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The Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
Canberra ACT 2600

Dear Sir/Madam

Inquiry into the Exposure Draft of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2005

We thank you for the invitation to comment on the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006. As you are aware we did provide submissions to the Committee on the 1st Draft of the Exposure Bill and to the Attorney General's Department and to AUSTRAC on the 1st and 2nd Draft Exposure Bill and accompanying Rules. We enclose a copy of those submissions as background.

The present submissions raise some new issues but we have also commented on earlier issues raised which have not been resolved.

Mrs Anna Lenahan recently attended a dialogue between Financial Action Task Force members and observers, and representatives from international, regional and national associations of lawyers, notaries, accountants and trust and company service providers, as well as individual practitioners working in the field. Issues specifically relevant to lawyers were discussed. She will be happy to discuss the outcomes of that meeting with members of the Committee when she attends on Wednesday.

Yours faithfully

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Submission on the Revised Exposure Draft of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006

The comments in these submissions on the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 (the ***Bill***) are those of Allens Arthur Robinson. They do not necessarily reflect the views of our clients.

Expressions of opinion or statements of interpretation in these submissions are not intended as legal advice.

These submissions are drafted on the basis of the Bill and the Rules released for public consultation. We may wish to comment further on the Bill as more draft Rules, Regulations or Guidelines are released and finalised.

We have already made detailed submissions to the Committee on the 1st Exposure Draft and to the Attorney-General's Department on the 1st and 2nd Exposure Drafts. The present submissions do not repeat the earlier submissions however a number of the issues raised which we consider to be significant have not been resolved and are referred to again.

Summary

In summary our main concerns relate to:

- the lack of a general agency provision;
- the limitation on the use of a designated business group in customer identification;
- section 38;
- section 34;
- overseas ML/TF offences;
- item 54 reporting entities;
- implementation of some record keeping provisions;
- review of an AUSTRAC decision;
- designated remittance services;
- the rule and regulation making power;
- technical submissions.

These are discussed in more detail below.

Agents

We welcome the simplification of the provisions relating to third parties. However we are concerned that there is no general reference to the use of agents to carry out AML/CTF obligations. It was indicated by the Government prior to the release of the Bill that reporting entities would be able to appoint agents to carry out all of their AML/CTF obligations. The specific provision in section 37 of the Bill that reporting entities can authorise agents to carry out applicable customer identification procedures gives rise to the question whether agents can be used to carry out other

AML/CTF obligations such as record-keeping. We suggest a general agency provision should be included in the Bill (or at a minimum the position should be made clear in the Explanatory Memorandum).

Customer identification

We welcome the extension of membership of a designated business group ***(DBG)*** to non – reporting entities. Our earlier submissions to the Attorney General's Department on the 2nd Exposure Draft Bill identified some practical problems with the use of the DBG. Some of these have been addressed but others remain. These include:

- The Explanatory Memorandum indicates that members of a DBG can share customer identity information but this is not specifically provided in the Bill. The Bill does not provide that members of a DBG can rely on an applicable customer identification procedure carried out by another member of the DBG. On the contrary, a reporting entity may authorise any other person as its agent to carry out such procedures on its part (section 37). Similarly, an applicable customer identification procedure can be carried out on behalf of a reporting entity by another reporting entity (section 38). This is also not related to the DBG concept.
- There is no exception in the Bill for reporting entities within the same DBG who provide designated services to each other, such as Treasury operations. As drafted they will still be required to carry out customer identification on each other;
- Reporting entities in the same DBG will **each** have to carry out customer identification/verification on each other's customers (unless section 38 applies in the circumstances);
- Customers of one reporting entity in a designated business group are not be "pre-commencement" customers of another member of the group. If the customer is "new" for one member, that member as a reporting entity will have an obligation to identify it. This will apply even if the customer is an existing customer for another member of the group.

We submit that:

- Reporting entities within a DBG should not be required to carry out customer identification procedures on a member of the same DBG;
- Customers who are existing customers of one member of the DBG should be treated as existing customers of all members; and
- Reporting entities within a DBG should be able to rely on customer identification procedures already carried out by or on behalf of other members (who may not be reporting entities) of the DBG;
- Rules as to what action is required under section 29 should be are released as soon as possible.

