CHAPTER 2

MAJOR CHANGES TO THE BILL

2.1 This chapter briefly outlines the main provisions of the Bill which have been revised following publication of the Exposure Bill on 16 December 2005.

Part 1 – Introduction

2.2 The Bill has introduced a phased implementation period in respect of various obligations (clause 2). There will be a 'prosecution free' period for the first 12 months of each implementation period and a formal review of the Bill will be required within seven years of commencement.

2.3 The term 'designated business group' has been inserted into the Definitions (clause 5). This will allow associated business entities to share customer identity information without committing a 'tipping off' offence and to subscribe to a joint anti-money laundering and counter-terrorism financing (AML/CTF) program.

2.4 The designated services identified in clause 6 have been split into four tables. Table 1 covers financial services, table 2 covers buying and selling bullion, table 3 covers gambling services and table 4 covers prescribed services provided in the regulations.

2.5 Table 1 now contains 54 designated services. Some items have been amended for clarity, whereas other items have been removed in their entirety.[1]

2.6 The new table 2 previously comprised items 62 and 63 in table 1 and deals with the buying and selling of bullion.

2.7 Table 3 was originally table 2 in the Exposure Bill and contained a single item: provision of a gambling service in the course of carrying on a business. The term 'gambling service' was defined in clause 5. 'Gambling service' is no longer defined in the Bill and has been replaced with the new table comprising 14 items. These items have been distinguished to facilitate the application of identification obligations at a time appropriate to the provision of the particular designated service.

Part 2 – Identification procedures

2.8 Existing customers are not subject to applicable customer identification procedures. In the Exposure Bill verification of an existing customer's identity was determined on the basis of materiality and risk. The Bill now establishes a trigger

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1 For example, former items 38, 42-43, 48 and 52 which concern advice provided by licensed financial advisers. The obligations of designated non-financial businesses and professions, including licensed financial advisers will be addressed in the second tranche of the AML/CTF legislation.

(clause 29): if a reporting entity identifies circumstances which give rise to a suspicious matter reporting obligation, then the reporting entity must take the action specified in the AML/CTF Rules within the time allowed under the rules.

2.9 Similarly, the AML/CTF Rules can classify some designated services as low risk services. A low risk service customer is not subject to customer identification procedures except when a suspicious matter reporting obligation arises (clause 31). Again the AML/CTF rules will specify the action the reporting entity must take and the time allowed for taking that action.

2.10 The new Division 6 requires reporting entities to monitor their customers to identify, mitigate and manage the risk the responsible entity may reasonably face that the provision of a designated service might involve or facilitate money laundering or financing of terrorism (clause 36). The AML/CTF Rules establish the method by which a reporting entity will comply with this ongoing customer due diligence obligation.[2]

2.11 An agent may carry out applicable customer identification procedures on behalf of a reporting entity (clause 37). The common law principles of agency apply and the reporting entity will be responsible for the acts or omissions of its agent. There is no requirement to verify the identity of the agent.

2.12 Under certain conditions, a reporting entity may rely on an applicable customer identification procedure carried out by another reporting entity (clause 38).

2.13 There are particular designated services to which the customer identification procedures will not apply (clause 39). For example, a designated service that is of a kind specified in the AML/CTF Rules or provided in circumstances specified in the AML/CTF Rules.

Part 3 – Reporting obligations of reporting entities

2.14 The term 'suspicious matters', which was prevalent in the Exposure Bill, has largely been replaced by the term 'suspicious matter reporting obligation'. This latter term has been defined in the Bill (subclause 41(1)).

2.15 There are two elements in relation to a suspicious matter reporting obligation: circumstance and physical. The circumstance elements indicate when the obligation arises and the physical elements specify the kinds of suspicious matters which require the matter to be reported to the AUSTRAC CEO by the reporting entity.[3]

2.16 Three examples of the physical elements are that the reporting entity suspects on reasonable grounds that:

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2 Australian Government, Australian Transaction Reports and Analysis Centre, *Draft Consolidated AML/CTF Rules for Discussion*, 4 July 2006, Chapter 6.

3 Proposed paragraphs (a)-(c), inclusive, and proposed paragraphs (d)-(j), inclusive, respectively.

- the customer is not the person they claim to be (paragraph (d));
- the provision of the service is preparatory to the commission of an offence covered by the definition of financing of terrorism (paragraph (g));
- the provision of the service is preparatory to the commission of an offence covered by the definition of money laundering (paragraph (i)).

