ABA Submission
AML/CTF Bill 2006 – November 2006

	Provision	Explanation of Issue	Proposed Solution
1.	"Commence to provide" Clause 5	The definition in the Bill combined with the statement in the Explanatory Memorandum is not fully aligned with the legal and policy assurance that has been given to industry by AGD, namely that the taking of steps preparatory to the provision of a designated service is not "commence to provide." Given the significance of this issue industry's preference remains that this be made clear within the relevant definitions in the Bill. It is critically important that Government confirm that, in accordance with current practice, provision of the designated service only occurs when the customer has access to the facility (withdrawal). The current practice, where a customer seeks to establish an account but is unable to complete identification until some future time, is to establish an account, and allocate a customer profile to that account, but to block withdrawals until identification is complete. There are strict procedures around these processes where customers are placed on "post credit only" status until applicable customer identification is carried out. Examples include: ▪ Customer attends branch but lacks sufficient identification; ▪ Customer contacts bank via telephone or via the internet (this category includes overseas residents planning a move to Australia wishing to establish a bank account prior to arrival); ▪ Customers in remote areas who cannot provide identification within 5 days, much less immediately. A further example relates to a number of financial products where customers wish to lock-in an interest rate (or other price sensitive factor) at an exact point in time and it would not be possible to carry out identification prior to that moment. This means that the transaction price would be agreed but the financial benefit of this transaction may not (or should not) be realised until such a time as the appropriate customer identification procedures have taken place. The ML/TF risk in both above scenarios would be mitigated by the	It is critical that Government formally confirm a policy position that provision of the designated service only occurs when the customer has access to the facility (withdrawal). As part of this confirmation Government would need to articulate what work, if any, it envisaged Rules under clauses 30, 33 and 34 doing or whether, in the case of clause 34, the intention is to merely rely on the clause itself. At a minimum the Explanatory Memorandum should be amended to add the words "Provision of the designated service only occurs when the customer has access to the facility (withdrawal)" prior to the sentence "Steps taken preparatory to the provision of the designated service are not considered to be part of commencing to provide the service." The operational impact of this issue dictates that it must be resolved (including in relation to the Rules) as a priority and in any event before the passage of the Bill. The issue affects all aspects of industry's products and services and if the clarification above is not obtained industry will need to make wholesale changes to its current operational practices at significant cost, as well as significant change to the customer experience that industry expects will result in customer backlash because of the additional time necessary to service the client. Alternatively a rule may be made under clause 39 exempting account opening (ie, Item 1 from Table 1) from Part 2.

	Provision	Explanation of Issue	Proposed Solution
		customer not being able to access the funds until they had been satisfactorily identified. Opening the account and establishing a customer profile allows a reporting entity to establish a record, within an appropriately accessible repository, of the relevant transactions: a step which will be a core component of the KYC, customer monitoring and risk management aspects of AML/CTF Programs. The circumstances in which a customer seeks an account prior to completing identification may well be relevant to the reporting entity's risk assessment. Operationally the processes of account opening and profile establishment are, for most reporting entities, linked simultaneous electronic processes which allow efficient and appropriate management of the information captured at the customer contact point. If it becomes necessary to confirm and verify customer information prior to the provision of an account number - even if the account is technically inoperative - then reporting entities will need to re-engineer all account opening processes to dis-engage these steps from each other (i.e. account number provision and customer allocation). Rather than re-engineer processes, reporting entities are likely to simply turn customers away until they have sufficient identification. The implication is that no meaningful customer information will be captured until the customer has accumulated sufficient proof of identity. Matters such as the number of times a customer attempts to identify themselves, and weaknesses in their identification, are likely to go unrecorded, unmonitored and unreported. Further, there are a number of products and services where it would not be commercially viable for identification of customers to be carried out before the commencement of the designated service. The customer experience would be significantly adversely impacted should this practice be restricted. Industry also notes that no content has been given to clause 30 (low risk) or clause 33 (special circumstances) as this is left to Rules which are not yet published as well as the fact that no Rules have been provided for clause 34.	
2.	Definition,	Designated Business Group (DBG) needs to be an extremely flexible	Confirmation of the scope of DBG particularly in relation to suspicious

