

CHAPTER 2

OVERVIEW OF THE BILL

2.1 This chapter briefly outlines the purpose and main provisions of the Exposure Bill.

Purpose of the Exposure Bill

2.2 The Exposure Bill is intended to provide a generic framework enabling individual businesses to manage money laundering and terrorism financing risks specific to their industry sector. The Bill purports to adopt a risk-based – rather than a prescriptive – approach. The general principles set out in the Exposure Bill will be supplemented by legally-binding Rules, and non-binding Guidelines.¹

2.3 The Rules are intended to establish operational details, including relevant standards and specific requirements for matters such as customer identification procedures, the monitoring of customer activity, reporting suspicious matters, appropriate 'risk-trigger' events, and the development of AML/CTF Programs.

2.4 The Guidelines will provide guidance only and may be issued by AUSTRAC from time-to-time to assist reporting entities to interpret their obligations under the AML/CTF legislative framework.

2.5 AUSTRAC would continue to be Australia's financial intelligence unit and AML/CTF regulator. AUSTRAC would regulate reporting entities covered under the Exposure Bill and continue to collect, retain, analyse and disseminate financial intelligence to designated law enforcement, revenue, national security, social justice and other regulatory agencies. AUSTRAC would also have an enhanced enforcement and monitoring role under the Exposure Bill.²

Main provisions of the Exposure Bill

General outline

2.6 Banks and other 'cash dealers' are already subject to AML/CTF measures under the FTR Act. However, the Exposure Bill (as well as the amendments to the

1 *Overview of the exposure Anti-Money Laundering and Counter-Terrorism Financing Bill* at [http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(03995EABC73F94816C2AF4AA2645824B\)~OverviewExposureDraftAML.pdf/\\$file/OverviewExposureDraftAML.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(03995EABC73F94816C2AF4AA2645824B)~OverviewExposureDraftAML.pdf/$file/OverviewExposureDraftAML.pdf) (accessed 7 February 2006).

2 *Overview of the exposure Anti-Money Laundering and Counter-Terrorism Financing Bill* at [http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(03995EABC73F94816C2AF4AA2645824B\)~OverviewExposureDraftAML.pdf/\\$file/OverviewExposureDraftAML.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(03995EABC73F94816C2AF4AA2645824B)~OverviewExposureDraftAML.pdf/$file/OverviewExposureDraftAML.pdf) (accessed 7 February 2006).

FTR Act, and other related legislation, made by the Anti-Terrorism Bill (No 2) 2005) extends these measures beyond 'cash dealers' to include a range of other financial service providers.

2.7 AML/CTF obligations under the Exposure Bill will no longer be linked to cash transactions. Instead, an activities-based definition will be introduced under which a person who provides, deals in, or handles a 'financial product'³ will be subject to customer due diligence and enhanced reporting obligations.

2.8 The Exposure Bill sets out the primary obligations of 'reporting entities' when providing 'designated services'. A 'reporting entity' is a financial institution, or other person. The key obligations for reporting entities under the Exposure Bill include:

- verifying the identity of new customers;
- monitoring customers and their transactions;
- reporting specified transactions and suspicious matters; and
- implementing and maintaining AML/CTF Programs.

2.9 AML/CTF Rules will set out the specific requirements to underpin the broader obligations contained in the Exposure Bill. The Rules will enable the flexible application of the Exposure Bill's broader principles such as customer due diligence. The Rules are being developed by AUSTRAC, in consultation with industry, and will be legally binding.

2.10 The Rules would cover the following types of matters:

- standards and/or procedures that reporting entities should use when verifying the identify of a customer – procedures may apply to different types of customers (for example, individuals, companies and other legal entities);
- the matters that reporting entities should take into account in determining whether a matter is suspicious and should be reported to AUSTRAC;
- the matters that reporting entities should address in their AML/CTF Programs, including:
 - systems to identify and mitigate money laundering and terrorism financing risks;
 - a customer due diligence program; and
 - a staff risk-awareness training program;
- when reporting entities should re-verify the identity of customers;

3 The definition of 'financial product' will correspond to the definition of that term in the *Corporations Act 2001* – although some of the more specific exemptions in the Corporations Act relating to financial services regulation for investor protection and market integrity purposes, which do not accord with AML/CTF objectives, will not apply.

