20 November 2006

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Ms Jackie Morris
Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Ms Morris

The Financial Planning Association of Australia (FPA) is appreciative of the opportunity to provide a submission in advance of its appearance before the Committee during its inquiry into the Anti-Money laundering and Counter-Terrorism Financing Bill 2006 (the Bill).

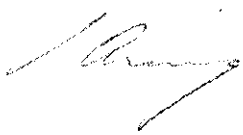
Over recent months, FPA has participated actively in discussions with the Government; officials from the Attorney-General's Department and AUSTRAC; and other industry groups in order to develop an AML/CTF regime which strengthens Australia's defences against money laundering and terrorist financing while minimising any adverse impact on financial planners and their clients.

The outcome of the discussions has been agreement that financial planners when helping their clients implement their financial strategy through acquisition of a designated service will incur certain, limited obligations to identify their clients. The obligations will apply at the level of the Australian Financial Services Licensee. The result of these limited obligations will be to enable identification to take place efficiently for the provision of designated services by other reporting Entities.

After consultation with its members, the FPA believes that the general framework adopted within the legislation for financial planners is satisfactory and should meet the needs of all parties. However there are a number of issues which the FPA suggests need to be resolved before the Bill is finalised and these are detailed in the Attachment. As the FPA Board has not had the opportunity to consider the submission, I must ask that it be considered a **draft**. A final approved version will be provided as soon as possible.

The FPA will be pleased to discuss the Bill when it appears before the Committee on Wednesday, 22 November.

Yours sincerely



(John Anning)
Manager Policy and Government Relations

ATTACHMENT

AML/CTF BILL 2006: ISSUES IDENTIFIED BY THE FPA

Section 6, Item 54: triggering of limited reporting entity obligations

Item 54, which triggers limited reporting entity obligations by the Australian Financial Services Licensee (Licensee) can be read as relating to the provision by the Licensee of ***all*** designated activities. This would include those designated services that are not governed by the license (eg arranging a loan, assisting the client to obtain a credit card, and arranging for Table 2 and Table 3 services).

The wide drafting of this item has led to a situation where, as license holder, a financial planner may potentially have greater responsibilities in providing designated services (other than those financial services covered by an AFS Licence) than an intermediary who provides similar services but is not licensed. Accountants, mortgage brokers and credit card agents, are a few examples of non-financial services intermediaries who would not be caught under item 54 and would be able to make arrangements for provision of a designated service without conducting identification.

This raises issues in terms of competitive neutrality and does not appear justified in terms of a policy outcome. The FPA recommends that the most suitable solution is that Item 54 should explicitly state that it relates only to the financial services that the Licensee carries out under its license rather than all designated services as set out in the Bill.

Section 236: Defence Provisions

FPA Principal members (i.e. AFS Licensees) are concerned that the reasonable precautions and due diligence defence provisions in s236 still provide them with insufficient protection from prosecution in the event of disregard or willful neglect of AML/CTF obligations by their Authorised Representatives (agents). Unlike the Corporations Act, the AML/CTF legislation imposes an obligation on the Licensee (and not the Authorised Representative), while allowing it to be discharged by the Authorised Representative. The Licensee therefore is liable if the obligations imposed on it as a reporting entity are not adhered to. In order to defend itself against a breach of these duties by an agent, the Licensee must take reasonable precautions and exercise due diligence to avoid contravention.

It remains unclear whether a well constructed and effectively implemented training and supervisory program would enable a Licensee to avail itself of s236. In this situation it would be desirable that at a minimum, the Explanatory Memorandum gave explicit comfort that if a Licensee implements appropriate training within a 'special AML/CTF Program' and takes reasonable steps to

monitor and supervise compliance, then this is in fact sufficient to provide them with a defence under s236.

Sections 81 and 86: AML Programs

Sections 81 and 86 requires AFS license holders that carry on arranging services to have a special AML program, which is more limited then the standard or joint program in ss84 and 85.

It is a concern, however, that 'item 54 arrangers' cannot have their AML program as part of a Designated Business Group. Diversified financial services businesses that own or have a legal relationship with an 'item 54 arranger' will now be unable to include them in their Designated Business Group. Similarly, there does not appear to be any rationale as to why a number of 'item 54 arrangers' cannot themselves form a DBG. The rationale behind these rules is unclear, and to attain the most practical outcome it is hoped these limitations will be removed.

In addition, a Licensee can only maintain a special AML/CTF program if it is not providing any other designated services eg Managed Discretionary Account services or platform administration. If, for example, a Licensee provides services covered under item 33 of table 1 as well as arranging for other designated services, then it must have a standard or joint AML program. It is unclear whether the full AML/CTF program will then need to be extended to customer identification for item 54 services. The FPA believes that this should not be necessary, and that a limited special AML/CTF program should apply only in relation to item 54 services.

Section 114: Record Keeping

Section 114 provides that the second reporting entity (the product issuer) must request records within 5 days of providing or proposing to provide a designated service if they are relying on the first reporting entity's (e.g. the financial planner's) customer identification procedures. There is no provision which allows for the first and second reporting entities to take advantage of s38 to enter into alternative arrangements with regards to recordkeeping.

This is a concern because in the situation where a provider of a designated service relies upon the identification done by a financial planner, there is no need in all cases for the records to be passed to the second reporting entity. It would not affect the rigour of the regime if it were open to the parties to agree that access to the records be available on request.

The FPA does not take a position on how this flexibility should be achieved but notes that a sub-section could be added to s114 that permits the reporting entities to enter into an agreement to decide which of them will keep a record of

the identification. Alternatively, s118 could be used to provide flexibility in the AML/CTF Rules for commercial arrangements to operate between reporting entities.

Time allowed for implementation

The FPA acknowledges the "prosecution free period" which has been introduced to complement the shorter and phased timetable for introduction discussed with industry. During this period AUSTRAC will not enforce the penalty provisions of the AML/CTF legislation where an organisation is acting in good faith in attempting to comply with its obligations but is not be fully compliant by the commencement date of the provision.

However, in observing the "prosecution free period" allowance needs to be made for when the relevant AML/CTF Rules are provided to industry. It will be unworkable if a Rule is only available either at the same time or shortly before the commencement date. Reporting entities need realistic lead times for planning projects, designing system and process changes, assessing organisational and customer impacts, developing training programs and managing all implementation activities. In most cases, the Rule should be available at least six months before an obligation commences.

If there is any delay in Rule release which impinges upon the implementation period available to industry, the commencement date for the prosecution free period should be extended by the duration of that delay. To do otherwise is to undermine the implementation timetable agreed between the Government and industry.