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	scope and operation "Designated business group" Clause 5	concept for an effective and workable AML/CTF regime. Considerations of efficiency are such that financial institution groups frequently centralise operations and processing across different business units, and in many cases across different entities. The ABA welcomes the revised definition in that it reflects an opt-in position. However, industry remains concerned that as the definition is incomplete it may be undermined and robbed of all utility by the Rules. This is compounded by the fact that other clauses making provision for DBGs (eg record keeping requirements, joint AML/CTF Programs) also leave content to be contained in the Rules. It is essential that the means of election under paragraph (b) of the DBG definition in clause 5 be finalised prior to commencement. It is also essential that any conditions under paragraph (d), or restrictions under paragraph (e) of that definition as to who can, and who cannot join a DBG are understood clearly before reporting entities begin design and build of their AML/CTF Programs. Further, industry requires a policy assurance from Government that the Rules will not limit or remove the broad flexibility of the current definition. The issue is also complicated by the fact that the Bill continues to impose restrictions on the ability of financial institutions to manage processing obligations centrally. For example: ▪ Threshold reporting; ▪ IFTI reporting; and ▪ Suspicious activity reporting. The ABA does not understand any of these restrictions to be based on stated policy considerations. There remains doubt as to whether one reporting entity may entrust threshold or IFTI reporting to another entity within a DBG, as the presence of provisions such as clause 36(4), clause 47(6) and the record keeping provisions, commencing with clause 106(6), suggests an interpretation that the Bill must expressly provide where one reporting entity's obligations may be discharged by another. Further, clause 123(7) appears to limit the scope for suspicious activity reporting to be entrusted by one entity to another.	matter reporting and information sharing is essential. Industry seeks publication, consultation and finalisation of the relevant Rule as a priority. At a minimum industry seeks Government confirmation of a policy position that the Rule will not undermine the following core features of a DBG: • reporting entity and members of DBG to determine membership. • inclusion of "entities" of the group and commercial relationships, not merely related companies (including members that are not reporting entities) or limited reporting entities under item 54 of Table 1. • DBG able to implement a joint AML/CTF Program that allows for DBG management, and full reliance and sharing of information in respect of: · any relevant AML/CTF information; · centralised or other recording keeping (maintenance and access of records); · identification verification for customers and agents; · collection of additional KYC; · transaction monitoring; · ongoing due diligence; · making suspicious matter and threshold transaction reports on behalf of each other; · exemption from funds transfer reporting obligations and originator information; · shared/joint compliance reports for the entire DBG under clause 43B; · a single AML/CTF compliance officer; · a single level of board oversight where appropriate; · agency arrangements; and

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		A key operational issue for banks is the extent to which they can centralise customer monitoring technology and its teams of operators and case managers. The requirement that each reporting entity attend to its own suspicious transaction reporting is likely to force entities to manage multiple installations and case management teams, substantially increasing costs without offering any discernible benefit in terms of the Bill's objectives. Further, confining suspicious matter reporting to the entity concerned will impede the ability of DBGs to centralise compliance monitoring and reporting functions. Operationally, the DBG concept needs to extend to all matters that are relevant to compliance or purported compliance with AML/CTF obligations under the Bill, including the full sharing of relevant information and reports as well as joint investigations. Essentially, a DBG should be able to behave and be regulated as if it were a reporting entity. A DBG that has full visibility across itself can detect and manage its AML risk both more efficiently and more effectively than one that is fragmented. It would also be appropriate for exemptions to be given for designated services provided by one member of a DBG to another member of the DBG and for designated services provided to a related entity even if it is not a member of a DBG. This would allow practices such as the provision of inter-company loans and treasury facilities to continue.	• training. Timing is of the essence in relation to this issue, not only because the definitions come in to effect the day after the Act receives Royal assent but because DBG is a fundamental concept which underpins the way in which reporting entities will manage their operations and compliance with the legislation. If the core features outlined above are not maintained reporting entities will need to outlay significant cost to rearrange current operations.
3.	Definition of "allowing a transaction" Clause 6 Table 1 Items 3,5,7 and 11	All references to "allowing a transaction" should be amended to read "allowing a customer initiated transaction", to prevent a reporting entity being taken to provide a designated service where it takes action in accordance with the terms on which the designated service is provided, for example debiting interest to a loan account. This issue will be less significant if the concept of "ceasing to provide a designated service" is changed.	All references to "allowing a transaction" should be amended in the AML/CTF Bill to read "allowing a customer initiated transaction", to prevent a reporting entity being taken to provide a designated service where it takes action in accordance with the terms on which the designated service is provided, for example debiting interest to a loan account.
4.	Designated Services Clause 6 (Table 4)	The scope of the AML/CTF Bill can be extended significantly through the ability to add further Designated Services by prescription in regulations. No consultation process has been adopted for the addition of	Publish formal consultation process for adopting new designated services and advise industry prior to implementation.

