SUMMARY OF THE MAIN DIFFERENCES BETWEEN THE REVISED EXPOSURE DRAFT BILL 2006 RELEASED IN JULY 2006 AND THE INTRODUCTION BILL

General

- The clauses in the Exposure draft Bill have been re-numbered. A Renumbering Schedule prepared by the parliamentary draftsperson from the Office of the Parliamentary Counsel is ***attached*** to this Summary.

- Many of the criminal offence provisions which were previously contained in individual Parts of the Bill have been removed so that most of the obligations will be enforced by prosecutions for civil penalties rather than criminal penalties. Civil penalty provisions are contained in numerous Parts of the Bill and the framework provisions for civil penalties are contained in Division 2 of part 15. Civil penalty provisions are considered more appropriate for a regulatory scheme that places obligations largely on financial institutions which are more likely to be bodies corporate.

Part 1—Introduction

Clause 5 – Definitions

- The definition of "*designated business group*" (DBG) has been broadened to mean a group of 2 or more persons (ie it can include non-reporting entities) who elect to be a member of a designated business group. Members of DBGs will be able to share customer identification information and rely on joint AML programs in satisfying obligations under the Bill. This will allow individual members to adopt some systems and controls to suit the individual needs of their particular business without thereby losing the right to be part of the joint program.

- The definition of "*game*" has been amended to specifically exclude a lottery (this ensures that persons operating a lottery (or similar activities) are not caught by Items in table 3 of clause 6).

- The definition of "*designated agency*" (which is an agency that may be authorised by the AUSTRAC CEO to have access to AUSTRAC information) has been expanded to include the Immigration Department, APRA and the Division of Treasury that is responsible for the *Foreign Acquisitions and Takeovers Act 1975* in line with requests by the relevant Ministers

Clause 6 – Designated services

- Services or activities included in Items that refer to "*carrying on a business*" will only be designated services when provided are in the course of carrying on a business of that type. For example, Item 6 refers to making a loan, where the loan is made in the course of carrying on a loans business. Other items that have been amended in this manner are Items 7 to 13, Item 40 and Items 46 to 53.

- Superannuation - Relevant Items in Table 1 have been amended to remove references to preservation age as this information is not always known by the provider.

- New Item 54 in Table 1 includes a new designated service: in the capacity of a holder of an Australian financial services licence (new definition in clause 5), making arrangements for a person to receive a designated service (other than a service covered by Item 54). The holder of the licence will be the reporting entity under the Bill but will have more limited obligations than other reporting entities namely customer identification, suspicious matters reporting and record keeping. Customer identification will only be required for designated services provided under Item 54 if customer identification would have also been required for the designated service that is actually arranged. (For example; Items 40, 42 and 44 are exempt from Part 2 (see sub-clause 39(7)) so where an Australian financial services licence holder arranges such services no customer identification will be required.) Sub-clauses 84(5) and 85(6) have been added to provide that for designated services covered under Item 54, a reporting entity does not have to adopt or maintain a standard or joint AML/CTF program but can adopt a "special" AML/CTF program under clause 86.

Former clauses 11, 12 and 34 (Part 2)

- These clauses and any other clauses which dealt with "*internal agents*", "*external agents*" and "*applicable agent identification*" have been deleted. This will remove time, cost and administrative impediments in identifying and authorising agents. The Financial Action Task Force Recommendations do not require the identification of agents. New clause 37 provides that the principles of agency apply in relation to the carrying out of customer identification procedures. The use of agents could facilitate reporting entities carrying out their obligations where customers are remotely located. Reporting entities will remain liable for the conduct of their agents.

New Clause 12

- This clause recognises that some Authorised Deposit taking institutions (ADIs) are structured in a way other than the normal ADI/branch structure where the ADI and the branch are the same legal entity. These differently structured branches are in fact third party franchisees or alliance members (an example of such structure is community banks). This clause defines these to be "*owner-managed branches*" and makes it clear that in such structures, even if the designated service is provided by the owner-managed branch the designated service is taken to have been provided by the ADI. This means that the ADI will be the reporting entity.

- New sub-clause 123 (8) ensures that the owner-managed branches can still disclose AUSTRAC information to the ADI reporting entity.

Part 2—Identification procedures

- Sub-clauses 29(2), 31(2) and clause 35 (formerly subclauses 27A(2), 28A(2) and 32)) have been amended to remove the requirement that reporting entities '*must not continue to provide*' and '*must not commence to provide'* any designated services to a customer until the reporting entity carries out the applicable customer identification procedure. The sub-clauses now permit reporting entities to take alternative action as prescribed in the AML/CTF Rules.

Part 3—Reporting obligations

- Paragraph 41(1)(f) (formerly paragraph 39(1)(f)) has been amended to revert to similar wording in the equivalent Financial Transaction Reports Act provision (section 16(1)(b)) providing a distinction between serious and technical breaches of tax law and thus limiting suspicious matter reports on suspected breaches of tax law to suspected breaches of serious tax law.
- Clause 45 (formerly clause 42) which requires reporting of international funds transfer instructions (IFTIs), has been amended to allow the AML/CTF Rules to exempt particular kinds of IFTIs or IFTIs sent or received in specified circumstances.

