DPP

Commonwealth Director of Public Prosecutions

**SUBMISSION BY THE COMMONWEALTH DPP**

**AUSTRALIAN SENATE**
**LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE**

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

## Introduction

The Office of the Commonwealth Director of Public Prosecutions is responsible for the prosecution of criminal offences against the laws of the Commonwealth. The CDPP welcomes the development of improvements to Australia's anti-money laundering and counter-terrorism financing system. The CDPP's comments focus on the criminal enforcement measures contained in the exposure Bill.

The exposure Bill covers the provision of designated services by reporting entities. It sets out a proposed framework where primary obligations would be contained in principles based legislation with operational detail being set out in Anti-Money Laundering and Counter-Terrorism Financing Rules ("AML/CTF Rules"). We understand these Rules, developed by AUSTRAC in consultation with industry, would establish standards and specific requirements for matters such as customer identification procedures, the monitoring of customer activity, reporting suspicious matters and the development of AML/CTF Programs.

Reporting entities would have a range of customer due diligence, record-keeping and reporting obligations, as well as obligations to develop, maintain and comply with anti-money laundering and counter-terrorist financing programs. Extensive provision is made for customer identification verification and re-verification.

The exposure Bill also places obligations on customers in relation to their dealings with reporting entities, for example persons commit an offence if they intentionally commence to receive a designated service using a false customer name or on the basis of customer anonymity.

There are also offences addressing the physical movement of currency into or out of Australia where a report is not made.

Importantly, the exposure Bill (in clause 112) addresses conducting transactions so as to avoid reporting requirements relating to threshold transactions. This carries a penalty of imprisonment for 5 years or 300 penalty units (i.e. $33,000), or both.

Non-compliance with the various requirements may be the subject of criminal prosecution, or alternatively, in many instances proceedings for a civil penalty may be instituted. In addition, Division 3 of Part 15 enables infringement notices to be issued where there are reasonable grounds to believe that a person has contravened subclause 49(3), namely where a person moves physical currency into or out of Australia, the total amount is not less than $10,000 and a report has not been given, or clause 55(4) relating to reports about bearer negotiable instruments.

**HEAD OFFICE**
4 Marcus Clarke Street Canberra City 2601
GPO Box 3104 Canberra ACT 2601
Telephone (02) 6206 5666 Facsimile

## Background

The Financial Transactions Reporting Act 1988 ("FTRA"), together with the Proceeds of Crime Act 1987, the Proceeds of Crimes Act 2002 and Division 400 of the Criminal Code, provide for a range of criminal offences relating to money laundering. In relation to the financing of terrorism offences include, section 103.1 of the Criminal Code which provides that it is an offence to provide or collect funds, being reckless as to whether the funds will be used to facilitate or engage in a terrorist act. This offence carries a penalty of life imprisonment. There is also an offence relating to getting funds to or from a terrorist organisation in section 102.6 of the Criminal Code with applicable penalties of 25 and 15 years imprisonment.

The offences in the FTRA have been an important part of the Commonwealth's overall scheme of dealing with money laundering.

Offences in the FTRA include:

- Section 15(1) relating to the transfer of currency into or out of Australia of not less than $10,000 in value without a report being made
- Section 24 relating to opening/operating an account with a cash dealer in a false name or failing to disclose multiple names
- Section 28 relating to cash dealers etc failing to comply with requirements and provide information
- Section 29 relating to cash dealers etc providing false or misleading information
- Section 31 conducting transactions so as to avoid reporting requirements.

These offences are replicated in the exposure Bill.

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

### *Part 12 – Offences*

Part 12 of the exposure Bill contains a range of criminal offences relating to the provision of false or misleading information or documents, forgery, and structuring a transaction to avoid a reporting obligation.

Clauses 107 and 108 relate to knowingly providing false or misleading information/documents to AUSTRAC, an authorised officer, a customs officer, a police officer, a reporting entity or a person acting on a reporting entity's behalf. There is a defence if the information is not false or misleading in a material particular. These offences carry a penalty of imprisonment for 5 years or 300 penalty units (i.e. $33,000), or both [See previously section 29 of the FTRA].

Clause 109 addresses making, possessing, or possessing equipment for making, a false document with the intention that the person or another will produce the false document in the course of an applicable customer verification procedure, or an applicable agent identification procedure. This offence carries a penalty of imprisonment for 5 years or 300 penalty units (i.e. $33,000), or both.

Clause 110 provides that a person commits an offence if the person is a reporting entity and the person commences to provide a designated service using a false customer name or on the basis of customer anonymity. This offence carries a penalty of imprisonment for 2 years or 120 penalty units (i.e. $13,200), or both [See previously section 24 of the FTRA].

