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Financial Crime Section
Transnational Crime Branch
Criminal Justice Policy and Programmes Division
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600
By email antimoneylaundering@ag.gov.au

Dear Sir/Madam

Enhancing Australia's AML/CTF regime: Phase 1 amendments to the Anti-Money Laundering and Counter-Terrorism Financing Act 2006: Industry consultation paper

The Australian Bankers' Association (**ABA**) appreciates the opportunity to provide the Attorney-General's Department (**AGD**) with comments on *Enhancing Australia's AML/CTF regime: Phase 1 amendments to the Anti-Money Laundering and Counter-Terrorism Financing Act 2006: Industry consultation paper* (**consultation paper**).

With the active participation of its members, the ABA provides analysis, advice and advocacy for the banking industry and contributes to the development of public policy on banking and other financial services. The ABA works with government, regulators and other stakeholders to improve public awareness and understanding of the industry's contribution to the economy and to ensure Australia's banking customers continue to benefit from a stable, competitive and accessible banking industry.

The key concerns of the ABA regarding the proposed amendments are:

- How the supervision and monitoring of reporting entities' compliance with Australian sanction laws will operate.
- The form of the proposed expansion of the general powers and functions of the AUSTRAC CEO.
- The form of the proposed expansion of the remedial direction power.
- The expansion of the infringement notice provisions.
- The proposed prohibition on providing a service if customer due diligence (**CDD**) cannot be performed.

The ABA has three particular requests, firstly that the AGD and government take the time necessary to ensure the legislation is precise, unambiguous and drafted in a way such that unintended consequences and unnecessary industry costs are avoided.

Secondly, that opportunity be given to provide input into the Exposure Draft of the legislation.

Finally, as a precursor step to the above, the ABA and its members seek engagement with the AGD on our five key concerns stated above, prior to the commencement of the drafting of the legislation Exposure Draft.

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For ease of reference, the ABA has grouped our comments under the relevant section of the consultation paper.

Should you have any questions regarding the content of this submission, the ABA and its members are happy to assist and look forward to the continued dialogue with both the AGD and AUSTRAC.

Yours faithfully

Signed by:

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2. Proposals for reforms

2.1 Objects of the Act

The ABA generally supports the amendments to the objects of the Act under 2.1, however there are a number of areas that are in urgent need of further clarification and amendment.

Serious crimes

The ABA believes that the term "serious crimes" needs to be properly defined and refined before industry is able to understand the full impact of the proposed reforms. Currently, monitoring is based on defined predicate offences. The expansion of this beyond financial crimes would have a significant impact on how the AML/CTF legislation operates in practice, and the flow on cost and resource impacts to all reporting entities (**REs**). The proposed reform, as it stands, may likely result in REs having to expand their transaction monitoring scenarios, and in some instances, their entire platforms would need to be updated, modified and re-aligned to look for other types of serious crime/typologies that are currently not monitored.

The ABA is unclear as to the reasons why the legislation is being broadened beyond financial crimes, and requests that the AGD outline the policy objectives and regulatory need to justify such a large expansion.

The reference to "serious crimes" in the proposed reform needs to be altered to refer to 'serious financial crimes' and not all serious crimes. The scope of the Act should be the deterrence of the financing of serious crimes but not to be broadly applied to the deterrence of all serious crimes.

Co-operation and collaboration among reporting entities

The ABA strongly supports the proposal to support further co-operation and collaboration among REs, AUSTRAC and other government agencies, particularly law enforcement. The ABA recommends that necessary consideration be given to amending the Privacy Act to facilitate the sharing of personal information that would be required for this reform to be fully effective.

It appears that the proposed legislative reforms are focused only on government agencies and international counterparts at this stage. While the wording to facilitate the sharing of information in the private sector is limited to AUSTRAC 'supporting co-operation and collaboration among reporting entities'. The ABA continues to support and encourage better co-operation and collaboration with government agencies and would submit that there is a need for legislative mechanisms to facilitate these alliances and give full effect to the intended objectives of the Act.

Sanctions power

While the ABA supports the proposal for AUSTRAC to supervise and monitor sanctions, further information is requested on how AUSTRAC will supervise sanctions and whether the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (**AML/CTF Act**) and Rules will be amended to include requirements for REs to have controls in relation to sanctions. Given that banks already have significant controls around sanctions, the ABA does not expect there to be a significant increase in regulatory burden from a compliance perspective. It would however, be useful to have clarity around the intended transition and oversight in respect of sanctions, in particular, greater clarity on the model for supervising and monitoring sanctions compliance. Any guidance should include a clear outline of responsibilities being adopted by AUSTRAC in this new role. For example, it is not yet clear how the supervision and monitoring of REs' compliance with Australian sanction laws will operate, specifically the interaction between AUSTRAC and the Department of Foreign Affairs and Trade.

Designated business groups

The proposal does not address the situation where members of a Designated Business Groups (**DBG**) have dual obligations under the *Financial Transaction Reports Act 1988* (**FTR Act**) and AML/CTF Act. If the FTR Act is to be repealed, then an insurer or an insurance intermediary could possibly have no obligations under the FTR Act or AML/CTF Act, however, will have sanction obligations. The ABA queries whether the intention is for AUSTRAC to supervise and monitor these entities.

2.2 Principals of the Act

The ABA supports the proposed amendments to the Act to incorporate the principles, in particular the requirement that obligations under the legislation should be proportionate to the money-laundering and terrorism financing (**ML/TF**) risks faced by REs. The risk-based approach is fundamental, and embedding that approach into the principles of the Act is appropriate. The ABA does query how the ML/TF risks faced by REs will be assessed, as the assessment of the ML/TF risk can vary between the REs, the industry as a whole, and AUSTRAC's own view. Differences in risk assessments could result in different views on the proportionality of regulatory responses.

