

## New laws on anti-money laundering and counter terrorism financing

On 16 December 2005 the Federal Government released the draft exposure of its Anti-Money Laundering (AML) and Counter Terrorism Financing (CTF) Bill (Draft Bill).

### Key message

Late last year the Federal Government released a draft bill on Anti-Money Laundering and Counter Terrorism Financing which aims to significantly strengthen Australia's laws in this area, imposing more onerous obligations on entities subject to the regime.

There is a 4 month consultation period, during which public submissions on the new AML/CTF regime can be made. The closing date for submissions is 13 April 2006. It is anticipated that the Government will introduce the Draft Bill into Parliament sometime in mid-2006. However, at this stage, the timing of the commencement of the new AML/CTF regime and of any transition period have not been determined. This is an issue on which the Government has specifically invited public comment.

The Draft Bill implements the recommendations put forward by the Financial Action Task Force on Money Laundering (FATF). FATF is the international, intergovernmental body which sets the standards and promotes policies to combat money laundering and terrorist financing.

The Draft Bill proposes to significantly strengthen Australia's AML and CTF laws. The new AML/CTF regime will have considerably broader application than the current regime under the Financial Transactions Reporting Act (FTRA) and will impose more onerous obligations on entities subject to the regime. The Draft Bill contains the first tranche of AML/CTF reforms targeting:

- » the financial sector
- » the gambling sector
- » bullion dealers
- » professionals (eg lawyers and accountants) to the extent that they provide financial services in direct competition with the financial sector.

It is intended that the second tranche of reforms, which will not be released for some time, will cover real estate agents, jewellers, lawyers and accountants when they provide specific non-financial services.

The new AML/CTF regime will eventually replace the FTRA.

### Outline of the Proposed Regime

The Draft Bill imposes general obligations on entities. The operational details of the regime will be set out in the AML/CTF Rules, which are legislative instruments (similar in effect to ASIC class orders), to be issued by AUSTRAC. AUSTRAC will also release Guidelines to assist entities in understanding various aspects of the regime.

The Government and AUSTRAC have simultaneously released various draft exposure documents including the Draft Bill, some of the Rules and several Guidelines. All documents have been released for public comment. The full list of documents released can be found at [www.ag.gov.au/aml](http://www.ag.gov.au/aml). Additional Rules and Guidelines will be issued by AUSTRAC over the coming months.

### Coverage of the AML/CTF Regime

The new AML/CTF regime will cover all entities that provide what are defined in the Draft Bill as *designated services*. The Draft Bill sets out 64 designated services, which include:

- » opening and allowing transactions on a bank account

- » lending money in the course of carrying on a business
- » issuing debit cards
- » acquiring or disposing of securities, derivatives or foreign exchange contracts on behalf of a person
- » issuing or selling securities, derivatives or life insurance policies to a person in the course of carrying on a business
- » providing personal financial product advice, as an Australian Financial Services Licensee, to a person in relation to:
  - securities or derivatives
  - life insurance policies
  - superannuation
- » as trustee of a superannuation fund or ADF, accepting a contribution, rolling over, transferring or cashing out, an interest held by member of the fund
- » providing a custodial or depository service.

The following points should be noted:

- » many of the definitions used in the Draft Bill are taken from the *Corporations Act 2001*
- » an entity that provides a designated service, will be regarded as a *reporting entity*. It is the reporting entity on which the regime imposes various obligations.

### Customer Identification

The AML/CTF regime will impose significant obligations on reporting entities to identify customers.

As a general rule, a reporting entity must identify a customer by carrying out *the applicable customer identification procedure*, before providing that customer with a designated service.

The applicable customer identification procedure may vary depending on, among other things, the type of reporting entity, the designated service being provided and the type of customer to whom the service is provided. Details of the applicable customer identification procedures have not yet been released but will be specified in draft Rules to be released early in 2006.

The general obligation to identify a customer before providing a designated service will be qualified in 3 main ways.

**Pre-existing customers** of an entity will generally not need to have their identity re-verified when the new AML/CTF regime commences. However, pre-existing customers, as well as all customers whose identity has already been verified in accordance with the new AML/CTF regime, will be subject to ongoing customer due diligence requirements. The Rules will specify certain circumstances or events as 'risk triggers', the occurrence or existence of which in relation to a particular customer will require the reporting entity to re-verify that customer's identity.

**Special circumstances:** customer identification can take place 5 days after the provision of a designated service, if:

- » identifying the customer before the provision of the designated service would disrupt the ordinary course of business of the reporting entity; and
- » the service is specified in the Rules; and
- » the service:
  - is not provided face to face; or
  - consists of acquiring or disposing of a security or derivative for a customer; or
  - consists of issuing or undertaking liability as the insurer under a life policy or sinking fund policy.