2.17 A reporting entity must give the AUSTRAC CEO a report about the matter, within a specified timeframe: generally within 3 business days or, if the suspicion relates to financing of terrorism, within 24 hours. The AML/CTF Rules may specify the information to be included within that report.[4]

2.18 The AML/CTF Rules may exempt some designated services from the reporting obligations. The Rules may also provide for the lodgement of regular reports in which case a reporting entity must give the AUSTRAC CEO a report regarding the reporting entity's compliance with the legislation, regulations and the AML/CTF Rules.[5]

2.19 Competent authorities are now able to obtain information and documents for use in investigations of money laundering and underlying predicate offences.[6] If a reporting entity is obliged to report to the AUSTRAC CEO, including in respect of a threshold amount or electronic funds transfer, then authorities such as the AFP Commissioner, the Commissioner of Taxation and the CEO of the Australian Crime Commission may obtain further information or require the production of documents from the reporting entity (clause 49).

2.20 Where a request for information or documents relates to the identity of an account holder of a credit or debit card issued outside Australia, the AUSTRAC CEO or the Commissioner of Taxation may direct the reporting entity to obtain the necessary information from the card issuer (clause 50).

Part 6 – Register of providers of designated remittance services

2.21 The provisions of Part 6 have been substantially amended. In the Exposure Bill the primary obligation was for AUSTRAC to maintain a register of designated remittance service providers. Those providers were required to furnish AUSTRAC with all necessary details.

2.22 Persons are now expressly prohibited from providing a registrable designated remittance service unless their name and details are entered on a Register of Providers of Designated Remittance Services (subclause 74(1)).

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4 Australian Government, Australian Transaction Reports and Analysis Centre, *Draft Consolidated AML/CTF Rules for Discussion*, 4 July 2006, Chapter 9.2.

5 Proposed clauses 42, 44-45 and 47.

6 Proposed clauses 49–50 and Explanatory Memorandum, p.91.

2.23 AUSTRAC continues to be responsible for the maintenance of an electronic register. A reporting entity may request advice from the AUSTRAC CEO as to whether a specified person is entered on the register however the register is not available to the public as it is not a legislative instrument.

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

2.24 In the Exposure Bill a reporting entity was required to develop, maintain and comply with an AML/CTF program, which was defined in former clause 73.

2.25 In the Bill a reporting entity is expressly prohibited from commencing to provide a designated service to a customer unless the reporting entity has adopted, maintained and complied with an AML/CTF program (clauses 81-82).

2.26 An AML/CTF program is comprised of two parts: Part A (general) and Part B (customer identification). The purpose of Part A is to identify, mitigate and manage the money laundering or financing of terrorism risks a reporting entity may face. The purpose of Part B is to establish the customer identification procedures.

2.27 Reporting entities are now subject to three types of program:

(a) a standard program;

(b) a joint program which applies to each reporting entity that belongs to a designated business group; or

(c) a special program which applies where the only designated services provided by the reporting entity are covered by item 54 in table 1 of clause 6 (This item covers a holder of an Australian Financial Services Licence who arranges for a person to receive a designated service).

2.28 AML/CTF standard and joint programs must incorporate the prescriptive Parts A and B. A special AML/CTF program need only address Part B.

Part 8 – Correspondent banking

2.29 The provisions regarding correspondent banking relationships with shell banks have been re-drafted to reflect the fact that it can be difficult to identify shell banks. A 'shell bank' is defined in clause 15 and essentially means a bank incorporated in a foreign country which has no physical presence in that country.

2.30 A financial institution is prohibited from entering into a correspondent banking relationship with another person if the financial institution does so reckless as to whether that person is a shell bank or is a financial institution that has a correspondent banking relationship with a shell bank (clause 95).[7]

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7 Note that clause 5 defines 'person' to include an individual, company, trust, partnership, corporation sole or body politic.

2.31 The Bill continues to require financial institutions to assess the risk that the correspondent banking relationship might involve or facilitate money laundering or financing of terrorism ('the preliminary risk assessment') (subclause 97(1)). This is a precondition to the formation of a correspondent banking relationship.

2.32 If warranted by the risk identified in the preliminary risk assessment, financial institutions must also carry out an assessment of the matters specified in the AML/CTF Rules (that is 'a due diligence assessment') (subclause 97(2)).