Clause 111 relates to a person intentionally commencing to receive a designated service using a false customer name or on the basis of customer anonymity. This offence carries a penalty of imprisonment for 2 years or 120 penalty units (i.e. $13,200), or both [See previously section 24 of the FTRA]. Clause 111, in addressing receiving a designated service, has a broader application than section 24 which only refers to operating/opening an account in a false name.

Clauses 112 and 113 are an important feature of the scheme. Clause 112 provides that a person commits an offence if the person is a party to 2 or more non-reportable transactions and having regard to the manner and form in which the transactions were conducted, including:

- the value of the money or property involved in each transaction
- the total value of the transactions
- the period of time over which the transactions took place
- the interval of time between any of the transactions
- the locations at which the transactions took place;

it would be reasonable to conclude that the person conducted the transactions in that manner or form for the sole or dominant purpose of ensuring, or attempting to ensure, that the money or property involved in the transactions was transferred in a manner and form that would not give rise to a threshold transaction that would have been required to have been reported [See previously section 31 of the FTRA].

Clause 113 relates to conducting transfers so as to avoid reporting requirements relating to cross-border movements of physical currency and is in a similar form to clause 112 [See previously section 31 of the FTRA].

Clauses 112 and 113 carry a penalty of imprisonment for 5 years or 300 penalty units (i.e. $33,000), or both.

It is important to note that the activities addressed by each of these provisions may only be dealt with by way of criminal prosecution and proceedings for a civil penalty are not available. The available penalties reflect the seriousness of the conduct covered by these provisions.

***Other offences***

There are specific offences contained in other Parts of the exposure Bill that relate to compliance with the various requirements that are there set out. A discussion of many of these offences follows below.

**Part 2**

Part 2 of the exposure Bill provides for identification procedures. There is an offence relating to failing to carry out identification procedures before a designated service is provided in clause 29. This carries a penalty of imprisonment for 2 years or 120 penalty units (i.e. $13,200), or both. Alternatively, proceedings for a civil penalty may be instituted.

Where there are special circumstances as set out in clause 30, these identification procedures may be carried out after the provision of the service and clause 31 provides for an offence where this is not carried out. This offence also carries a penalty of imprisonment for 2 years or 120 penalty units or civil proceedings may be instituted.

There are offences in clauses 32 and 33 relating to a failure to re-verify customer identification where this is required by AML/CTF Rules.

The AML/CTF Rules are relevant to a number of the offences in the exposure Bill. In some instances they impose requirements that must be complied with and offences hinge on non-compliance with these requirements. In order to establish these offences it will be necessary to prove beyond reasonable doubt that the Rules are applicable in the circumstances and have not been complied with. From the prosecution perspective, where offences are founded on the AML/CTF Rules, it would be important that the requirements in them are clearly stated and that the matters addressed are capable, as a factual matter, of being proved or disproved as the case may be.

**Part 3**

Part 3 relates to obligations of reporting entities to report to AUSTRAC suspicious matters, threshold transactions, and the provision of international funds transfers.

Clause 39 places an obligation on reporting entities to report suspicious matters, namely where a reporting entity has reasonable grounds to suspect that the provision or prospective provision, of the service is preparatory to the commission of a financing of terrorism offence or the information that the reporting entity has concerning the provision or prospective provision of the service:

- may be relevant to the investigation of an evasion or attempted evasion of a taxation law or

- may be relevant to the investigation of, or the prosecution of a person for, an offence against a law of the Commonwealth or a law of a Territory or

- may be of assistance in the enforcement of the Proceeds of Crime Act 2002 or

- may be relevant to the investigation or prosecution of a person for a financing of terrorism offence [See previously section 28 of the FTRA].

This offence carries a penalty of imprisonment for 2 years or 120 penalty units (i.e. $13,200), or both. Alternatively, proceedings for a civil penalty may be instituted.

Subclause 39(6) provides that the AML/CTF Rules may specify matters that are to be taken into account in determining whether there are reasonable grounds for a reporting entity to form a relevant suspicion.

Clause 40 operates to make this offence also apply to various State/Territory laws and foreign laws.

Clause 41 requires reporting entities to report to AUSTRAC within 10 days where the provision of a designated service involves a threshold transaction. This carries a penalty of imprisonment for 2 years of 120 penalty units (i.e. $13,200), or both. Alternatively, proceedings for a civil penalty may be instituted [See previously section 28 of the FTRA].