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- the details that reporting entities should include in their reports to AUSTRAC of threshold transactions, suspicious matters and funds transfer instructions; and
 - the matters that reporting entities should assess when conducting a due diligence assessment of a correspondent banking relationship.⁴

2.11 The Guidelines would not be legally binding. They will be developed by AUSTRAC in consultation with industry.⁵

2.12 The following provides a brief summary of each Part of the Exposure Bill.

Part 1 - Introduction

2.13 Part 1 provides the objects of the Exposure Bill. Definitions are contained in proposed section 5.

2.14 As noted above, a 'reporting entity' is a financial institution, or other person, who provides 'designated services'. Designated services are listed in the tables in proposed section 6. Reporting entities will have customer due diligence, reporting and record-keeping obligations for such designated services. As the tables list services rather than specific service providers, any business that supplies one of the listed services will be covered, for example, lawyers and accountants who provide financial services.

2.15 Whether the person (legal or natural) providing the designated service is a 'reporting entity' will also be determined by whether the service is provided:

- at or through a permanent establishment of the person in Australia;
- by a resident of Australia at or through a permanent establishment of the person in a foreign country (foreign branch); or
- by a subsidiary of a company that is a resident of Australia at or through a permanent establishment of the subsidiary in a foreign country (foreign subsidiary) (proposed subsection 6(4)).

2.16 A service provider that does not have one of these geographical links to Australia is not a 'reporting entity' under the Exposure Bill.

4 *Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Rules – Questions and Answers* at [http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(03995EABC73F94816C2AF4AA2645824B\)~QAAMLCTFRules.pdf.pdf/\\$file/QAAMLCTFRules.pdf.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(03995EABC73F94816C2AF4AA2645824B)~QAAMLCTFRules.pdf.pdf/$file/QAAMLCTFRules.pdf.pdf) (accessed 10 February 2006)

5 *Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Rules – Questions and Answers* at [http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(03995EABC73F94816C2AF4AA2645824B\)~QAAMLCTFRules.pdf.pdf/\\$file/QAAMLCTFRules.pdf.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(03995EABC73F94816C2AF4AA2645824B)~QAAMLCTFRules.pdf.pdf/$file/QAAMLCTFRules.pdf.pdf) (accessed 10 February 2006)

2.17 Reporting entities that are foreign branches or foreign subsidiaries of Australian residents will be required to apply the principles of Australian AML/CTF obligations through their AML/CTF Programs to the extent possible under local law.

Part 2 – Identification procedures

2.18 Part 2 provides customer identification obligations of reporting entities, which form part of their customer due diligence responsibilities. A reporting entity must carry out a procedure to verify a customer's identity before providing a designated service to the customer. However, in special cases, customer identification procedures may be carried out *after* the provision of the designated service. Such special circumstances would involve instances where identifying the customer before the provision of the designated service would disrupt the ordinary course of business, and the service is specified in the AML/CTF Rules, and:

- is not provided on a face-to-face basis; or
- consists of acquiring or disposing of a security or derivative on behalf of a customer; or
- consists of issuing or undertaking liability as the insurer under a life policy or a sinking fund policy.

2.19 Existing customers will not be subject to initial customer identification requirements and will only need to have their identity re-verified where warranted by materiality and risk. However, existing customers would be subject to ongoing due diligence obligations.

2.20 The AML/CTF Rules will set out circumstances in which the identity of all customers will be required to be re-verified. The Rules may vary customer identification procedures for the provision of certain designated services taken to be low-risk services. The Rules will include a mechanism to allow a third party to carry out customer identification procedures on the reporting entity's behalf.

