



Investment & Financial Services Association Ltd

ACN 080 744 163

1 August 2006

Senator the Hon Chris Ellison
Minister for Justice and Customs
Parliament House
Canberra ACT 2600

Dear Minister

Revised exposure draft Anti-Money Laundering and Counter-Terrorism Financing Bill (AML/CTF Bill)

Thank you for this opportunity to comment on the revised exposure draft Anti-Money Laundering and Counter-Terrorism Financing Bill (AML/CTF Bill). Enclosed is a copy of IFSA's primary submission on the AML/CTF Bill at this time. IFSA will be providing additional material on a number of issues to you and your Department as soon as possible.

I am particularly pleased to see that the revised AML/CTF Bill attempts to address many of the concerns that had originally been raised in respect of the legislative package released on 16 December 2005.

In particular, I note the substantial progress that has been made on developing a large proportion of the necessary legislative Rules that underpin the Bill. I believe that the spirit in which these draft Rules were developed is testament to industry's commitment to assisting you in delivering a workable and effective AML/CTF regime.

In this regard, it is important to observe that the Bill itself has not been the subject of a similarly intensive co-development process. As a consequence, a significant number of issues have again been identified which we believe require rectification prior to the Bill being introduced. To the greatest extent possible, these issues have been outlined in our submission which largely focuses on the Bill.

Unfortunately, however, given the substantial changes that have occurred between the previous version of the Bill and the current draft, the 3 week consultation period provided for comment on the revised package has not been sufficient to allow IFSA to obtain all its members' views, and propose well thought out solutions in respect of all identified issues.

Regardless, IFSA will continue to discuss these matters with Attorney-General's Department post 4 August 2006 to the extent the legislative timetable permits.

In this regard, IFSA is strongly of the view that if sufficient time is not allowed for industry and the Attorney-General's Department to continue to "work through the issues", there is a high probability that these issues will remain outstanding at the time the Bill is introduced into Parliament.

This is expected to result in detailed submissions having to be lodged with the Senate Legal and Constitutional Committee (the Committee) raising outstanding as well as new matters which will inevitably be identified with the benefit of additional time to consider the package.

IFSA's strong preference would be to work with your Department to resolve the majority of outstanding issues rather than via submissions to the Committee at a later stage.

In respect of the transition period to be applied to the legislation, IFSA believes that a 3 year transition period is appropriate having regard to the obligations required to be implemented and the time that has been allowed for other significant legislative reforms, such as the *Financial Services Reform Act 2001*, to be introduced.

IFSA looks forward to discussing this critical issue with you at the Ministerial Advisory Group meeting on 10 August 2006.

Finally, I thank you for this further opportunity to comment on the draft legislation and Rules. It is industry's aim that we continue to work together to ensure the legislation does not introduce any significant unintended consequences or impose an undue burden on the industry or consumers.

If you have any questions in relation to this submission, please do not hesitate to contact me or Martin Codina on (02) 9299 3022.

Yours sincerely

Richard Gilbert
Chief Executive Officer

PRELIMINARY MATTERS

INDUSTRY SUBMISSION

The following table and respective attachments represent IFSA's primary submission on the issues covered. However, IFSA also supports the Australian Banker's Association submission prepared on behalf of the financial services sector.

CONSULTATION PERIOD – EXTENSION REQUIRED

In our first submission on the 16 December exposure draft Bill, IFSA noted that a "second round" consultation period of around 3 weeks would be welcomed but that, respectfully, such a timetable would be inadequate and unlikely to be sufficient for industry to undertake a full examination of the completed package and its interaction with other laws.

We also indicated that given the significance of this legislation, it is in everyone's interest (Government, consumers and industry) that adverse unforeseen consequences and outcomes be avoided where possible.

IFSA therefore requests that due to the large number of issues identified, the Government consider extending this period of consultation until 1 October 2006 to enable a more careful and extensive consideration of the package.