Section 38 contemplates that Rules may provide for reporting entities to rely on customer identification procedures already carried out by other reporting entities. The Rules on this are pending so detailed comment is not possible but as a general comment we suggest:

- This is of limited benefit. Because it only applies where an applicable customer identification procedure has been carried out it does not capture customers who were identified under the FTRA prior to implementation of the Act;
- It does not apply where an applicable customer procedure (or identification to a similar standard) has been carried out by a member of a DBG who is not a reporting entity, for example an overseas parent entity;
- As presently drafted it appears that the 2nd reporting entity may have to check that the applicable customer identification procedure was in fact carried out by the 1st reporting entity.

Special circumstances

We note that Section 34 still provides that where "special circumstances" apply a reporting entity can provide the designated service for a period of 5 business days. We are concerned that there is no guidance as to what will constitute "special circumstances" and suggest these should reflect the Interpretive Note to FATF Recommendation 5 (this was the position in the 1st Exposure Draft of the Bill)

We refer to our earlier submissions on this matter.

Reporting obligations

Section 41(g) requires a report to be made when it is suspected that the agent of the person who deals with the reporting entity is not who it claims to be. As there is no longer any requirement to identify agents we suggest this is unnecessary.

We suggest it should be clarified that a member of a DBG can make a report to AUSTRAC on behalf of another member. A number of cash dealers who are members of a larger financial institutions already make FTRA reports to AUSTRAC using a central reporting entity.

Overseas ML/TF offences

The issue that every reporting entity must maintain full knowledge of AML/CTF regimes and money laundering and terrorist financing risks in all other jurisdictions arises in the context of ongoing due diligence.

The definition of "money laundering" and "terrorist financing" includes money laundering and terrorist offences committed overseas (corresponding to Australian offences). As a result a reporting entity which is complying with the ongoing customer due diligence provisions in section 36 by monitoring of the provision of designated services in Australia will have to include (on a risk basis) measures to identify, manage and mitigate the risk of facilitating overseas money laundering and terrorist financing offences as well as Australian offences.

We appreciate that an AML/CTF program (required for example under section 84) also must address overseas offences but submit that, while the establishment and maintenance of such a program is appropriate, active monitoring of all Australian designated services for facilitation of overseas offences is not.

Item 54 reporting entities

Although an item 54 reporting entity can be a member of a DBG they are excluded from sharing joint AML/CTF programs. This could present difficulties for those financial services businesses that have relationships with AFSL holders who are item 54 reporting entities because they must exclude them from any group-wide AML/CTF program. It also seems unnecessary given that reporting entities can adopt such parts of a joint AML/CTF program as suit them.

As presently drafted because there is no obligation on item 54 reporting entities to make suspicious matter reports they do not benefit from the protection afforded by section 123(7).

Record keeping

We note that the Bill permits one member of a DBG to discharge some record-keeping obligations on behalf of other members (subject to such other conditions, if any, as are specified in the Rules). The Explanatory Memorandum suggests that the purpose of these provisions is to allow associated business entities "with joint AML/CTF programs" to make joint arrangements for meeting their record-keeping obligations. This is at odds with the AML/CTF legislation which does not require that reporting entities in a DBG must share a joint AML/CTF program before they can make DBG-wide record-keeping. We suggest this should be clarified.

There is no specific provision that record keeping can be carried out by agents on behalf of reporting entities.

We are concerned that the obligations under sections 107 and 108 apply immediately. This suggests reporting entities already have appropriate record-keeping systems and processes in place. This is not universally the case, for a number of reasons. First, many of those reporting entities who will be caught by this provision are not cash dealers and are thus not presently subject to such onerous record–keeping requirements.

Secondly, for those reporting entities who are cash dealers (and subject to the record-keeping requirements of the FTRA), the scope of the material to be collected and retained is considerably wider than the that presently captured under the FTRA and they will have to alter their existing systems to be able to comply.