As is the case with the objects of the Act, the reference to "serious crimes" in the principles needs to be updated to refer to just 'serious financial crimes' and not all serious crimes. The AGD has not articulated the reasons or justification for this proposed expansion. The scope of the Act should be the deterrence of the financing of serious crimes, but not to be broadly applied to the deterrence of all serious crimes.

The ABA would also recommend that the principles reference compliance with sanctions laws.

The ABA also queries the intent behind the explicit inclusion of specific privacy obligations, and seeks clarification on whether such new obligations are intended to add new obligations on REs and if so, what is the policy intent behind this proposal? The interaction of Australian privacy laws with the AML/CTF regime is a complex one, requiring careful design of the legislation to ensure the proposed reforms actually achieve their purpose in an efficient manner.

2.3 Powers and functions of the AUSTRAC CEO

2.3.1 General powers and functions

Proposed reforms to section 212

The ABA is deeply concerned that the drafting of the proposed powers under this section is too broad. The ABA holds that the further and significant broadening of powers is unnecessary as the AUSTRAC CEO already has broad rule-making authority and all powers necessary for the administration of the Act.

Directly or indirectly

Paragraph 2.3.1(b) under the second bullet point, makes reference to the AUSTRAC CEO enabling access to information either directly or indirectly. The ABA believes that it is not necessary to include reference to 'indirect' methods of accessing information. Given the nature of the information utilised by the AUSTRAC CEO, there is a strong preference that information is only accessed via clearly authorised direct channels.

The ABA questions how the proposed amendment to include 'indirect' methods would interact with the Privacy Act. If the AUSTRAC CEO has the power to indirectly access such information, the legislation must clarify the interaction between this power and the privacy legislation.

General power "necessary or convenient"

The ABA strongly disagrees with the proposal to insert an additional general power into Division 3 of Part 16 that gives the AUSTRAC CEO the power "to do all things necessary or convenient to be done for or in connection with the performance of his or her functions." This proposal is too wide-ranging in its effect. Such a new broad-based power is wholly unnecessary given the range of powers already available to the AUSTRAC CEO.

In particular, the inclusion of the term "convenient" is open to wide-ranging interpretation leaving REs with little recourse in the event they disagree with its application. Convenience is not a measure to be used in determining the appropriateness of an action. This is an extremely broad power and it is not clear why it would be necessary or useful for the AUSTRAC CEO to have this power for 'convenience' as opposed to where it is necessary for the purposes of carrying out his/her functions.

In addition, for the AUSTRAC CEO to have this power for 'convenience' will likely result in all REs bearing significant additional administrative burden and costs responding to ad-hoc information requests from AUSTRAC. Information deemed "convenient" is likely to be information not relevant (or necessary) for the administration of the Act.

The ABA recommends that any changes to regular reporting requirements should be a separate consultation with all REs.

Disseminating AUSTRAC information

Whilst industry would welcome the ability to request information from AUSTRAC, the ABA queries whether the proposed ability for the AUSTRAC CEO to disseminate information, as contained in the first bullet point, is feasible considering the restrictions in the current tipping off provisions in the Act.

As a general note, the ABA also queries whether the proposals, as they stand, will infringe upon Australian Privacy Principles (**APP**). Recent reforms implemented by AUSTRAC in regard to 'collecting information about the customer rather than from the customer', imposes a higher onus in relation to privacy issues on a RE, highlighting the complexity of the interaction with the APPs.

AUSTRAC's dual role of regulator and as Australia's' Financial Intelligence Unit

The ABA queries how this amendment will fit with the dual role AUSTRAC has as regulator and the Australian Financial Intelligence Unit (**FIU**). The ABA seeks clarification whether the information obtained under this proposed section would be capable of being used for a 'dual' use e.g. for both intelligence as well as supervisory and/or compliance actions?

The ABA opposes the amendments as the AUSTRAC CEO already has broad rulemaking authority and all powers necessary for the administration of the Act. It is unclear as to why AUSTRAC would require further information powers, beyond that of section 167*: Authorised officer may obtain information and documents* of the Act. The AGD has not provided adequate reasons why such reforms would proceed as they stand.

As an alternative, the ABA recommends that the AGD review the information gathering powers of section 167 of the AML/CTF Act to identify any deficiencies in AUSTRAC's information gathering powers.

2.3.2 Determining exemptions

The ABA supports the proposed reform.

The ABA suggests that a number of features of this power should be clearly defined. For example, the burden on REs would be reduced if a standard is set for what information needs to be included in a request to AUSTRAC for an exemption.

The ABA also strongly recommends that a defined timeframe should be established for a response to be provided in relation to exemption requests e.g. 60 days. REs should have a reasonable expectation that a response will be received in a timely manner. A delay or failure to receive a response may have an adverse impact on a RE. Moreover, a failure to respond on the part of AUSTRAC calls into question the procedural fairness of the infringement/retrospective proposals in this reform package where a RE has previously sought the guidance of the regulator.

The Act should also be amended to make clear on whose assessment of risk this decision for exemption will be based. There is a broad variety of international and domestic assessments alongside industry standards and a RE's own risk assessment. The lack of clarity on the appropriate assessment of risk to be used could lead to confusion, unnecessary applications and inconsistent application of the law.

2.3.3 Expanding the remedial direction power

The ABA has a number of concerns with this recommendation. In particular, the ABA strongly believes that retrospectivity which extends back before the commencement date of a specific provision should not feature in any part of these reforms.

The suspicious matter report (**SMR**) example set out in the consultation paper highlights the ABA's concerns with the proposed remediation power. Where a RE has not formed a suspicion and hence does not submit a SMR, AUSTRAC may, at a later date, form a different view and force remedial actions in this instance. At that point, a RE will always be best placed to propose appropriate steps for remediation (if required) rather than AUSTRAC, therefore any proposed amendment should not state that AUSTRAC determines the remediation actions to be undertaken. The proposal, as it stands, may also increase the likelihood of defensive reporting (where REs will lodge a SMR as a protective measure rather than risk incurring further penalty) and adversely impact the integrity and effectiveness of the regulatory reporting framework by impacting the quality of intelligence AUSTRAC receives.