	Provision	Explanation of Issue	Proposed Solution
		designated services.	
5.	Making arrangements for a person to receive a designated service Clause 6, Table 1, item 54	Item 54 says that a designated service is provided where, in the capacity of an AFSL holder, the person makes arrangements for another person to receive a designated service (other than the service covered by item 54). Does this cover where the advice is provided by an AFS licensee's authorised representative? Clause 37 says that the principles of agency apply in relation to the carrying out by a reporting entity of an applicable customer identification procedure. Therefore, it seems that in order for item 54 to apply to an authorised representative of an AFS licensee, the authorised representative must have undertaken the customer identification as the AFS licensee's agent. It is commercially unrealistic to expect reporting entities to investigate the legal relationship between each of the financial planners from which that RE receives introductions and the AFS licensees under whose licences those planners may be acting.	Item 54 provides for a designated service where the AFSL holder provides a designated service where it makes arrangements for a person to receive designated services from another reporting entity. As Authorised Representatives are not the agents of the Licensee for the purpose of the Corporations Act or the AML/CTF Bill then where the arranging service is provided by a financial planner (who is an authorised representative of a licensee) there has been no designated service provided by the AFSL holder and as such the second reporting entity will not be able to rely on the customer identification procedure conducted by the Authorised Representative. Given the large number of Authorised Representatives within the financial services industry the impact of not including the acts of the Authorised Representative within Item 54 would be significant. Accordingly Item 54 should be clarified such that the act of an Authorised Representative in providing an arranging service is a designated service. We appreciate that all Authorised Representatives should not be reporting entities however as they provide the arranging service, the act should be captured and the AFSL holder should be responsible as the reporting entity for the purposes of the AML/CTF Bill only.
6.	Signatories are defined as customers Clause 6 Various items eg Item 2	The AML/CTF Bill considers signatories and account holders as customers, which has a much broader impact than under FTRA. The AML/CTF Bill has requirements on the management of customer data, the monitoring of customer behaviour and the management of customer risk. To support the management of the signatory's customer data would require a signatory to be treated in the same manner as an account holder. Currently signatories are identified and then their name and signature is checked when the signatory transacts. Signatory details are not kept with account holders. This is a fundamental change in how a signatory is treated. Core banking systems will need to be significantly changed. Given the cost of this work, and the short implementation timeframe for customer identification, signatories should be identified but not treated as 'customers' for ongoing due diligence purposes. This is in	Amend the Bill to clarify that signatories can be identified via applicable customer identification procedures but not treated as customers for other purposes in the Bill.

	Provision	Explanation of Issue	Proposed Solution
		line with the arrangements for customer agents in the non-banking sector.	
7.	Thresholds for walk in customers Clause 6 Various Items	The provisions in the Bill allow for a threshold for money orders and stored value cards, but not for example, for bank drafts, bank cheques, foreign currency exchange or traveller's cheques. This is not competitively neutral. Similar products must be treated in a similar fashion. Further, FATF allows a threshold for walk in customers. Additional operational costs will be incurred on an ongoing basis by one industry sector and not others if this is allowed to continue.	Amend the definitions in the Bill in line with the provisions for stored value cards and money orders. The threshold should be consistent with that permitted by FATF, which is EUR15000.
8.	Control Test Clause 11	This remains very broad and inappropriately linked to the Social Security Act test. Unintended consequences flow as a result to the definition of "resident" – which impacts on coverage of foreign financial institutions, and consequences under "Countermeasures".	Control Test should be amended either similar to the "beneficial owner" test in the Rules or in terms of s50AA of the Corporations Act
9.	Agency Clause 37	This clause is unnecessary but its inclusion creates uncertainty about whether similar provisions are required elsewhere in the Bill so that an agent may carry out a legislative function for a reporting entity. There is potential uncertainty as to whether the Bill allows common outsourcing practices to continue in relation to other obligations under the Bill. Many financial institutions use external information brokers (such as Baycorp Advantage, Dun & Bradstreet etc) to assist with customer identification and to obtain information about customers' credit histories. It is also common for record-keeping functions to be outsourced to specialist data houses or document storage facilities. Such outsourcing can occur under a standard service agreement, without the service provider being formally appointed as an "agent". Clause 37 could be interpreted as meaning that reporting entities can only outsource functions related to customer identification and only through a formal agency appointment. It would be preferable to allow normal commercial practices to prevail, rather than selectively referring to agency arrangements for only one of the many obligations under the Bill. Draft Rule 8.1.3 requires a reporting entity to apply its AML/CTF Program to all areas of its business that are involved in the provision of a designated service, including in relation to any function carried out by a third party. This provision should be sufficient. If Government requires further guidance to be given, outsourcing provisions similar to those in ASIC's Policy Statement 164 [PS164.25	Delete clause 37 and insert a provision permitting the appointment of agencies more generally for the execution of any obligation under the Bill or at least include a statement in the EM that clause 37 is included "for the avoidance of doubt" and otherwise normal principles of agency and outsourcing apply to the remainder of the Bill.