Part 3 – Reporting obligations of reporting entities

2.21 A reporting entity must give AUSTRAC reports about suspicious matters (proposed section 39).

2.22 Issues to be taken into account in determining whether to report a suspicious matter will be set out in the AML/CTF Rules. Relevant issues may include whether a transaction was complex, unusual or large, or whether it involves a resident of a particular foreign country.

2.23 Further, if a reporting entity provides a designated service that involves a threshold transaction (\$10,000, unless changed by regulation), the reporting entity must give AUSTRAC a report about the transaction within 10 business days after the day on which the transaction takes place (proposed section 41).

2.24 If a reporting entity provides a designated service that relates to an international funds transfer instruction, the reporting entity must give AUSTRAC a report about the provision of the service within 10 business days after the day on which the service commenced to be provided (proposed section 42).

Part 4 – Reports about cross-border movements of physical currency and bearer negotiable instruments

2.25 Cross-border movements of physical currency must be reported to AUSTRAC, a customs officer or a police officer, if the total value moved is above a threshold of \$10,000 (proposed section 49).

2.26 If a bearer negotiable instrument is produced to a police officer or a customs officer by a person leaving or arriving in Australia, the officer may require the person to give a report about the instrument to AUSTRAC, a customs officer or a police officer (proposed section 55).

Part 5 – Funds transfer instructions

2.27 Reporting entities must verify the identity of customers originating a funds transfer and transmit originator information with the funds transfer (proposed sections 58, 60 and 61).

2.28 Where a reporting entity receives two or more incoming funds transfer instructions from an overseas counterpart that do not include appropriate originator information, AUSTRAC may direct the reporting entity to request their overseas counterpart to include appropriate originator information in all future funds transfer instructions (proposed section 59).

Part 6 – Register of providers of designated remittance services

2.29 AUSTRAC must maintain a register of providers of designated remittance services (proposed section 71). Persons who provide designated remittance services must provide business details to AUSTRAC for inclusion on the register (proposed section 70).

Part 7 – Anti-money laundering and counter-terrorism

2.30 Reporting entities must develop, maintain and comply with AML/CTF Programs (proposed section 73).

2.31 An AML/CTF Program is defined in proposed section 74. An AML/CTF Program is a program that is designed to identify and 'materially mitigate' the risk that the provision of a designated service might involve or facilitate a transaction that is connected with the commission of:

- a money laundering offence; or
- a financing of terrorism offence.

2.32 Amongst other things, AML/CTF Programs must require the monitoring by reporting entities of their provision of designated services to each of their customers (monitoring forms part of their ongoing customer due diligence obligations).

Part 8 – Correspondent banking

2.33 Financial institutions must not enter into a correspondent banking relationship with a shell bank or another financial institution that maintains accounts with a shell bank (proposed section 78).

2.34 Before a financial institution enters into a correspondent banking relationship with another financial institution, the financial institution must carry out a due diligence assessment (proposed section 79).

2.35 If a financial institution has entered into a correspondent banking relationship with another financial institution, the financial institution must carry out regular due diligence assessments (proposed section 80).

2.36 A financial institution must not enter into a correspondent banking relationship with another financial institution unless the respective rights, obligations and responsibilities of the parties are set out in a written agreement (proposed subsection 79(5)).

Part 9 – Countermeasures

2.37 Regulations may prohibit or regulate transactions with residents of prescribed foreign countries (proposed section 83).

Part 10 – Record-keeping requirements

2.38 If a reporting entity makes a record of a designated service, the reporting entity must retain the record for a certain number of years (to be agreed after consultation) (proposed section 85).

2.39 If a customer of a reporting entity gives the reporting entity a document relating to the provision of a designated service, the reporting entity must retain the document for a certain number of years (to be agreed after consultation) (proposed section 86).

2.40 A reporting entity must retain a record of an applicable customer identification procedure for a certain number of years (to be agreed after consultation) after the end of the reporting entity's relationship with the relevant customer (proposed section 87).

2.41 A person who carries out an applicable customer identification procedure on behalf of a reporting entity must give a record of the procedure to the reporting entity (proposed section 88). The reporting entity must retain the record for a certain number of years after the end of the reporting entity's relationship with the relevant customer (proposed section 89).