The SMR example in the consultation paper does not detail how this provision would work in practice. For example, how would AUSTRAC determine that the RE has the prerequisite level of suspicion?

Additionally, the ABA recommends that the proposed amendment should also include a requirement for the AUSTRAC CEO to consider the benefits in terms of the reduction in ML/TF risk associated with retrospective remedial action against the costs of the exercise for the RE. For example, an issue may extend over a number of years, however, the nature of the issue is such that retrospectively remediating it may have no impact on the ML/TF risk of the RE/industry sector, but it will require a significant resource commitment for the RE and AUSTRAC. In these instances, a requirement for the AUSTRAC CEO to balance the remediation action against these factors will produce a more pragmatic outcome for all stakeholders.

Equally, for the RE, the ABA is unsure what the benefit would be for the RE to attempt reconstruction of reporting which is a costly and time consuming exercise. The ABA would maintain that these are RE resources which would be much better spent on the priority of the RE fixing the contravention to prevent future occurrences, thereby strengthening the system as a whole.

The proposed power also fails to address an ABA concern that where a RE, or an industry sector, has previously sought guidance or an exemption from AUSTRAC and no response has yet been provided by the regulator, allowing retrospectivity for these remedial powers in these cases would be problematic.

The proposed power also fails to address a concern of instances where AUSTRAC changes its view with regards to certain aspects of the law and then requires a RE to remediate retrospectively. Certainty in a regulatory regime is one hallmark of efficiency.

As a general comment, the ABA also queries how this proposed amendment differs from (or replaces) the current arrangement with REs where following an on-site visit from AUSTRAC, where applicable, AUSTRAC then issues the RE with a letter containing mandatory requirements which the RE is required to action. ABA members consider the current process of co-operation and engagement with a RE as a very efficient and effective regulatory tool for AUSTRAC and questions the additional cost/benefit of the proposed reform.

2.3.4 Expanding the power to deregister remitters

The ABA generally supports the proposed reform, however, the banning of individuals from involvement in remittance activities represents a significant increase in powers for AUSTRAC. Currently it is only responsible office-holders such as directors, actuaries and financial planners who are subject to banning orders. Guidance should be provided on the appropriate governance framework (including procedural fairness, right of appeal, publication etc.) for a banned individual. Clarification is sought on whether the AUSTRAC CEO intends to publish a list of banned individuals, including details of any decision, given the intent of the reform appears to prevent the registration from passing to a third party for the purpose of avoiding AUSTRAC scrutiny.

REs would benefit from AUSTRAC sharing more information with regards to registered and deregistered remittance providers in order to ensure that they effectively manage the ML/TF risks. The publication of any reason for the decision to remove or suspend the registration would also greatly assist in this regard.

The ABA seeks more detail in relation to the avenues of redress for a banned/deregistered remitter. For example, what mechanisms would be used to review decisions e.g. AAT, Courts etc.?

2.3.5 Remitter registration and reviewable decisions

The ABA supports the proposed reforms.

2.4 Infringement notices and civil penalties

2.4.1 Expanding the infringement notice provisions

The ABA is strongly opposed to the reforms as they stand. The proposal constitutes an overreach by proposing a heavy handed regulatory response for a number of minor offences, some of which could be considered administrative errors or accidental omissions, where there is genuinely no intention to deceive on the part of the RE. The consultation paper itself calls them “minor offences”.

The ABA fails to understand the regulatory benefit of issuing fines for a number of these types of “minor breaches”. The ABA is unware of any evidence to support implementing this change as it stands.

The ABA is also very concerned that this proposal would provide the AUSTRAC CEO with the power to issue significant fines for breaches that may have already been remediated and/or for which may have limited or no impact on ML/TF risk exposure. The consultation paper is silent on appropriateness, procedural fairness, and any checks and balances that should accompany any such extension of power.

Under the proposals, the AUSTRAC CEO could issue significant fines without being required to have the same considerations and evidentiary threshold that are applicable if he/she was to apply to the Federal Court for a civil penalty order.

The ABA queries whether the significant increase in power contained in this proposed reform could result in less self-reporting in certain sectors. Issuing infringement notices for these incidents could result in REs in certain industry sectors not self-disclosing breaches, which could result in AUSTRAC being more reliant on its own investigations to find such contraventions in certain sectors.

Notwithstanding our opposition to these proposals, the ABA takes this opportunity to provide some comments on the proposals as they stand.

Should the AGD proceed with this proposed reform, then the ABA recommends that the infringement notice provisions in the AML/CTF Act also require the AUSTRAC CEO to have the same considerations that the Federal Court is required to have when determining a pecuniary penalty (as outlined in subsection 175(3) of the AML/CTF Act). This will provide the AUSTRAC CEO with a framework for determining fines in an infringement notice.

Of particular concern is the fact that there is no consideration of materiality e.g. one-off breaches as opposed to systemic breaches, and/or the level of ML/TF risk concerns and hence no threshold defined for when the proposed power would be exercised. The ABA's comments here are consistent with our earlier comments associated with the proposed reform to extend the remediation powers, including that none of the powers in these sections, or elsewhere in the reforms should be retrospective.

The ABA has concerns in relation to inclusion of subsection 41(2) regarding the lodging of SMRs within a specified timeframe. Current industry practice (known to AUSTRAC) is for reports to be submitted to specialist investigators where there is 'unusual activity'. Suspicion may not be formed for some time depending on the complexity and detailed nature of the investigation required within the RE. Once a suspicion is formed a delegate will always submit an SMR within the required timeframe. The ABA is concerned that the proposed amendments and infringement notice for section 41(2) may call into question the time 'suspicion' was formed and/or lead to defensive reporting by the RE which will dilute the quality of intelligence AUSTRAC receives.