	Provision	Explanation of Issue	Proposed Solution
		- 29] could be provided, to the effect that if functions are outsourced, reporting entities remain responsible for complying with their obligations under the Bill and for putting appropriate measures in place to manage outsourced functions.	
10.	Use of another reporting entity's applicable customer identification procedure Clause 38	Clause 38 is unable to be assessed as its core content is left to Rules which are as yet not published. It is important that the Government confirm a policy position that reliance by the second reporting entity is not predicated upon the second reporting entity knowing what the "applicable customer identification procedure" of the first reporting entity is and whether that procedure is the one that has actually been conducted. It is also important the membership of the same DBG is not a condition of reliance on another reporting entity's identification. The Bill should also make clear that a reporting entity may prevent a third party relying on that reporting entity's identification of a customer, without that reporting entity's consent. Clause 114, while meeting the initial intent of ensuring the first reporting entity share its identification records with the second reporting entity may have an unintended consequence where subsequent reporting entities could demand identification records from any other reporting entity and these requests could not be denied due to commercial reasons.	It is essential that the relevant Rule be published, consulted upon and finalised as a priority. Customer identification is a key obligation under the legislative package requiring a sufficient lead time to implement. Industry requires certainty so as to enable this planning and implementation to occur in a cost efficient and timely manner.
11.	Reporting suspicious matters Clause 41	The ABA continues to have concerns about the breadth of the obligations. This is a critical issue. Clause 41(1)(f) as presently drafted is so broad as to be unworkable in requiring assessment of numerous un-identified offences. This sub-clause is unnecessary in light of the earlier requirements in sub-clauses (d) and (e). Further, the extent of the obligation in sub-clauses (g) -(j) is unclear because of the breadth of the definitions of "financing of terrorism" and "money laundering" which include non-identified State, territory or foreign offences "corresponding" to those identified. The problems are exacerbated by the use of the words "may be of assistance"; "may be relevant to an investigation" and "preparatory to the commission of an offence". Industry queries the capability of law enforcement professionals to make such broad judgements and employees of a reporting entity are simply not equipped to do so. It is not possible to train staff as to every possible scenario that could	Government to confirm policy position that s41 to be interpreted consistently with a risk-based approach. Industry requests that the consolidated Rule be amended to reflect the Bill. Industry also requests that the Bill be amended to reflect the statement in the EM that the time for reporting starts from when a designated officer (rather than a teller) forms the suspicion.

	Provision	Explanation of Issue	Proposed Solution
		be considered suspicious and "may be relevant" to the investigation or prosecution of a person. Nevertheless, at a practical level, common sense will have to prevail from the reporting entities perspective on focussing on key areas that could be considered suspicious and to be able to demonstrate actions taken. Such an interpretation is consistent with a risk-based approach and the policy position industry understands the Government to have taken. There is a minor inconsistency between the words used in the Bill, and the wording in the Rules, concerning the trigger for filing a suspicious transaction report under clause 39 and the trigger for re-verification of identity under Rule 4.2.1. Under clause 41 a suspicious matter reporting obligation is triggered where a reporting entity "suspects on reasonable grounds that the first person is not the person the first person claims to be". Under draft consolidated rule 4.2.1, dealing with the obligation to reverify, the condition is "If at any time a reporting entity has reasonable grounds to doubt whether a customer is the person that he or she claims to be".	
12.	Electronic funds transfer instructions Part 5	The EFTI provisions in the Bill need to align with the IFTI provisions in the amended FTRA. Currently they do not. The Bill introduces new concepts, such as "required transfer information", "tracing information" and "control" of funds. The Bill also introduces new obligations, such as obligations in relation to domestic EFTIs. There is uncertainty as to the status of the amended FTRA and the Guideline that industry and AUSTRAC have been working on in light of the implementation date of the EFTI provisions in the Bill. Issues with the amended FTRA have not been resolved and which remain problematic under the Bill. Examples include: ▪ the requirement to include credit card account numbers in certain EFTIs (section 71(d)(ii)), ▪ the requirement for same institution EFTIs coming from overseas branches to include information which may breach local secrecy laws (section 66). ▪ the obligation imposed by clause 66(2) creates enormous	Bill needs to align to the amended FTRA. Amend clause 66 to ensure that overseas permanent establishments are not obliged to supply customer information either to reporting entities in Australia, or the AUSTRAC, where that may breach laws or other legal obligations. Exclude international withdrawals and cash advances made via credit or debit cards from clause 66.