ISSUE TITLE	DESCRIPTION	PROPOSED SOLUTION
KEY ISSUES		
Implementation timeframe	<p>The Bill does not specify any implementation/transition period. IFSA understands that this issue will be discussed at a Ministerial Advisory Group meeting on 10 August. However, in advance of that meeting, IFSA would like to make some preliminary comments.</p> <p>While there may be risks with providing an implementation/transition period that is excessively lengthy, there are also significant risks in providing an implementation/transition period that is insufficient to allow for the obligations imposed under the Bill to be properly implemented. IFSA has previously stated that not all participants in the Australian financial services industry have, to date, been subject to all of the measures outlined in the <i>Financial Transaction Reporting Act 1988</i> (FTRA). Indeed, a significant number of financial services participants do not deal with the general public on a cash basis and consequently are not currently required to verify the identity of individual clients. It should therefore not be assumed that all reporting entities are commencing from the same “base” and hence equally positioned to achieve 100% AML/CTF compliance after the end of any implementation/transition period.</p> <p>Further, and having particular regard to existing IT systems, there will be significant competition for resources during the transition period. The shorter the transition period the less likely it will be that reporting entities, particularly smaller entities, will be able to obtain the necessary resources to undertake the necessary upgrades etc.</p> <p>IFSA has also previously stated that a legislative design and implementation period similar to that of the Financial Services Reform (FSR) Act would be appropriate. FSR was implemented in the following fashion:</p> <p>March 1999: CLERP 6 Consultation Paper released February 2000: Draft FSR Bill released September 2001: Bill receives the Royal Assent March 2002: Legislation commences with 2 year transition period March 2004: End of transition period</p>	<p>Industry’s preferred position is for an implementation roll-out period of 3 years. Industry believes it is far preferable to implement the regime properly and effectively over a realistic period rather than rush the implementation and risk unnecessary regulatory action from the regulator.</p> <p>Industry will present a more detailed proposal in time for the Ministerial Advisory Group meeting on 10 August. The proposal will consider, amongst other things: the number and range of entities caught by the Bill; expected transition costs; an indication of the more immediate deliverables versus those elements which will require considerable time to implement and additional timeframes that may be required for certain products and systems.</p>

	<p>It should be noted that many of IFSA's members have strongly suggested that this legislative package is more far reaching and significant than FSR.</p> <p>Finally, IFSA stresses that this regime will not be implemented in a vacuum. That is, the industry is currently responding and implementing a wide range of regulatory reforms including:</p> <ul style="list-style-type: none"> ▪ new fee disclosure requirements under the Corporations Act; ▪ Federal Government's 2006 Budget announcements around the treatment of superannuation; ▪ new APRA standards on governance and fit and proper person requirements; and ▪ further Corporations Act refinements in respect of FSR, financial reporting, corporate governance and other matters. <p>Industry is therefore concerned to ensure that any timetable for implementation is realistic, in the context of other obligations being imposed on the industry as well the nature of the obligations which will be required to be implemented – consisting of substantial technology intensive solutions/investments.</p>	
<p>Superannuation</p>	<p>While we acknowledge that the Government has recognised the low risk nature of superannuation, the linking of the provision of a designated service to preservation age in Table 1 of section 6 presents a number of serious practical difficulties for superannuation Trustees, their customers and their employers. IFSA therefore suggests the alternative approach outlined in Attachment A.</p>	<p>See Attachment A.</p>
<p>Life insurance policies (generally)</p>	<p>We understand from AGD that the Government has attempted to <u>only</u> include in the Bill life policies that have an investment component or surrender value.</p> <p>However, the definition of 'life policy' in the Bill and in turn that definition's reliance on the phrase 'term life policy' (which is defined neither in the Bill nor in the Life Insurance Act), it is clear that this approach does not achieve the Government's objectives.</p>	<p>IFSA suggests that the definition of "life policy" be based on the definition of "investment life insurance product" in section 761A of the Corporations Act.</p> <p>Essentially, this seeks to distinguish between life policies which are contracts of insurance (which do not fall within the definition) and those which are not contracts of insurance (which do fall within the definition). The distinction in essence turns on whether or not payment of benefits under the policy depend on the occurrence of a contingency.</p>