The ABA is particularly concerned around the provision being extended for information and identity of foreign credit card or debit card transactions (subsection 50(5)) as identity is not confirmed at the time transactions are being undertaken. It is a fact that limited information is captured for these foreign credit card or debit card transactions. The ABA also queries whether it is intended that this subsection also to be extended to include travel cards?

In subsection 49(2), issuing infringement notices for not "providing further information" in the prescribed timeframe is unreasonable. If a RE has not been consulted on the time it may take to respond to a specific request, yet the issuing agency has put a timeframe that is simply not realistic given the complexity of the request or number of concurrent requests from multiple agencies. There should always be a dialogue as to what is reasonable/achievable in the circumstances. For example, an agency issued a number of REs with section 49 notices for information gathering purposes on 23 December 2016 with a response period of 15 working days, over a period which traditionally is the time many Australian workers take their annual leave. Every endeavour is always made to meet these timeframes, however sometimes these dates are not reasonable due to circumstances out of the REs control. The ABA always recommends engagement between a RE and the issuing agency to ensure a reasonable due date for such requests.

2.4.2 Power to issue infringement notices and apply for civil penalty orders

The ABA does not support the proposed changes to expand powers of other agencies to issue infringement notices and apply for civil penalty orders under the AML/CTF Act. The consultation paper does not demonstrate the need for such a significant expansion of this power to other agencies, beyond the AUSTRAC CEO.

Expanding this power beyond the AUSTRAC CEO to multiple agencies is likely to result in multiple government agencies pursuing individual actions to suit their own agenda with no coordination between them. Such a free-for-all will not be a good regulatory outcome for Australian businesses.

One simply has to look at the checks and balances on the powers of the Australian Securities and Investments Commission (**ASIC**) to issue infringement notices and apply for civil penalty orders, or the governance of the ASIC Market Disciplinary Panel (**MDP**) to understand the regulatory overreach of these AGD proposals.

The proposal is devoid of any of the checks or balances present in the Corporations Act or ASIC Act which ensure appropriateness, oversight, independence and procedural fairness when issuing infringement notices and seeking civil penalty orders.

As a general comment, under the current legislation this authority to issue infringement notices and apply for civil penalty orders is currently restricted to the AUSTRAC CEO which provides for an appropriately consistent application of civil penalty orders. The ABA supports the current settings as the AUSTRAC CEO is in the best position to view the behaviour of REs across the sector and therefore make determinations on when to pursue a civil penalty order relative to this whole-of-sector view. AUSTRAC is the administrator of the legislation therefore it is appropriate the powers to issue infringement notices should remain with AUSTRAC only.

Expanding this authority to other agencies introduces the real danger of inequity and inconsistency being introduced to the application of infringement notices civil penalty orders. The ABA is unclear as to what type of control AUSTRAC would have and how it would manage other agencies having the power to issue infringement notices and civil penalty orders. Without such rigorous oversight, independence and procedural fairness, the proposed expansion, as it stands, should be considered an overreach.

Having a centralised approach to compliance through AUSTRAC (as the regulator) ensures consistency and allows for a centralised point of contact for REs in relation to the Act. The proposals will result in more severe duplication, inconsistency and inefficiency already experienced by REs in cases where they are issued with multiple legal notices (such as section 49 notices) by a number of different agencies.

Finally, while it seems straightforward to consider civil penalty orders for a late response, the AGD must acknowledge that some requests take a significant time for REs to compile a response. The threat of civil penalty orders is likely to have the unintended consequence that a RE may not have adequate time to undertake the normal rigorous verification, checking and sign-off of a response, as complying with the due date now has to become the priority for a RE. This may impact the quality of intelligence that AUSTRAC currently receives.

The ABA notes that the recommendation to expand the agencies who may issue an infringement notice would appear to address the concerns raised in the *Report on the Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 and Associated Rules and Regulations*, that related to REs not complying with subsection 49(1) and 50(2) notices. The ABA suggests there are other more appropriate regulatory responses to the concerns raised rather than the expansion of civil penalty orders powers to other agencies beyond the primary regulator AUSTRAC.

2.5 Customer due diligence (CDD)

2.5.1 Reliance

There is variation in the wording between the review recommendation and the proposed reform. At a high level, recommendation 5.12 provides something quite useful, but then the proposed reform is overcomplicated, and tied up with ‘explicit and informed consent’ requirements.

The proposed reforms would be difficult to operationalise and may have limited application. The ABA requests face-to-face consultation to avoid unintended consequences and unnecessary industry costs. ABA members are also cognisant of the significant changes to CDD as part of the 2016 reforms and would want to ensure that any further changes proposed do not contradict of conflict with the CDD obligations recently implemented.

Notwithstanding the above, the ABA makes the following comments on the proposal.

The ABA is generally supportive of allowing overseas Designated Non-Financial Business Professions (**DNFBPs**) to complete the CDD process provided it remained within the discretion of the RE to do so. In order for the RE to have confidence in utilising the proposed reforms, the ABA would seek confirmation that AUSTRAC would provide guidance by way of a list of acceptable foreign countries with acceptable or equivalent regimes. There is definitely scope for the proposed changes to provide benefits such as cost savings and a more effective supervisory outcome, but only where AUSTRAC guidance is provided.

The ABA supports the proposal for DNFBPs such as lawyers, accountants, auditors, insolvency practitioners, real estate agents, conveyancing firms, corporate and trust registrars etc. to complete CDD only if those DNFBPs are incorporated into the Australian AML/CTF regime, and are therefore registered as REs.

In relation to allowing REs to search the Reporting Entity Roll, the ABA would like AUSTRAC to provide details of what, if any, implications this proposal has on the Privacy Act and how AUSTRAC would manage that.