	Provision	Explanation of Issue	Proposed Solution
		difficulties. Firstly, it requires the offshore permanent establishment to supply information to its Australian parent which it may be unable to supply without breaching local laws or other legal obligations. Secondly, in the case of credit or debit card withdrawals or cash advances which lack the benefit of the ATM exemption, ie., processed via bank branch terminals or merchant terminals, the card scheme infrastructure simply lacks the ability to pass on. ▪ Clause 66(3) creates further difficulties. Offshore Permanent Establishments cannot be obliged to supply customer information to AUSTRAC where that might offend laws or other legal obligations. This limitation is recognised in other areas of the Bill, particularly in Part 3, and the considerations are no less compelling in relation to Part 5. ○ If these issues are not corrected an imbalance will result, placing Australian offshore permanent establishments at a competitive disadvantage to other overseas banks in the market for card issuing, as clause 66 imposes no obligations on an Australian beneficiary institution dealing with an overseas bank that is not one of its own offshore permanent establishments. Further, new issues arise under the Bill. For example, clause 64(7)(e) requires interposed institutions to ensure that an EFTI includes tracing information. Clause 72 defines tracing information as the account number if money is transferred from an account held with the ordering institution or in any case a unique reference number. The unique reference number must enable the ordering institution to identify the originating entity. Query how an interposed institution or beneficiary institution can ensure whether an alphanumeric string is the source account number or a unique reference number for the purposes of the Bill. If the intent is that reporting entities may rely on the SWIFT TRN number in field 20 as a unique reference number, the reference to "tracing information" is inappropriate. Banks do not currently report international cash advance or card withdrawal transactions as they are not viewed as "transfers" under the FTRA. Under the Bill, these transactions appear to be "multiple-institution same-person transfer instructions" and be reportable. This is a very	

	Provision	Explanation of Issue	Proposed Solution
		significant change which may be an oversight, as it conflicts with the Minister's commitment to industry that the Bill will not introduce new obligations unless required by FATF's Recommendations or Special Recommendations, neither of which call for the mandatory reporting of international funds transfer instructions. The IFTI reporting regime is due to commence on day one, presumably because the Government incorrectly considered Part 3 Division 4 made no change to the current position. Substantial system builds would be required to generate IFTI reports of the many international withdrawals and advances. These would take many months to engineer and relief would be appropriate, as no institution will be in a position to comply by January 2007.	
13.	Obtaining customer information for electronic funds transfers – Day "1" Compliance Clauses 64 to 71	Part 5 (Electronic Funds Transfer Instructions) commenced on the day after the Bill receives Royal Assent. Given that obligations in Part 5 are new and are not a carry over of provisions from the Anti-Terrorism Act, industry should be given an appropriate time to prepare to implement these changes. Where a person instructs a covered entity to make an electronic funds transfer to another person, or to an account held by the same customer with another financial institution, the covered entity must obtain the following customer information before it takes any action to carry out the instruction: the name of the customer; • (at least) one of: ➢ the customer's full business or residential address (not a post office box); ➢ a unique identifier given by the Commonwealth (such as an ABN or ARBN); ➢ a unique identifier given by a foreign government; ➢ the identification number given by the reporting entity; ➢ if the customer is an individual – their date and place of birth; • if the money is to be transferred from a single account, the account number;	Amend the Bill for "Day 1" compliance relating to customer information for electronic funds transfers is limited to what is required at present under FTRA. Compliance relating to additional information to be at least 6 months.