Finally, many reporting entities will plan to implement their record-keeping systems group-wide using the mechanism of a DBG but will be hindered from doing so because the Rules on DBGs have not been released. This effectively requires reporting entities implementing systems to meet their immediate obligations and then changing them when the Rules are finalised.

Secrecy and access

We welcome the extension of the tipping off exceptions to include obtaining legal advice and making disclosure to reporting entities who are members of the same DBG. We submit this exception should go further to allow disclosure to other members of the DBG who are not themselves reporting entities, such as the parent entity or members who perform a related administrative function including members overseas) so long as there are adequate precautions to prevent tipping off.

AUSTRAC

There do not appear to be any mechanisms in sections 161, 162 or 165 requiring AUSTRAC to advise a reporting entity of the grounds on which suspicion is based, or allowing the reporting entity to appeal against the terms of the notice. We submit that there should, for example, be a right to appeal to the Administrative Appeals Review Tribunal.

In relation to AUSTRAC's power under section 191 to give remedial directions, we note the Australian Communications and Media Authority has similar powers under the Telecommunications Act 1997 (Cth) and the Interactive Gambling Act 2001 (Cth). Significantly, both of those Acts provide that those affected by a direction can apply for review to the Administrative Appeals Review Tribunal. There is no such provision for review in the AML/CTF Bill.

Designated services 31 and 32.

Designated services 31 and 32 deal with 'designated remittance arrangements'. Lawyers are constantly involved in remittance arrangements (as defined) without in any way competing with providers of financial services. For example, at the settlement of a simple conveyance the lawyers involved (typically one for the purchaser, one for the vendor, one for the outgoing mortgagee and one for the incoming mortgagee) will be handing over and receiving cheques, certificates of title and transfer documents. It appears that all four lawyers would be providing either designated service 31 or 32.

We submit that lawyers should be specified in the AML/CTF Rules for the purposes of section 10(1)(a) and (b). In the alternative, the AML/CTF Rules should specify conditions, in accordance with section 10(1)(c), that would exclude conveyancing and other asset sales from the definition of a 'designated remittance arrangement'.

Rules and Regulations

We note that there is no requirement that either the Government or AUSTRAC should consult with industry prior to making regulations under section 252. This is a matter of concern given that Item 1 of table 4 provides that designated services can be prescribed by regulation. In effect this gives the Government the tool to capture all parties not included in the first tranche without due consultation with interested parties and the potential for proper parliamentary debate. We are aware that amendments to regulations need to be tabled in Parliament and can be disallowed by Parliament. Nonetheless, during the period between commencement and disallowance any additional designated services would be legally enforceable.

We submit that Item 1 of Table 4 should be removed. In the alternative, we submit that the following be added to section 205 immediately after sub-section (1):

> "(2) Prior to including any designated service in the Regulations the Minister must:
>
> *(i) consult with persons who provide or are likely to provide the proposed designated service; and*
>
> *duly consider any comments made in the course of those consultations"*

In our earlier submissions to the Senate we argued that it is imperative that AUSTRAC's Rule making power is subject to, (at the least) industry consultation and some form of parliamentary scrutiny. We repeat this submission.

AUSTRAC functions are to assist the AUSTRAC CEO in the performance of his functions (section 200). His functions as set out in Section 212 (1)(f) include such functions as are conferred under the Act. Section 229, his rule making power, falls within this category. Although section 212(2)(a) requires him to consult with reporting entities or their representatives in performing his functions (such as making Rules), section 212 (5) provides that any failure to do so does not invalidate any action that he might take in performing his function. In practice this means that the AUSTRAC CEO can issue Rules under section 212 without effective industry consultation.

We submit that the Government should consider excluding section 212 (the rule making power) from the application of section 212(5) so that a failure by the AUSTRAC CEO to consult on the Rules would invalidate those Rules.

Technical submissions

We have already made a technical submission on a number of matters which remain unresolved. These include:

- the definition of a loan :
- designated service 17
- Designated services 26 to 27.
- the control test
- foreign partnerships

Finally we assume that the defence of taking reasonable precautions etc in section 236 should apply to criminal proceedings for offences under the Act (and not the regulations as it is presently drafted).