The ABA seeks clear guidance on the expectations in relation to placing reliance on a third party that has conducted the customer identification program (**CIP**) on a mutual customer. The ABA is unclear on what the expected steps are for both parties to ensure appropriate compliance with the provision and where the obligations rest e.g. recording keeping.

The ABA would also like the AGD to examine the implications this proposal has on the Privacy Act, as it pertains to 'explicit and informed consent' and the sharing of customer identification information such as 'purpose and intended nature of the business relationship' between REs. The legislation must clarify the interaction between this power and the privacy legislation.

The ABA recommends the AUSTRAC guidance covers, but is not limited to:

- Who maintains the primary liability to ensure that know your customer (**KYC**)/CDD requirements are met and for any failure to comply with those requirements. Any failures or deficiencies on the side of the third party may result in the RE conducting its own CDD, thereby mitigating any benefit (both cost and regulatory)
- What, if any, formal agreements are required between parties?
- What is a reasonable timeframe when referring to "without delay" under the requirements of 2.5.1(ii) which states that the RE is able to obtain copies of the documentation from the prescribed third party without delay and how does this align with the requirements under 2.5.1(i)?
- How does the proposal impact on the use of CIP providers conducting KYC at a person's home?
- Timing of the collection of KYC as 2.5.1 (i) appears to be at odds with 2.5.1 (ii).
- Whether a safe harbour be considered in complying with this proposed provision, and
- What are the recommended steps to be taken by both parties to ensure appropriate compliance with the provision, and what are the impacts of considerations such as record keeping obligations and the obligations arising from the Privacy Act?

The ABA also queries whether the REs are now required to collect the 'purpose and intended nature of the business relationship', if so the legislation must clarify the interaction between this obligation and privacy legislation.

Prescribed third parties

The ABA notes that KYC is an ever-evolving area where service providers and KYC utilities are moving into managed services on behalf of REs.

From a future proofing perspective, the ABA queries whether the AGD is proposing that KYC service providers could be considered as prescribed third parties, and if so whether AUSTRAC intends to provide a list of 'approved' KYC third party providers. The proposed reform does not appear to extend cover to such utilities. The ABA recommends that such service providers should register with AUSTRAC and come under the banner of oversight and regulation.

2.5.2 Prohibition on providing a service if CDD cannot be performed

As with the CDD proposals, there is variation between the review recommendation 5.9 and the proposed reform. The proposed reform is inconsistent with existing practices and AUSTRAC's guidance in relation to account opening. AUSTRAC released a Guidance Note in 2007 titled *Opening an Account* outlining when an account is deemed to be open for the purpose of providing a designated service under the provisions of the Act and the Rules.

The proposed reform is a significant deviation from current accepted industry practice and will have a significant resource and cost impact should the reform proceed as is. The ABA is unclear as to the policy objective of this reform, and seeks clarification on the risks are the AGD seeking to mitigate.

Clarity is needed on how this proposal impacts the position in the Guidance Note mentioned above, which permits the creation of an account prior to completion of KYC, although full operation of the account is not permitted until KYC is completed. Based on the current AUSTRAC Guidance Note an account can be opened with a stop being placed on the account until KYC is completed on the customer.

There currently are situations where accounts may be opened and a stop placed pending the completion of the CDD e.g. a new migrant to Australia. A change in this provision would significantly alter current practice in Australia impacting both REs and their customers. Therefore the ABA questions the rationale for this change? The ABA would hold, that providing that the customer cannot redeem the funds this change is deemed unnecessary as the ML/TF risk is mitigated through this blocking action.

Review Recommendation 5.9 should ideally clarify that the establishment of the account is neither a designated service nor a business relationship where the customer is unable to transact without restriction on an account.

Business relationship

Additionally, the proposed reform introduces new wording of "must not establish a business relationship", the ABA seeks urgent clarification on the definition of "establish a business relationship" before we can comment further on the proposed reforms. For instance, when should KYC now be completed? Can a RE create a profile, but block that profile so that it is not transacted on? To what extent can a bank engage with prospective customers before it is considered "establishing a business relationship"?

The ABA queries why the proposals contain two separate paragraphs setting out the same obligation, but one referring to designated service provision and the other a relationship?

Consider making a suspicious matter report

The term "consider making a suspicious matter report" is vague, but the ABA would deem necessary as there will, at times, be circumstances where insufficient information is held to lodge a 'suspicious matter report' at that particular point in time.

Retrospective application

The proposed reform, if adopted, should not apply retrospectively, therefore the new rule should only apply to new customers to be on-boarded.

2.5.3 Cash-in-transit deregulation

The ABA supports the repeal of designated services Items 51 and 53.

2.6 Correspondent banking

2.6.1 *Nostro* and *Vostro* accounts

Whilst the ABA supports this proposed change, the amendments do not address the ability to extend correspondent banking to entities that are regulated as financial institutions (**FIs**) offshore, but not captured under the definition of a FI under the AML regime. This needs to be extended to ensure that Australia aligns with global definitions of a FI or at least allow REs to make that determination and not be limited by APRA's definition of a FI.

It is also unclear if the "Third Party reliance provisions" extend to correspondent banking due diligence. Therefore, the ABA would welcome the opportunity to comment on the proposed legislative amendment that will clarify the due diligence requirement and how this aligns to the issue of Nostro/Vostro accounts.

2.6.2 Definition of correspondent banking

The ABA generally supports the proposed reform to expand the definition of correspondent bank, although we would welcome the opportunity to comment on the proposed legislative amendment to ensure that the correspondent banking definition is sufficiently clear to minimise any potential adverse impacts on REs, specifically where the definition could be deemed to extend to relationships with FIs that are not part of a correspondent banking relationship. The ABA supports the reference to the Wolfsberg Principles as the appropriate mechanism to ensure global consistency.