Part 11 – Secrecy and access

2.42 Specified government agencies (the Australian Taxation Office (ATO) and other designated agencies) will be able to access information held by AUSTRAC, under certain conditions. In the case of the ATO, information may be accessed for any purpose relating to facilitation of the administration or enforcement of a taxation law; in the case of other agencies, information may be accessed for the purposes of performing that agency's functions and exercising the agency's powers (proposed sections 98 and 99).

2.43 Reporting entities must not disclose that they have formed an applicable suspicion or have reported information to AUSTRAC under the suspicious matter reporting requirements, or that they have given further information to a law enforcement agency in response to a request (proposed section 95).

Part 12 – Offences

2.44 Part 12 of the Exposure Bill establishes offences for:

- providing false or misleading information or documents (proposed sections 107 and 108);
- forging identity documentation (proposed section 109);
- providing or receiving a designated service anonymously or using a false customer name (proposed sections 110 and 111); or
- structuring a transaction to avoid a reporting obligation (proposed sections 112 and 113).

2.45 Other offences are contained in other Parts of the Exposure Bill for failure to comply with specific requirements set out in those Parts.

Part 13 – Audit

2.46 An 'authorised officer' (a member of the staff of AUSTRAC, appointed in writing by AUSTRAC) may enter any reporting entity business premises by consent or under a monitoring warrant to monitor compliance with obligations under the Exposure Bill (proposed section 117).

2.47 Monitoring powers of authorised officers are contained in proposed sections 118 and 119.

Part 14 – Information gathering powers

2.48 Part 14 enables authorised officers to give a notice requiring the giving of information or the production of documents from a reporting entity or a person suspected of being a reporting entity (proposed section 131).

Part 15 – Enforcement

2.49 Part 15 provides a civil penalty framework as an alternative enforcement mechanism to criminal offence provisions.

2.50 In addition to the criminal offences in Part 12, there are criminal offences in other Parts of the Exposure Bill for failure to comply with requirements set out in those Parts. For many of those offences, the same conduct that constitutes the criminal offence may also be the subject of a civil penalty provision. This creates a two-tier system of penalty provisions, whereby civil penalties would be used in situations where the offending conduct does not warrant criminal prosecution; criminal sanctions would be sought for more serious failures to comply with obligations.

2.51 Pecuniary penalties are payable for contravention of civil penalty provisions (proposed section 140).

2.52 Authorised officers, customs officers and police officers may issue infringement notices where a report that is required for cross-border movements of physical currency or bearer negotiable instruments is not made (proposed sections 149 and 150).

2.53 AUSTRAC is to monitor compliance by reporting entities of their obligations under the Exposure Bill (proposed section 155).

2.54 The Federal Court may grant injunctions in relation to contraventions of the Exposure Bill (proposed sections 156 and 157).

2.55 Customs officers and police officers may exercise powers of questioning, search, seizure and arrest in connection with a cross-border movement of physical currency or bearer negotiable instruments (proposed sections 161, 162 and 163).

Part 16 – Administration

2.56 Part 16 establishes AUSTRAC, its functions and staffing arrangements; and provides that AUSTRAC may issue legislative instruments, known as AML/CTF Rules.

Part 17 – Vicarious liability

2.57 Part 17 establishes a standard of proof for liability in matters involving employees or agents of reporting entities.

Part 18 – Miscellaneous

2.58 Part 18 contains miscellaneous provisions:

- partnerships, trusts and unincorporated associations are to be treated as persons for the purposes of the Exposure Bill (proposed sections 196, 197 and 198);

- the Exposure Bill is not intended to affect the concurrent operation of state and territory laws (proposed section 199);
- the Exposure Bill does not affect the law relating to legal professional privilege (proposed section 201);
- a contravention of the Exposure Bill does not affect the validity of any transaction (proposed section 202);
- provision is made in relation to the making of reports to AUSTRAC (proposed section 203); and
- the Governor-General may make regulations for the purposes of the Exposure Bill (proposed section 205).