**Low risk services:** the Rules may stipulate that certain designated services are *low risk* in which case a modified customer identification process can be adopted.

The draft Rules relating to identification procedures, at this stage, only set out the minimum Know Your Customer (KYC) information that needs to be obtained by a reporting entity when performing the applicable customer identification procedure. However, it is anticipated that further Rules will stipulate additional KYC information that will need to be obtained depending on particular circumstances.

The Draft Bill allows a reporting entity to authorise, in writing, a third party to carry out the initial customer identification procedure on its behalf. However, the reporting entity will remain responsible for ensuring the customer identification procedure adopted by the authorised third party is adequate.

### AML/CTF Programs

The draft Bill requires each reporting entity to establish, maintain and comply with an AML/CTF Program (Program).

A reporting entity's Program is designed to identify and materially mitigate the risk that the provision of a designated service by a reporting entity might involve or facilitate a transaction that is connected with the commission of a money laundering or terrorism financing offence.

The minimum requirements of Program is set out in the Rules. Programs must outline a framework for identifying risks and must include:

- » policies, procedures and controls for customer due diligence and the ongoing monitoring of customers and their transactions. This will in turn include:

- a classification structure for customers in terms of their AML/CTF risk
- policies to help the entity determine whether, on a risk basis, an enhanced customer due diligence process should be carried out on a particular customer
- policies to help the entity determine whether, on a risk basis, additional KYC information should be obtained from a particular customer
- » measures for screening employees for AML/CTF risks
- » an ongoing employee training program to ensure employees understand their responsibilities under the Program and the nature of AML/CTF risks
- » compliance monitoring and auditing of the Program by the reporting entity.

Further, all aspects of a reporting entity's Program must be approved by the governing board or senior management of the reporting entity.

The Rules can stipulate that an AML/CTF Program will not be required for the provision of certain designated services.

The development and maintenance of an appropriate AML/CTF Program for reporting entities will be vitally important to ensure compliance with the new regime.

### Reporting to AUSTRAC

Reporting entities will be required to report certain matters to AUSTRAC.

**Suspicious Matters:** A reporting entity must make a report to AUSTRAC if it has reasonable grounds to suspect that information it has in its possession, which relates to the provision of a designated service, is connected with tax evasion, money

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laundering, terrorism financing or any other Commonwealth offence. The Rules set out 24 factors to be taken into account by a reporting entity when determining whether they should have reasonable grounds for forming a suspicion. It will also be an offence to alert a customer to the fact that the reporting entity has made a report to AUSTRAC.

### Threshold Transactions and International Funds Transfer Instructions:

Current obligations imposed by the FTRA in relation to reporting any cash transactions of \$10,000 or more and international funds transfers of any amount (irrespective of whether they are suspicious), appear to be almost identical under the new regime.

### Record Keeping

The Draft Bill imposes record keeping obligations on reporting entities with respect to a wide variety of documentation. The period for which such records must be kept has not yet been finalised.

### Penalties & AUSTRAC Powers

AUSTRAC will be responsible for administering and enforcing the new AML/CTF regime and will be given broad new powers to achieve these objectives. AUSTRAC will also be responsible for issuing the Rules and Guidelines under the legislation.

The Draft Bill contains both civil penalty and criminal penalty provisions. It also confers on AUSTRAC the power to seek injunctions in the Federal Court.

### Other Matters

Various other obligations will be imposed by the new regime, including:

- » additional reporting obligations with respect to cross border movements of

physical currency and certain types of funds transfers

- » the registration of designated remittance service providers
- » the requirement for financial institutions to carry out due diligence prior to entering correspondent banking relationships.

### What Happens Next?

Whilst important parts of the regime have not yet been released for public comment (in particular the Rules relating to the customer identification procedures) businesses should begin to develop an understanding of how the new AML/CTF regime will apply to them. Businesses should review their existing AML procedures and assess the impact of the new AML/CTF regime on their operations as well as identify changes that will need to be made to existing documents and procedures. They should also appoint appropriate people to oversee and manage the adoption of AML/CTF Programs within their organisation.

Businesses should effectively use the consultation process to make their views known to the Government, AUSTRAC and peak industry bodies.

Submissions on the AML/CTF regime should be sent to either:

- » the Attorney-General's Department (with respect to the Draft Bill)
- » AUSTRAC (with respect to the Rules and Guidelines).

As previously mentioned the closing date for submissions is 13 April 2006.

Middletons will of course keep its clients posted on developments on the AML/CTF front in an effort to help businesses understand the implications of the new AML/CTF regime.