The amendment as it stands does not address the ability to extend correspondent banking to entities that are regulated as FI's offshore, but not captured under the definition of a FI under the AML regime. Therefore 'authorised institution' needs to be added to the definitions under the AML/CTF Act and then defined more broadly rather than using the APRA definition of a FI as is currently the case.

2.6 Cash dealers under the FTR Act

The ABA supports the proposed reform.

2.7 Designated business groups

The ABA supports the proposed reforms in principle, noting that the proposals may have an impact on other REs subject to how their DBG is constructed.

The proposed amendment may be considered to be too 'Australia centric'. The legislation needs to reflect that financial crime is an international business and take account of the fact that criminals are banked in multiple jurisdictions and to fight financial crime, REs need to be able to share information with all members of a corporate group whether in a DBG or not. A good example of that corporate group structure would be one of the large international banks who operate a branch or subsidiary in Australia.

As a threshold question, DBGs are an artificial construct, the AGD and AUSTRAC should visit the question whether DBGs have an ongoing role in the AML/CTF regime in Australia? The ABA would maintain that the government could facilitate a significant reduction in the red tape burden on REs by allowing entities in the same corporate group to use that single AML/CTF parent program that applies across that entire corporate group. The ABA therefore recommends consideration be given to moving away from the limitation of sharing only being permitted between members of a DBG.

A DBG consists of a connected group of REs, however, this concept does not apply to offshore members of a group who are not REs as they do not provide designated services into Australia. Therefore a member of a DBG has to adopt a joint AML program which also meets the AUSTRAC rules. For foreign owned banks operating a branch or subsidiary, there are multiple entities in the corporate group who have adopted a joint AML program. However, this is based on legislation in the parent jurisdiction rather than Australian legislation. Although there are some differences in detail, a number of these foreign jurisdictions are generally equivalent to Australia.

In regards to the proposed amendments as they stand, the ABA would like to recommend that:

- AUSTRAC issue guidance regarding sharing of information, specifically addressing the implications in terms of the Privacy Act.
- AUSTRAC and the AGD provide REs with guidance regarding jurisdiction equivalency in terms of reliance on CIP within a DBG or across multiple DBGs under the same corporate group i.e. an Australian DBG member of a corporate group placing reliance on an overseas permanent establishment in a jurisdiction with lower AML/CTF standards or requirements than those imposed in Australia?

2.8 Definitions

2.8.1 Carrying on a business

The ABA supports the proposed reforms in principle, however questions why the changes are limited to Tables 2 and 3 of section 6 of the Act and not more broadly. The ABA also recommends that the terms 'routinely, incidentally, occasionally or regularly' be defined in the Act.

2.8.2 Designated remittance arrangement

The ABA supports the proposed reforms in principle, however further clarity is required on what this means and what constitutes a 'remittance type-transaction'. Care should be exercised given that there may be a transition to any such arrangement where regulation has been eased.

The designated remittance arrangement (DRA) definition may need to be extended (and remain technology neutral) to take into consideration changing technologies in this space.

2.8.3 Stored value cards

In principle the ABA supports the proposed reform as the definition removes those cards that do not have a material ML/TF risk associated with them. The amendments also provide clarity of what a stored value card is, although the ABA does have concerns with the proposal to exclude certain types of cards. The ABA understands that AUSTRAC has completed a ML/TF risk assessment of stored value cards and requests to view this risk assessment before finalising our view on the proposals.

2.8.4 Signatories

The ABA is supportive of the AGD pursuing this reform, however believes the solution proposed is not adequate and requires a different approach. The proposed reform appears to be focused on the person who owns the account. This does not appear to be consistent with the stated focus of the recommendation.

The proposed reform states an intention to redraft the definition of "signatory" so that it more narrowly applies to persons with authority to authorise payment transactions. This suggests the definition for a signatory is focused on persons who are able to authorise transactions on an account. However, the proposed reform refers to persons who have control of the account and refers to examples where a person can:

- Approve the establishment of the account; and
- Controls who accesses the account and the parameters of its use.

The proposed reform appears to be focused on the person who owns the account. This does not appear to be consistent with the stated focus of the recommendation.

The *Report on the Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 and Associated Rules and Regulations*, refers to the difficulty in establishing a definition of signatory to anticipate every situation and that REs should consider the issue as part of their risk-based approach to ML/TF.

As an example, company A has two directors who have established an account. Both of the directors are authorised to approve transactions on the account. An employee of the company has also been authorised by the directors to approve transactions on the account. Under the stated recommendation (based on authority to authorise transactions on an account) all three would be defined as signatories, however under the proposed reform (based on account ownership) only the two directors would be defined as signatories.

It is suggested the proposed reform should provide the flexibility referred to in the statutory review allowing REs to adapt to their approach based on the ML/TF risk.

The ABA also seeks further clarity on the difference between an 'authorised signatory' to an account as opposed to a 'nominated signatory'.

2.8.5 Investigating officer

In principle the ABA is not opposed to the proposed reform, however would like to understand the context and circumstances under which the Australian Commission for Law Enforcement Integrity (**ACLEI**) would seek to issue a notice under section 49. The ABA recommends that the ACLEI publish guidance on how the agency intends to use this regulatory tool.

Additionally, the ABA urges that the purpose, format and guidelines for the use of section 49 notices, where possible, be standardised across all agencies, particularly given the extension of authority to new agencies unfamiliar with the use/purpose of a section 49 notice, which could result in unnecessary costs for the industry.