	Provision	Explanation of Issue	Proposed Solution
		• if the money is not to be transferred from a single account, a unique reference number for the account. For example - a customer uses a covered entity's internet banking facility to transfer funds between their account and an account they hold with another financial institution. This is additional information that is provided to AUSTRAC at present and will require large build unlikely to be complete by Day "1".	
14.	Credit and debit cards, cash advances and originator information obligations Clause 67(2)	Part 5 imposes obligations on financial institutions in relation to the information they capture and include in international payment messages. These create considerable difficulties in relation to the use of credit and debit cards for cash withdrawals from overseas ATMs. This is now a commonplace transaction and a widely expected feature of credit and debit cards. These transactions tend to be low value, typically $1,000-2,000 and an exemption would be consistent with other exemptions in the Bill, for example low value foreign exchange services. Such transactions are arguably same person international transfers. Two situations are problematic. Australian issued card used outside of Australia: In this situation, the Australian bank which issued the card (Issuer) appears to have the role of originator, and faces a raft of obligations under clause 64. The Issuer will ordinarily have the complete payer information and would be able to comply with clauses 64(3), (4) and (5). However, the Issuer will be unable to include the required payer information with its outgoing message to the supporting credit or debit card scheme in accordance with clause 64(6). The card scheme systems have no facility to accept or transmit this information. All that the Issuer can transmit is either an approval or a decline using a two digit code which identifies reasons for a declined transaction from a menu of typical matters, for example, an incorrect PIN will trigger a code "55" decline response. The location and type of terminal used by an Australian cardholder to	Delete clause 67(2)(a). Limit the exceptions in sub-clauses 67(2) and (4) to free issuers processing credit and debit card transactions from the obligation otherwise imposed by sub-clause 64(6) to transmit required payer information when passing on transfer instructions, other than in circumstances prescribed by the Rules. This will preserve the obligation of Australian issuers to pass on to the overseas acquiring bank (the beneficiary) the "complete payer information" concerning a cardholder who uses a foreign ATM, merchant terminal or branch terminal to access funds in Australia. Publish appropriate policy in relation to the passage of rules under clause 67(2)(c) and (d). The answer is not to legislate for additional restrictions on the use of cards in Australia by foreign travelers, but to recognise and give effect, in line with the practice of Governments elsewhere in the world, to the FATF's exemption for credit and debit cards. In relation to international practices, neither the United Kingdom nor the United States restricts credit or debit card cash advances in the manner proposed by the Bill.

	Provision	Explanation of Issue	Proposed Solution
		withdraw funds overseas is ordinarily communicated back to the Issuer. Australian Issuers could manage an obligation to block overseas withdrawals at bank branches or merchant terminals via system changes and changes to account terms and conditions. However, industry understands that Australia would be alone in imposing these restrictions upon its cardholders. Foreign issued card used in Australia: Different outcomes face a foreign traveler using their credit or debit card in Australia to access funds. At present, overseas travelers can opt between ATM, or any branch of any Australian bank in seeking to withdraw cash. In these situations, the Australian bank occupies the role of beneficiary institution and faces no obligations under clause 64. In most other countries travelers can also obtain cash advances via merchant terminals. Australian banks are planning to adopt this functionality from around February 2008. As in the case of ATM or branch transactions, the Australian bank occupies the role of beneficiary institution and faces no obligations under clause 64. The overall effect is that foreign travelers face no restrictions in accessing offshore via cards, while Australian banks will be obliged to impose inconvenient restrictions on Australian cardholders, even though these customers are subject to risk assessment and ongoing due diligence in accordance with their bank's domestic AML & CTF Program. These outcomes are poor. They are entirely inconsistent, fail to advance the objects of the legislation, pose significant inconvenience and expense for Australian travelers and pay insufficient regard to the FATF exemption for card transactions. The overwhelming majority of users of these services are not criminals and these services offer enormous benefits to the community by allowing convenient and inexpensive access to funds while traveling.	
15.	Implementation at Offshore	Industry accepts the implementation timetable proposed by the Government in relation to Australian reporting entities.	Extend the prosecution free period in relation to OPEs by an additional 12 months.

