

## **SUMMARY OF THE DIFFERENCES BETWEEN THE EXPOSURE DRAFT AML/CTF BILL 2005 AND THE REVISED EXPOSURE DRAFT BILL 2006**

In response to submissions on the Exposure Draft Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Bill 2005 and also in response to the Report of the Senate Legal and Constitutional Legislation Committee Inquiry into the Bill various amendments appear in the revised exposure draft AML/CTF Bill of 2006.

In general terms the changes make the Bill more risk based. The most significant changes to the revised exposure draft Bill are to be found in Parts 1, 2, 7 and 8. Changes to these Parts (Introduction, Identification procedures, AML/CTF programs and Correspondent banking) clarify that reporting entities will be able to apply risk based systems and controls as part of their mandatory AML programs when carrying out customer identification procedures and other obligations under the legislation. Other important changes have been made to Parts 3, 6, 10, 11, 15 and 18.

### **Part 1**

#### **Clause 5 – Definitions**

- A definition has been inserted of the term “**designated business group**” to facilitate members of a business group being able to share identification information without committing a ‘tipping off’ offence and to enable members of the group to subscribe to one “joint anti-money laundering and counter-terrorism financing program”.

#### **Clause 6 – Table 1**

- Item 6 (making a loan) will not cover loans which are in effect the granting of ‘trade credit’ to a purchaser (this result is achieved by amendments made to the definition of the term “loan” in clause 5).
- Changes to Items 25 and 26 (issuing, selling, cashing or redeeming money orders, postal orders etc) limit the scope of these items to where the face value of the order is more than \$1,000.
- Items 27, 28, 29, 30 and 31 are amended to make it clear that only funds transfers where a financial institution (or other person specified in the Rules) is the destination or originating institution will be captured.
- Items 32 and 33 – amendments to the definition of ‘designated remittance arrangement’ in clause 9 clarify that under these items money or property transfers to or from financial institutions will not be designated remittance arrangements.
- Changes to item 34 are intended to ensure that the item applies to agents of stockholders (and not those providing registry services to companies).
- Changes to Item 36 clarify that the Bill will not apply where an entity issues shares or options to acquire shares in itself.
- The obligations under the ‘first tranche’ Bill will not apply to personal advice provided by licensed financial advisers and accordingly former Items 38, 42, 43, 48 and 52 have been deleted from the revised exposure draft – they will be dealt with in the ‘second tranche’ legislation.

- Superannuation - Items 46 and 47 have been amended to clarify that the Bill will not directly apply to self managed superannuation funds (SMSFs) \*. Sub-clause 35(4) provides that Part 2 (Identification procedures) will not apply to items 46 and 50 which relate to accepting superannuation or RSA contributions where the person has not reached preservation age (because the money laundering risk is very low). However the insertion of new items 46A and 50A enables Part 2 to be applied where the person has reached preservation age. Application of Part 2 identification to items 47 and 50 will enable identification to be required at the stage when an interest in a superannuation fund or RSA provider is being cashed out, rolled over or transferred (this being the point of money laundering risk).
- Items 57 and 58 have been amended to clarify that the Bill will only apply to services (provision of guarantees and currency exchange) provided in the course of carrying on a business.
- Item 59 (collecting physical currency) has been amended to ensure charitable donations and payments for goods and services are not covered by the item.

\* although the 'first tranche' AML/CTF legislation will not directly apply to SMSFs money laundering and terrorist financing risks that may arise in relation to them will be dealt with when the SMSF opens an account with a financial institution. This approach to SMSFs will be reviewed in the development of 'second tranche' AML/CTF legislation.

#### **Clause 6 – Table 2**

- a new table 2 has been inserted dealing with the buying and selling of bullion in the course of carrying on a business. The content of the two items in the new table 2 remains the same as items 62 and 63 in table 1 of the original exposure draft Bill.

#### **Clause 6 – Table 3**

- table 2 in the original exposure draft Bill has become table 3 in the revised exposure draft Bill. The original table 2 contained one item of providing a 'gambling service' in the course of carrying on a business and the term 'gambling service' was defined in clause 5. The revised exposure draft Bill withdraws the definition from clause 5 and replaces it with a new table 3 which consists of 12 items. These items have been separated out from the former definition in order to facilitate the application of identification obligations at a time appropriate to the provision of the particular designated service. For example for some items it may be more appropriate to require identification to be carried out after commencement of the service and on the occurrence of a particular event (such as on payout of winnings) whereas for some other items carrying out of identification before commencement of the service may be more appropriate.

### **Part 2 – Identification procedures**

Triggers for re-verification of the identity of existing and low risk service customers and their agents are now risk based and will depend on the identification of

circumstances that may require filing of a suspicious matter report (Divisions 2 and 3 of Part 2).

Reporting entities will be required to monitor, in accordance with the AML/CTF Rules, the risk that the reporting entity might reasonably face that the provision of a designated service might involve or facilitate money laundering or the financing of terrorism (see new Division 6 – Ongoing customer due diligence).