2.9 Secrecy and access

New objects for Part 11	Discussion questions
Proposal: Establish objects for the secrecy and access provisions of the AML/CTF Act to guide interpretation. The objects could include elements that support: • the collection of financial intelligence • effective and efficient information-sharing to underpin collaborative efforts to combat and disrupt money laundering, terrorism financing, and other serious crimes • enhanced information-sharing partnerships between government and the private sector • robust safeguards to protect AUSTRAC information from inappropriate and unauthorised disclosure.	*What objects should be included to help guide interpretation?* The reference to serious crimes in the objects needs to be updated to refer to just "serious financial crimes" and not all serious crimes. The scope of the Act should be the deterrence of the financing of serious crimes, but not to be broadly applied to the deterrence of all serious crimes. The ABA believes that 'other serious crimes' would need to be properly defined before industry is able to understand the full impact of this proposal. The ABA would welcome more detail on this proposal, as there is a lack of detail which limits our ability to respond. In general, the ABA believes that robust safeguards should also be included to protect AUSTRAC information from misuse by members of the private sector who have access through the proposed private sector information-sharing model i.e. appropriate restrictions and oversight should be put in place to ensure that commercially sensitive information is not disclosed to a RE's competitors.
Expanded power to disseminate AUSTRAC information	**Discussion questions**
Proposal: Give the AUSTRAC CEO an explicit power to disseminate AUSTRAC information to support increasingly collaborative approaches to combating and disrupting serious and organised crime in Australia. This would include a power to disseminate information to (for example): • domestic law enforcement, regulatory and revenue agencies and taskforces at the Commonwealth, state and territory level • international partner agencies and multi-lateral bodies such as INTERPOL and EUROPOL • reporting entities and other private sector bodies, and • the general public, including academic and research bodies. The AUSTRAC CEO would only have an explicit power to disclose AUSTRAC information for the purpose of the performance of the functions of the CEO and limits would apply to the disclosure of 'sensitive AUSTRAC information.' In these circumstances, the AUSTRAC CEO would need to be satisfied that the recipient has given appropriate undertakings for: • protecting the confidentiality of the information • controlling the use of the information, and • ensuring the information will be used only for the purpose for which it is communicated.	*What safeguards should be established to address the privacy and confidentiality concerns associated with sensitive AUSTRAC information?* In New Zealand, under the draft *Anti-Money Laundering and Countering Financing of Terrorism Amendment Bill*[1] , the New Zealand Government proposed that the Privacy Commissioner should be consulted for any agreements outside of those provided for under legislation. The Bill states: *139A (2) Before recommending the making of regulations under this section, the Minister must consult -* *a) the agencies and regulators that may be affected by the proposed regulations; and* *b) the Privacy Commissioner; and* *c) any other person or body that the Minister considers may be affected by the proposed regulations.* The ABA suggests that there should be similar controls in Australia to ensure privacy obligations are met. The ABA recommends that a RE's identity should always be treated as confidential and not shared where the AUSTRAC CEO uses the explicit power to disclose AUSTRAC information for the purpose of the performance of the functions of the CEO.

[1] Explanatory note, Anti-Money Laundering and Countering Financing of Terrorism Amendment Bill, New Zealand Government Bill, https://www.justice.govt.nz/assets/Documents/Publications/exposure-draft-aml-cft-amendment-bill.pdf

Access to AUSTRAC information	Discussion questions
Proposal: Give the Minister for Justice the power to prescribe taskforces by way of regulation for the purposes of accessing AUSTRAC's intelligence database.[2] The current 'designated agency' model for accessing AUSTRAC information does not adequately provide for access by interagency bodies at the domestic level, such as domestic taskforces. Access to AUSTRAC information given to these task forces will be in accordance with a written authorisation by the AUSTRAC CEO outlining: • which officials, or which class of officials, can access AUSTRAC information, and • what types of AUSTRAC information they can access.	*Which agencies should have direct access to AUSTRAC's database?* The ABA would welcome further detail on this proposal as we are unclear as to what the AGD are attempting to solve.

Clarifying power to use AUSTRAC information	Discussion questions
Proposal: Clarify the scope of agencies' ability to use AUSTRAC information. Agencies that access AUSTRAC information do not have an explicit power to use such information. This generates ambiguity about the scope of an agency's power to use the information. To provide clarity, agencies would be given an explicit power to use AUSTRAC information that AUSTRAC has disseminated to them, or they have accessed. This power to use information would then be limited to use: • for the purposes of the performance of the agency's functions and exercising the agency's powers • in accordance with any undertaking agreed between • AUSTRAC and the agency, and • in accordance with any binding conditions imposed by AUSTRAC on use.	*Should agencies be given an explicit power to use AUSTRAC information?* *What limitations on this power should be prescribed in legislation?* The ABA's strong view is that agencies other than AUSTRAC should not be able to issue remediation or penalty notices. Such power should rightly remain with the AUSTRAC CEO. Additionally, access to information should be for investigation purposes only, with any subsequent requests for information being made directly to the subject and not back to the RE.

On-disclosures of AUSTRAC information	Discussion questions
Proposal: Clarify and simplify the provisions that allow an agency to make on-disclosures of AUSTRAC information. The provisions for the on-disclosure of AUSTRAC information are complex and interact with each agency's own information disclosure provisions. The proposal would allow an agency to on-disclose AUSTRAC information disseminated to, or accessed by, the agency to another Australian government agency where: a) the disclosure is for the purposes of the performance of the functions of the partner agency, and b) the partner agency is satisfied that the recipient agency has a proper interest in receiving such information. Such on-disclosures would need to be in accordance with any undertaking agreed between AUSTRAC and the agency and any binding conditions placed on the information by AUSTRAC.	*What limitations should be imposed on the ability of agencies to on-disclose AUSTRAC information?* The ABA suggests that the on-disclosure of AUSTRAC information be restricted to the 'designated agency' model and subject to clarification to those included under the definition of interagency bodies.

[2] This is similar to the model used to prescribe taskforces to receive taxpayer information under the *Taxation Administration Act 1953* and the *Income Tax Assessment Act 1936*.