	Provision	Explanation of Issue	Proposed Solution
	Permanent Establishments (OPEs) Part 7 and other	Reporting entities with OPEs will be obliged to consider and in many instances substantially overhaul their OPEs' AML and CTF control environments to implement AML/CTF Programs in accordance with the Rules. In some instances the amount of work required will be close to or possibly exceed what needs to be done in Australia. Australian reporting entities offer designated services through full service operations, likely to meet the OPE definition, in at least 21 countries. For reporting entities with a number of OPEs it will simply not be possible to achieve this within the implementation timeframe. The preference of such reporting entities is to develop, implement and refine Australian AML/CTF Programs and to then roll those programs out, subject to tailoring to local needs and risks, as a common generic starting point at their OPEs. Industry seeks an additional 12 months in which to allow reporting entities to comply at OPEs.	
16.	Countermeasures Part 9, Clause 102	This Part refers to Regulations and the concept of "transactions" and is thus inconsistent with the rest of the Bill. This part deals very briefly with matters which are potentially significant and yet are extremely difficult to operationalise.	The scope of the section requires clarification in the Rules or guidelines.
17.	Privacy Act Clause 105 Clause 123(9)	Part IIIA of the Privacy Act is not overridden. Industry seeks that the AML legislation specifically overrides Privacy Act given the importance of the AML legislation. Note comments in Explanatory Memorandum. A Reporting Entity is not in breach of the Privacy Act by virtue of meeting its obligations under this Act. A problem remains with customers requesting their information under Privacy Law. This clause requires a reporting entity to comply with this request and the customer may obtain AML sensitive information such as suspicious matter reports. This goes against the spirit of the legislation in that elements of a reporting entity's AML program may be revealed to the customer. Further the Consequential Amendments legislation does not make the amendments necessary to the Privacy Act to allow reporting entities to access credit reports for purposes other than assessing credit history.	Amend the AML/CTF Bill to ensure it overrides the Privacy Act and avoids "tipping off" where suspicious matter reports are raised. A problem may also arise when customers requesting their information under Privacy Law. Although NPP 6.1 may provide the solution this clause may require a reporting entity to comply with a request and the customer may obtain AML sensitive information such as suspicious matter reports. This goes against the spirit of the legislation in that elements of a reporting entity's AML program may be revealed to the customer.
18.	Record	It is not clear why clause 111 is necessary, that is why it is necessary	Rules should reflect an ability to maintain a "choice" between current

	Provision	Explanation of Issue	Proposed Solution
	Keeping (Photocopying) Clause 111	to specify that 'photocopying' = making a copy. The obligation is too onerous if it requires a reporting entity to make photocopies of all customer identification documents.	practices (under FTRA) whereby identification information is recorded, rather than needing to perform photocopying or scanning. Recording of customer identification document information could be performed electronically or via a form.
19.	Keeping records of customer information in electronic funds transfer instructions received from overseas financial institutions Clause 115	Where covered entity receives an electronic funds transfer instruction from an overseas financial institution, the covered entity to another financial institution, then the covered entity must: • keep a record of so much of the required customer information that was in the file transfer instruction that the covered entity has received for passing on; • retain that record, or a copy of it, for 7 years after the covered entity passes the instruction on. This is additional obligation to what is required at present and will require large build unlikely to be complete by Day "1"	Amend the Bill for "Day 1" compliance relating to Keeping records of customer information in electronic funds transfer instructions received from overseas financial institutions to say 6 or 12 months.
20.	Risk Management Audit – Clause 161	This provision reverses the policy decision by the Minister and AGD to remove the mandatory obligation to take action to mitigate. In the first exposure draft of the Bill clause 74 was not risk-based as it required a reporting entity to take appropriate action to identify and mitigate risk and the formulation was removed as the Minister accepted industry's position that such a requirement was not risk-based. It was agreed that clause 74 was inappropriate and differed significantly from: · the FATF Recommendations; · overseas AML legislation; and · overseas practices and regulators' approaches. However, clause 161 reflects the approach taken in clause 74 of the first exposure draft rather than the agreed risk-based approach as is reflected in later amendments. The flaws in clause 161 include that: · the provision is directed to the result of a reporting entity's conduct, rather than its purpose, in that it essentially requires	Delete clause 161 from the Bill. Industry notes that clause 162 already gives the AUSTRAC CEO the power to require an external audit where the CEO has reasonable grounds to suspect that a reporting entity has contravened the Act, the regulations or the AML/CTF Rules. This would include a suspected breach of: · clause 84, which requires Part A of a standard or joint AML/CTF program to have a primary purpose to identify, mitigate and manage money laundering and terrorism financing risk the reporting entity may reasonably face; and · clause 82, which requires compliance with Part A of a standard or joint AML/CTF financing program.