Clause 42 requires reports in relation to designated services involving certain international funds transfers. This carries a penalty of imprisonment for 2 years or 120 penalty units (i.e. $13,200), or both. Alternatively, proceedings for a civil penalty may be instituted [See previously section 28 of the FTRA].

Clause 45 provides for an offence where further information is required from a reporting entity and the reporting entity fails to comply with the request. This carries a penalty of imprisonment for 2 years or 120 penalty units (i.e. $13,200), or both. Alternatively, proceedings for a civil penalty may be instituted [See previously section 28 of the FTRA].

**Part 4**

Part 4 relates to reports about cross border movements of physical currency and negotiable instruments.

Clause 49 provides that a person commits an offence if the person moves physical currency into Australia, (i.e. if the person brings or sends the physical currency into Australia – see clause 54) or moves it out of Australia (see definition in clause 53) and the total amount is not less than $10,000 and a report in respect of the movement has not been given in accordance with the clause. A report must be in the approved form and contain details specified in the AML/CTF Rules [See previously section 15 of the FTRA].

Clause 51 relates to receiving such physical currency and not making a report [See previously section 15 of the FTRA].

These offences carry a penalty of imprisonment for 2 years or 120 penalty units (i.e. $13,200), or both. Alternatively, proceedings for a civil penalty may be instituted.

Clause 55 relates to a person being required to make a report about bearer negotiable instruments (these are defined in clause 16), as soon as possible, where a person has been required to declare whether or not the person has with him or her any such instrument in accordance with clause 162. This carries a penalty of imprisonment for 2 years or 120 penalty units (i.e. $13,200), or both. Alternatively, proceedings for a civil penalty may be instituted.

**Part 5**

Part 5 relates to funds transfers instructions containing certain originator information. Clauses 58-61 contain offences where, in various situations, different levels of originator information (see clause s 66 – 68) is not provided as required. These offences carry a penalty of imprisonment for 2 years or 120 penalty units (i.e. $13,200), or both. Alternatively, proceedings for a civil penalty may be instituted.

Clause 63 provides for a defence of reasonable reliance on information given by another person where there has been a contravention in criminal proceedings for an offence against Division 2 or 3 of Part 5.

**Part 6**

Part 6 relates to providers of designated remittance services being required to advise AUSTRAC of certain information (see definitions in clause 9) and the maintenance by AUSTRAC of a register of providers of designated remittance services. Clause 70 provides for an offence where a provider or prospective provider fails to advise AUSTRAC and carries a penalty of imprisonment for 2 years or 120 penalty units (i.e. $13,200), or both. Alternatively, proceedings for a civil penalty may be instituted.

**Part 7**

Part 7 relates to reporting entities being required to develop, maintain and comply with anti-money laundering and counter-terrorism financing programs. These programs are 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. A program must require a reporting entity to monitor each of its customers.

Clause 73 provides for an offence if a reporting entity fails to develop, maintain or comply with the program. This offence carries a penalty of imprisonment for 2 years or 120 penalty units (i.e. $13,200), or both. Alternatively, proceedings for a civil penalty may be instituted.

**Part 8**

Part 8 places obligations on financial institutions in relation to correspondent banking relationships.

Clause 78 prohibits entering into a correspondent banking arrangement with a shell bank or another financial institution that permits a shell bank to maintain an account with it. It carries a penalty of imprisonment for 2 years of 120 penalty units (i.e. $13,200), or both. Alternatively, proceedings for a civil penalty may be instituted.

Clause 79 requires financial institutions to carry out due diligence assessments and enter into written agreements setting out the respective rights and obligations of the parties before entering into a correspondent banking relationship. It carries a penalty of imprisonment for 2 years or 120 penalty units (i.e. $13,200), or both. Alternatively, proceedings for a civil penalty may be instituted.

Clause 80 requires regular due diligence assessments of correspondent banking relationships. It carries a penalty of imprisonment for 2 years or 120 penalty units (i.e. $13,200), or both. Alternatively, proceedings for a civil penalty may be instituted.

**Part 10**

Part 10 provides for detailed record-keeping requirements by reporting entities in various circumstances. Records of transactions are required to be kept by clause 85. A failure to comply carries a penalty of 100 penalty units (i.e. $11,000). Alternatively, proceedings for a civil penalty may be instituted. Clause 86 provides for a similar offence in relation to customer generated transaction documents.

Clauses 87-89 require the retention of various records relating to identification procedures and that where records of identification procedures are carried out by an authorised person, on behalf of the reporting entity, that these are given to the reporting entity. A person commits an offence if these requirements are breached and these offences carry a penalty of imprisonment for 1 year or 60 penalty units (i.e. $6,600), or both. Alternatively, proceedings for a civil penalty may be instituted.