2.33 Financial institutions which have already entered into a correspondent banking relationship must also conduct regular preliminary risk and due diligence assessments. The assessments must be carried out in accordance with the AML/CTF Rules.

2.34 Financial institutions which are in correspondent banking relationships and which become aware that the other person is a shell bank, or a financial institution which has a correspondent banking relationship with a shell bank, have obligations to terminate the relationship under clause 96.

Part 10 – Record keeping requirements

2.35 This Part has been substantially expanded in the Bill. Clause 105 provides that this Part does not override the credit reporting provisions in Part IIIA of the *Privacy Act 1988*. Effectively this means that records retained by reporting entities in compliance with this Part for longer than the maximum period permitted under the Privacy Act should only be used for purposes associated with this legislation, its Regulations and the AML/CTF Rules, or in compliance with a warrant issued by law enforcement and national security agencies.[8]

2.36 The AML/CTF Rules may now require a reporting entity to make a record of information relating to the provision of a specified kind of designated service or the provision of a designated service in specific circumstances (clause 106). Under clause 108, any documents relating to a designated service which have been given to the reporting entity by or on behalf of the customer concerned are to be retained. The retention period for transaction records and customer provided transaction documents is seven years.

2.37 Clauses 109 and 110 require retained documents to be transferred between banks within 120 days after the transfer or closure of an active account. The transferring bank is then released from its document retention obligations, whereas the receiving bank is bound to observe a fresh seven year document retention period. The intention of these provisions is to avoid duplication and to ensure that a reporting entity can expeditiously comply with its obligations under the Bill.

8 Explanatory Memorandum, p.122.

2.38 A reporting entity must now document all 'applicable customer identification procedures' carried out by it. Each record is to include information obtained during the procedure and any other information required by the AML/CTF Rules (clause 112). The retention period for records of identification procedures is seven years.

2.39 Electronic funds transfer instructions are also captured by a seven year record keeping requirement (clause 115).

Part 11 – Secrecy and access

2.40 Under clause 123, a reporting entity is prohibited from disclosing to someone other than the AUSTRAC CEO or a staff member of AUSTRAC that a suspicious matter reporting obligation has arisen and been communicated to the AUSTRAC CEO. This tipping off prohibition has some exceptions.

2.41 In particular, the Bill now allows qualified accountants to disclose that information. The disclosure must relate to the affairs of a customer and be made for the purposes of dissuading the customer from engaging in unlawful activity (clause 123). This provision has been inserted into the Bill in recognition of the fact that qualified accountants often provide their customers with tax advice.

Part 13 – Audit

2.42 New Division 7 enables the AUSTRAC CEO to require a reporting entity to appoint an external auditor to audit of the reporting entity's capacity and endeavours to comply with its obligations under the legislation, its regulations and AML/CTF Rules. Clause 161 allows the AUSTRAC CEO to require the conduct of a risk management audit. While clause 162 gives the AUSTRAC CEO the power to require a compliance audit.

Part 15 – Enforcement

2.43 This Part establishes the various ways in which compliance with the obligations imposed by the Bill can be enforced by AUSTRAC. The Exposure Bill contained a number of enforcement options which allowed for application of the most appropriate enforcement mechanism. The Bill now contains two further enforcement options: remedial directions and enforceable undertakings.

2.44 The AUSTRAC CEO may direct a reporting entity to take specified action aimed at preventing the contravention of a civil penalty clause, or minimising the likelihood that such a contravention will occur (clause 191).

2.45 New Division 7 enables the AUSTRAC CEO to accept written undertakings from reporting entities and to seek an order from the Federal Court in the event that the undertaking is breached. An undertaking can be compliance based or remedial in nature. AUSTRAC may publish undertakings on its Internet site.

Part 18 – Miscellaneous

2.46 The Exposure Bill contained a number of protection from liability clauses.[9] These have been replaced with a single protection from liability clause (clause 235). A reporting entity and its employees or agents, are indemnified for acts and omissions done in good faith in relation to compliance or purported compliance with the legislation, its regulations or the AML/CTF Rules. The conduct of an applicable customer identification procedure and fulfilment, or purported fulfilment, of a requirement to discontinue or not provide a designated service are specifically covered by the indemnity.

2.47 There is now also a general defence to both criminal and civil proceedings (clause 236). A reporting entity can establish the defence if it proves that it took reasonable precautions, and exercised due diligence, to avoid the contravention in respect of which the proceedings were instituted.

9 *Exposure Draft of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2005*, Clauses 36, 46 and 64.