Information sharing with the private sector	Discussion questions
Proposal: Establish an information-sharing model that allows AUSTRAC to disclose AUSTRAC information to reporting entities and private sector bodies to assist them to understand their risks and comply with AML/CTF obligations. The secrecy and access provisions prevent AUSTRAC from sharing sensitive AUSTRAC information with the private sector. This in turn limits AUSTRAC's ability to provide in-depth guidance to reporting entities about current ML/TF risks and inhibits Australia from developing a collective understanding of its ML/TF risk profile. The proposal would give the AUSTRAC CEO the power to disclose AUSTRAC information to reporting entities where the recipient has given appropriate undertakings to: • protect the confidentiality of the information • control the use of the information, and • ensure the information will be used only for the purpose for which it is communicated.	*What safeguards should surround the disclosure of AUSTRAC information to the private sector?* *For what purposes should AUSTRAC information be disclosed to the private sector?* This will depend on the information being shared. If it is in relation to data provided by the RE in the first place, via any reporting mechanism (TTR, IFTI, STR or compliance reporting) then no safeguards are warranted or necessary. The ABA also believes that AUSTRAC data should be shared with a RE where it can assist in the detection of any person (individual or non-individual) involved in ML/TF activity. Similar to the current methodology briefings that are distributed on a limited basis, AUSTRAC currently shares these with designated individuals/teams, and it is the ABA's view that this is limited to group MLRO or financial crime teams.

Disclosure of information to AUSTRAC	Discussion questions
Proposal: Establish a framework that allows reporting entities to disclose information to the AUSTRAC CEO (outside of section 49 notices and reporting obligations). If a more collaborative approach is adopted to the sharing of information with the private sector, it would be useful for the AUSTRAC CEO to be able to request information from a reporting entity. However, immunity from liability would need to be provided to anyone responding to such a request.	*If the AML/CTF Act were to provide such an authorisation, what restrictions should be placed on this authorisation?* *Should it be mandatory for reporting entities to respond to these types of requests for information?* The ABA is supportive of the development of a framework for RE to report information outside of current reporting requirements and notices. The framework to share information to increase intelligence holdings should be free enough to allow an easy exchange amongst parties and without reprisal, providing there is no egregious breach. However, as stated in the consultation paper, where a RE responds to an information request outside of a section 49 notice then they would need to be protected from liability; the framework would also need to address privacy concerns.

Tipping-off offence	Discussion questions
Proposal: Simplify the tipping-off offence and permit reporting entities to share SMR-related information with: • domestic and foreign members of their corporate or designated business group, including parent entities, subsidiaries and branches, and • external auditors subject to appropriate controls and safeguards.	*What controls and safeguards should apply to the sharing of SMR-related information offshore?* *Should the sharing of SMR-related information be limited to countries with equivalent AML/CTF requirements?* *What groups should reporting entities be able to share SMR-related information with?* As per our comments earlier in this submission, the ABA believes consideration should be given to permitting the sharing of SMR information across a corporate group rather than just within the artificial construct of a designated business group, so that this information can be shared across parent entities, subsidiaries and branches in and outside of Australia.

	Consideration should also be given to sharing SMR information with legal advisers so that, where necessary, REs are in a position to share information with lawyers for the purposes of obtaining legal advice in relation to compliance with their AML/CTF obligations. The ABA would hold that if REs are part of the same corporate group (as discussed in our response to section 2.7 – Designated business groups), then no additional safeguards are necessary or warranted. It is not clear to the ABA why SMR related information (other than raw numbers) would be shared with an external auditor. The ABA view is that a number count should be sufficient and that there should be no prohibition on this.
Cross-border notification of SMRs	**Discussion questions**
Proposal: Permit reporting entities that have filed a SMR with AUSTRAC to disclose to an FIU in another country that the SMR has been filed. This proposal will ensure that multiple countries involved in a suspicious transaction can be alerted that an SMR has been made. To prevent law enforcement investigations from being jeopardised, disclosures could be limited to just providing, for example, a unique SMR reference number, rather than disclosing the actual details of the SMR.	*Should reporting entities be able to advise FIUs of other countries that they have made an SMR to AUSTRAC?* *What limitations should be placed on this ability to share SMR-related information?* A significant number of Australia's banks operate in a number of jurisdictions and customers may have cross-jurisdictional relationship. These banks should be able to disclose to a regulator that an SMR has been lodged in another jurisdiction, as this may assist in identifying additional illicit activity outside of Australia and provide that information to a FIU that may not have identified the customer as a person of interest. The disclosure should be limited to the actual lodgement itself rather than the details of the filing i.e. grounds for suspicion, as these could be obtained via any existing MOU arrangements with AUSTRAC.
Private-to-private information sharing	**Discussion questions**
Proposal: Permit the sharing of information between private sector entities to empower the private sector to work together to identify and, if necessary, report on suspected ML/TF. The USA PATRIOT Act provides a model for this type of information sharing, permitting two or more financial institutions and any association of financial institutions to share information with one another regarding individuals, entities, organisations, and countries suspected of possible terrorist or ML activities, on a voluntary basis, and with specific protection from civil liability for disclosure of personal data. The shared information may only be used to identify and if necessary report on ML or terrorist activity. Only details about customers or transactions which form the basis of a SMR can be shared with other financial institutions, provided they do not share the actual SMR or reveal the existence of the SMR.	*Should Australian reporting entities be explicitly able to disclose details about customers or transactions that formed the basis of an SMR to other reporting entities?* *What would the benefits of this proposal?* *What controls and would be required to protect the ongoing confidentiality and security of the underlying information?* The ABA would support such a reform, particularly where exits are being undertaken. At the moment, in Australia, a bank may exit a customer and that customer can simply walk in to another bank and open an account and recommence that activity. The ABA supports the reforms as often a bank may also be an interposed institution in identifying an activity or transaction that it reports, but is unable to provide any details of its suspicion to the ultimate beneficiary institution.