Provisions dealing with the authorisation of external agents and other reporting entities to carry out customer identification procedures on behalf of the first reporting entity have been clarified to ensure that the internal agents and employees of the first reporting entity, the external agent or the other reporting entity can carry out customer identification without the need for a written authorisation (see clause 34).

### **Part 3 – Reporting obligations**

Triggers for filing a suspicious matters report have been clarified to include suspicions held by both the reporting entity and authorised agents and have been expanded to include suspicions that a customer is not the person they claim to be. The types of offences that may be relevant to the formation of the suspicion have been clarified. New clauses 40A, 41A and 43A enable AML/CTF Rules to be made exempting particular designated services from Divisions 2, 3 and 4 of Part 3 (these Divisions require reporting of suspicious matters, of threshold transactions and of services relating to international funds transfer instructions).

Former items 3 and 6 have been omitted from the table in clause 43 to ensure that domestic transfers are not inadvertently covered by reporting obligations relating to international funds transfers instructions.

AML/CTF Rules may be made requiring a reporting entity to give AUSTRAC a report about its compliance with the AML/CTF Act, Regulations and Rules during the reporting period specified in the Rules (see clause 43B).

Obligations to provide further information to AUSTRAC and the Commissioner of Taxation upon request have been included to enable foreign financial institutions to be requested to provide account holder details concerning anonymous credit and debit card accounts issued by those institutions (see new clause 46).

### **Part 6 – Register of providers of Designated Remittance Services**

There have been several changes to the provisions which previously required persons to advise AUSTRAC of the provision of registrable designated remittance services and requiring AUSTRAC to maintain a register of persons providing such services. A person will commit an offence if the person provides such a service without being registered (see clause 70). AUSTRAC will have obligations to register applicants (new clause 71A), to update entries on the Register (new clause 71B), and to remove entries where appropriate (new clause 71C). AUSTRAC must respond to a reporting entity's request as to whether a specified name is on the Register (new clause 71D).

## **Part 7 – Anti-money laundering and counter-terrorism financing programs**

The provisions about AML/CTF programs have been amended to reflect the integral nature of such programs in the AML/CTF regulatory regime. Reporting entities will not be able to commence to provide a designated service unless they have adopted an AML/CTF program (new clause 72A) and they must comply with the program that has been adopted (clause 73). Reporting entities will now have the choice of two types of program. A ‘standard’ program will apply to a particular reporting entity (see sub-clause 74(2)) and a ‘joint’ program will apply to each reporting entity that from time to time belongs to a particular ‘designated business group’ (see sub-clause 74(3) and the definition in clause 5 of the term ‘designated business group’.

## **Part 8 – Correspondent Banking**

Provisions prohibiting financial institutions from entering into correspondent banking relationships with shell banks have been re-drafted to reflect the fact that it can be difficult to identify a shell bank (see clause 78). Financial institutions will be required to terminate a correspondent banking relationship with a person where it becomes aware that the person is a shell bank (new clause 78A). Details of assessments which financial institutions must undertake before entering new correspondent banking relationships and the details of regular due diligence assessments of correspondent banking relationships will now be specified in the AML/CTF Rules.

## **Part 10 – Record keeping requirements**

This part has been expanded. The Part now requires records of provision of a designated service (clause 84A). New provisions 86AA and 86AB (records relating to transferred ADI accounts and retention of records relating to closed ADI accounts) have been carried over from the *Financial Transaction Reports Act 1988*. There are new provisions requiring the making of records of identification procedures where carried out by the reporting entity or on behalf of the reporting entity (clauses 86A and 87A respectively). Reports about funds transfer instructions must also be retained (new clause 89A). The retention period has been specified to be 7 years.

## **Part 11 – Secrecy and access**

The provision allowing legal practitioners to make certain disclosures of suspicious matters reports in certain circumstances has been extended to ‘qualified accountants’ (see new definition in clause 5) in recognition of the fact that such professionals also provide tax advice (see sub-paragraphs 95(4)(a)(iii) and (iv)). Reporting entities which subscribe to joint AML/CTF programs will now be able to disclose such information for the purpose of informing their related entities about the risks involved in dealing with a customer (see sub-clause 95(7)).

## **Part 13 – Audit**

New Division 7 in this Part enables AUSTRAC to require a reporting entity to appoint an external auditor to carry out an external audit of the reporting entity’s management of risks it may face in provision of designated services or on its compliance with the AML/CTF Act, Regulations and Rules.

## **Part 15 – Enforcement**

AUSTRAC has two added enforcement options. It will be able to issue remedial directions (see new clause 155A) and enter into enforceable undertakings (see new clauses 160A and 160B).

## **Part 18 – Miscellaneous**

A protection from liability clause was previously repeated at various stages throughout the Bill (see old clauses 36, 46, 64). This has been replaced by the one clause which applies to the whole Bill (see new clause 195A). Part 18 also includes a general defence (at new clause 195B) to criminal proceedings and civil proceedings under the Act of taking reasonable precautions and exercising due diligence. New clause 203A enables AML/CTF Rules to be made providing general exemptions from the Act for particular designated services.