Clause 90 requires the retention of records about diligence assessments of correspondent banking relationships. A failure to comply carries a penalty of 1 year imprisonment or 60 penalty units (i.e. $6,600), or both. Alternatively, proceedings for a civil penalty may be instituted.

**Part 11**

Part 11 relates to secrecy and access and contains a number of offences. The activities addressed by each of these provisions may only be dealt with by way of criminal prosecution and proceedings for a civil penalty are not available. The available penalties reflect the seriousness of the conduct covered by these provisions.

Of significance in relation to investigations, is clause 95 relating to tipping off. Clause 95 provides that it is an offence for a reporting entity to disclose that the entity has formed a suspicion in relation to a matter under clause 39, communicated this suspicion to AUSTRAC or provided further information to AUSTRAC under clauses 39, 41 or 42. The prohibition extends to any other information from which the person to whom the information is disclosed could reasonably be expected to infer that the suspicion had been formed or the information had been communicated to AUSTRAC.

**Part 13**

Part 13 relates to audits and the activities addressed by each of these provisions may only be dealt with by way of criminal prosecution.

Clause 119 concerns a failure by a person to answer questions or produce a document relating to the operation of the exposure Bill or regulations when asked by an authorised officer who has entered premises when authorised by a monitoring warrant. This offence carries a penalty of imprisonment for 6 months or 30 penalty units, or both.

A person is not excused from this requirement on the ground that the answering of the question or the production of the document might tend to incriminate the person or expose the person to a penalty, but it is not admissible in evidence against them except in specified limited circumstances.

**Part 14**

Part 14 relates to information gathering powers. Clause 131 provides that an authorised officer may obtain information and documents from a reporting entity by written notice. Contravening a requirement in the notice is an offence punishable by imprisonment for 6 months or 30 penalty units (i.e. $3,300), or both. Again, provision is made in relation to self-incrimination.

**Part 15**

Part 15 relates to enforcement. Division 2 of Part 15 addresses proceedings for a civil penalty that may be brought before the federal court on the application of AUSTRAC.

The relationship of these civil proceedings to criminal prosecutions is addressed in Part 15. The Federal Court must not make a civil penalty order against a person for a contravention if the person has been convicted of an offence constituted by conduct that is substantially the same as the conduct alleged to constitute the contravention (clause 145).

Proceedings for a civil penalty order are stayed if criminal proceedings are started or have already been started against the person for an offence and the conduct is substantially the same as the conduct alleged to constitute the contravention. The proceedings for the order may be resumed if the person is not convicted of the offence otherwise the proceedings for the order are dismissed (clause 146).

Criminal proceedings may be started against a person for conduct that is substantially the same as conduct constituting a contravention of a civil penalty provision regardless of whether a civil penalty order has been made against the person (clause 147).

Evidence given in proceedings for a civil penalty order is not admissible in criminal proceedings where the conduct alleged to constitute the offence is substantially the same as the conduct alleged to constitute the contravention, however this does not apply to a criminal proceeding in respect of the falsity of the evidence given by the individual in the proceedings for the civil penalty order (clause 148).

As mentioned above, provision is made for infringement notices to be issued in Division 3 of Part 15 in relation to contraventions of clauses 40(3) or 55(4). This provides an alternative avenue to criminal prosecution or proceedings for a civil penalty in relation to minor infringements.

Division 6 of Part 15 provides for powers of questioning, search and arrest in relation to cross-border movements of physical currency and bearer negotiable instruments. Subclauses 161(11) and 162(10) provides that it is an offence if a person is subject to a requirement to make a declaration or produce currency/bearer negotiable instruments and their conduct breaches the requirement. These offences carry a penalty of imprisonment for 1 year or 60 penalty units (i.e. $6,600), or both.

Clause 163 enables a police or customs officer to arrest a person where that officer has reasonable grounds to believe that specified offences have been committed, and provides that a person commits an offence if a person resists, obstructs or prevents the arrest of a person. This offence carries a penalty of 10 penalty units (i.e. $1100).

Clause 164 provides for notices to be given to persons requiring them to give any information or produce any documents relevant to determining whether the person provides a designated service at or through a permanent establishment in Australia or ascertaining the details of any permanent establishment in Australia at or through which the person provides designated services. Clause 166 provides that it is an offence to breach a notice requirement. This offence carries a penalty of imprisonment for 6 months or 30 penalty units (i.e. $3,300), or both.