	Provision	Explanation of Issue	Proposed Solution
		"appropriate action"; · in particular, the obligation to take action to "mitigate" risks gives rise to concerns,; and · the extent of the obligation and seriousness of the concern is compounded by the lack of a definition of "appropriate action", leaving AUSTRAC the discretion to interpret its meaning, unguided by legislative requirements and not informed by the relevant entity's assessment of its risk. Not only is this provision unworkable, it is defective as a matter of drafting. The provision is contained in an ancillary part of the Bill and should properly be connected to a primary obligation, that is, an audit should be triggered only where the AUSTRAC CEO has reasonable grounds to suspect a contravention of a primary obligation. This is already provided for under clause 162.	
21.	Risk Assessment Clause 165	This is a new requirement. Industry acknowledges that AUSTRAC may want to understand the basis on which a reporting entity has assessed its risk but does not accept that part of that process entails a reporting entity outlining to AUSTRAC "what the reporting entity will need to do or continue to do" to address that risk. This is a significant obligation which in the context of detailed and onerous legislative provisions breach of which results in penalties both civil and criminal is unnecessary and will result in duplicative costs. "What the reporting entity will need to do or continue to do" to address its AML/CTF risk is essentially met by all of the other requirements under the Bill and the Rules. Risk is not a static concept and flexibility is needed to properly address it. Such a requirement unnecessarily diverts costs from the procedures and actions designed to managed risk to yet another reporting function under the Bill. Further industry seeks "reasonably" to be inserted in clause 165 (1). This is appropriate given the significance of the obligation and to be consistent with other provisions in the Bill.	Delete clause 165(6)(b) from the Bill. Insert word "reasonably" before word "satisfied" in clause 165(1).
22	AUSTRAC Rules	The legislative scheme leaves much of the core content to the Rules (eg DBG) and is also able to be impacted significantly by the Rules	Please see covering letter. Please see also letter to Minister Ellison dated 17 November (copy attached).

	Provision	Explanation of Issue	Proposed Solution
	Clause 229	(eg broad exemption provisions both in relation to specific parts and the Bill as a whole). As a matter of policy, it is important that all of the core obligations be contained within the Bill, in order to allow industry sufficient certainty in implementing this significant regime, particularly in the context of penalty sanctions. As a matter of construction it is also necessary that the key obligations and offences be contained in the primary rather than subordinate legislation because the Rules will provide no remedy to defects in the legislation itself. AUSTRAC has a virtually unfettered power to make the Rules. It is confined only to the extent that the Minister chooses to given AUSTRAC a direction in relation to them. The Bill contains no formal consultation process in relation to the Rules. In relation to the Rule making power, it is critical that there be a specific statutory consultation process which includes publication of draft Rules for comment and assessment of regulatory impact. A specific mandatory statutory consultation process is needed to supplement the general consultation process provided by the Legislative Instruments Act (Cth). The consultation process provided for under that Act is insufficient as no content is given to "consultation" and because failure to consult does not affect the validity of the Rules. It is appropriate that mandatory consultation obligations be provided for – consistent with and proportional to AUSTRAC's significant discretions within such a major regulatory regime. The National Electricity Law (Schedule to the National Electricity (South Australia) Act 1996[1]) and Payment Systems (Regulation) Act 1998 (Cth)[2] provide examples of a specific consultation process. More generally, there also needs to be proper independent consideration given to appropriate checks and balances on the powers of AUSTRAC and the manner in which they are exercised. The consultation process would need apply both to new Rules as well as to any proposed amendments to Rules. Without such input there is a risk that Rules will be made that have unintended operational or	

[1] section 45

[2] see sections 12, 18 and 28

	Provision	Explanation of Issue	Proposed Solution
		cost impact. Industry's experience through the drafting of the consolidated Rules is that detailed consultation was essential to ensure that the Rules reflected operational reality and were able at a practical level to be implemented.	
23	Defence of taking reasonable precautions and exercising due diligence to avoid a contravention Clause 236	This clause does not apply to an offence against the Bill (only against the regulations, as currently drafted). The Bill provides for offences that can be committed by a reporting entity, for instance: • Clause 66 – EFTI's - one institution involved in transfer; • Clause 123 – offence of tipping off; • Clause 139 – providing a designated service using false customer name or customer anonymity. If a reporting entity commits an offence under any of these provisions, the clause 236 defence will not be available. A reporting entity could be found guilty of an offence, even if it took reasonable precautions and exercised due diligence to avoid the contravention.	Clause 236(1)(a) should be amended by adding the words "this Act or" following the word "against".