties are sent directly to Somalia or via the UAE. As shown in the graph below, between January 2011 and December 2015 there has been a gradual and persistent increase in the value of IFTI reports to or from Somali-based parties.



***Could you also indicate what evidence is available that Somali MTOs have been used for the purpose of money laundering or financing terrorism?***

Australian authorities are aware that Australian remitters have facilitated the transfer of funds to Somalia for the purposes of financing terrorist activities perpetrated by the Somalia-based terrorist group, al-Shabaab.

Authorities are aware of multiple cases where Somali MTOs have been used by persons of security concern or persons connected to financial crime to send funds from Australia to Somalia and/or

other countries in Africa and world-wide. Due to operational sensitivities Australia is not in a position to release any details on these cases.

The observed criminal activity is partially specific to Somali MTOs (due to risk factors such as al-Shabaab) but also reflects the general high-risk nature of the MTO sector.

We trust that the information contained within this letter provides a clearer picture of the de-risking situation within Australia.

Yours sincerely

A handwritten signature in black ink, appearing to be 'John Quinn', written in a cursive style.

John Quinn  
Ambassador and Permanent Representative  
Permanent Mission of Australia to the United Nations in Geneva