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

- New clauses 84, 85 and 86 have been added. Clause 84 provides for 'standard' AML/CTF programs. Clause 85 enables members of a designated business group to enter a 'joint' AML/CTF program and new clause 86 provides that reporting entities only providing an Item 54 service (ie an Australian financial services licence holder arranging for a person to receive a designated service) may have a 'special' AML/CTF program which only relates to customer identification procedures.
- Clause 91 (formerly clause 74F) has been amended to allow reporting entities to provide that the elements of an applicable customer identification procedure under a standard, joint or special AML/CTF program must if required by the AML/CTF Rules include obtaining disclosure certificates from a customer. Requesting a disclosure certificate from the customer places the onus on the customer to provide the identification information that the reporting entity requests.

Part 8—Correspondent Banking

- Clause 80A(1) (formerly cause 99) provides that a financial institution must not enter a correspondent banking relationship with another person if a senior officer of the financial institution has not approved the entering of that relationship having regard to matters specified in the AML/CTF Rules. Sub-clause 99(2) requires a financial institution which has a correspondent banking relationship to document the responsibilities of both parties to that relationship.

Part 10—Record-keeping requirements

- Former provisions relating to making of records of identification procedures carried out by identification agents of the reporting entity and requiring retention of such records have been deleted in line with earlier mentioned amendments omitting agency provisions in favour of relying on common law agency principles.
- Clause 106 (formerly clause 84A) has been amended so that reporting entities will only be required to make a record of the provision of a designated service if required to do so by the AML/CTF Rules.

Part 11—Secrecy and Access

- Clause 123 (formerly clause 95) in Division 3 has been amended so that the clause only applies where the reporting entity, not an identification agent, has communicated information to the AUSTRAC CEO under the relevant sub-clause. Other amendments to clause 95 enables disclosure between members of a designated business group and disclosure by an Authorised Deposit taking Institution (ADI) (eg. a bank) to an owner-managed branch of an ADI.
- Clause 97 dealing with the disclosure of information by identification agents of reporting entities has been deleted.
- Sub-clauses 126(5) and (6) have been added to Clause 126 (access by designated agencies to AUSTRAC information) to enable AUSTRAC to authorise the Treasury Department or its officials to have access to AUSTRAC information for the purposes of the *Foreign Acquisitions and Takeovers Act 1975* or regulations under that Act.
- Sub-clause 128(3) (formerly sub-clause 101(3)) clarifies that AUSTRAC information may be disclosed for court or tribunal proceedings. Sub-clauses 128(16) and (17) (formerly sub-clauses 101(16) and (17)) provide that officers of designated Commonwealth, State or Territory agencies may disclose AUSTRAC information to Ministers responsible for administration of the law establishing the agency where disclosure is required for performance of the Minister's responsibilities in relation to the agency.
- New clause 129 enables AUSTRAC to authorise a non-designated agency to have access to AUSTRAC information upon request for investigation or proposed investigation of a possible breach of a Commonwealth law. New clauses 130 and 131 regulate disclosure by an official of a non-designated agency of AUSTRAC information accessed by the official under a clause 129 authorisation. New clauses 132(5), 132(6) and 132(7) enable the AUSTRAC CEO to authorise the Australian Crime Commission CEO to communicate AUSTRAC information to a foreign law enforcement agency subject to undertakings as to confidentiality and use.

Part 12—Offences

- The penalties for the offences at clauses 136 (formerly clause 107 - false or misleading information), 137 (formerly clause 108 -producing false or misleading documents) and 138 (formerly clause 109 - forgery) have been increased from a maximum of 5 years imprisonment or 300 penalty units ($3,300) or both to a maximum of 10 years imprisonment or 10,000 penalty units ($1,100,000) or both. High maximum penalties are the best way to ensure that the Government can confidently rely on the risk based approach to regulation in that there are significant disincentives on reporting entities and their customers to provide or use false or misleading information or documents.

Part 13—Audit

- New clause 165 enables the AUSTRAC CEO to give a reporting entity a notice requiring it to carry out a money laundering and terrorism financing risk assessment.

Part 15—Enforcement

- The revised exposure draft bill did not include the maximum pecuniary penalties that a court may impose on a body corporate or on a person other than a body corporate for a civil penalty. The penalties that have now been inserted at sub-clauses 175(4) and 175(5) (formerly sub-clauses 140(4) and 140(5)) are a maximum of 100,000 penalty units for a

body corporate and 20,000 for a person other than a body corporate. This converts to a maximum of $11,000,000 and $2,200,000 respectively. This high maximum penalty level reflects penalties imposed under the US AML/CTF regime and are particularly necessary now that the majority of criminal offences have been removed

Part 18—Miscellaneous

- Provisions allowing the Rules to exempt (from specified provisions in the Bill) designated services and designated services provided in circumstances specified in the Rules have been added to clause 247 (formerly clause 203C).
- New clause 248 (formerly clause 203D) allows the AUSTRAC CEO to exempt a specified person from one or more specified provisions in the Bill and to declare that the Act applies to a specified person subject to modifications specified in the declaration. The exemption may apply unconditionally or subject to specified conditions. If there are conditions specified in an exemption, the person to whom the exemption applies must comply with the condition or civil penalties will apply.