		<p>Alternatively, the definition in the Bill could be amended so that it captures a life policy (as defined in the Life Insurance Act 1995 (Cth)) only if it had a positive surrender value (therefore excluding life policies with no or a zero surrender value).</p> <p>IFSA welcomes the opportunity to continue to further discuss this issue with Attorney-General's Department.</p>
<p>Life insurance policies (legacy products)</p>	<p>IFSA supports a risk based approach to the treatment of existing legacy products. Therefore, in IFSA's view, where a legacy product does not permit new customers or further contributions to be made, it will effectively have a very minimal AML/CTF Program obligation as its customers will all be pre-commencement customers and there will be limited transactions to monitor or report etc.</p> <p>In some cases, however, it may be appropriate for AUSTRAC to grant specific exemptions under section 203C. IFSA acknowledges that such matters can be dealt with by AUSTRAC, although AGD will need to provide AUSTRAC with clear direction where it feels exemptions of this nature are appropriate.</p> <p>Regardless, where the legacy product is a "hybrid", that is, it is closed to new members but allows contributions to be made, some form of a risk-based AML/CTF Program may be appropriate to address any ML/TF risks.</p> <p>Where AML/CTF obligations are imposed, however, it is vital that additional time is provided to allow appropriate systems and controls to be implemented. Both Treasury and ASIC has accepted that such products pose unique challenges (by virtue of being supported by outmoded technology) and have on various occasions either provided permanent or transitional relief from certain regulatory requirements.</p>	<p>IFSA would be happy to work with the Government and AUSTRAC in developing any appropriate exemptions under section 203C.</p> <p>IFSA believes that an extended transition period should apply to all legacy products in recognition of the fact that the systems supporting these products require considerable changes in order to accommodate the proposed AML/CTF regime.</p> <p>IFSA therefore suggests that an additional period of 2 years, in addition to the maximum period for implementing other aspects of the AML/CTF legislation, would be appropriate.</p> <p>IFSA welcomes the opportunity to continue to discuss this issue with Attorney-General's Department and AUSTRAC.</p>
<p>Managed investments (Section 6, Item 36)</p>	<p>IFSA submits that a separate and clear designated service is required in respect of managed investment schemes. The current position is unclear due to the reliance on the term 'security' and the potential application of the wording in item 36 of table 1 in section 6 of subparagraph (b)(ii).</p>	<p>IFSA suggests that the following wording be inserted into a new item in section 6:</p> <p>"XX issuing, selling or redeeming an interest in a managed investment scheme to a person where the interest was issued is in the course of carrying on a business."</p>

		<p>To be clear, IFSA proposes that a designated service would arise upon the event of either issuing, selling or redeeming. However, provided a customer has been identified prior to the provision of the designated service (in respect of either of those events), an additional identification obligation should not arise if say a customer was “redeeming” an interest where they had already been identified by the reporting entity immediately prior to “issuing” that interest.</p> <p>We believe this interpretation is consistent with the current wording of section 29 which permits a designated service to be provided so long as the customer has previously been identified.</p>
<p>Wraps/platforms/IDPS arrangements: Clarify proposed treatment</p>	<p>The current position is unclear due to the reliance on the term ‘security’ and the potential application of the wording in item 36 of table 1 in section 6 of subparagraph (b)(ii).</p> <p>Such arrangements may, for example, be caught under the Corporations Act as a managed investment scheme. However, for the avoidance of doubt, IFSA submits that a separate and clear designated service is required in respect of such arrangements.</p> <p>IFSA would welcome the opportunity to discuss these matters further.</p>	<p>IFSA notes that for the purposes of regulation under the Corporations Act, an Investor Directed Portfolio Service is defined by ASIC under Class Order 02/294: Investor directed portfolio services. This term is widely used within the industry and would not require any additional definition for AML/CTF purposes.</p> <p>IFSA will provide a more considered view to Government as soon as possible on this issue.</p>
<p>Definition of designated services generally</p>	<p>IFSA notes that some designated services are provided on the issue of a product or service and others on the withdrawal from a product or service.</p> <p>Given the very short time period for consultation, IFSA has been unable to conduct a thorough examination of the implications of this issue. However, it is of vital importance in relation to the timing of identification procedures and the interpretation of “ceasing to provide a designated service”.</p> <p>This issue is also especially relevant when defining pre-commencement customers to ensure that if the designated service is provided on withdrawal of a product or service, then the customer should still be considered a pre-commencement customer.</p>	<p>IFSA welcomes the opportunity to continue to discuss this vital issue with Attorney-General’s Department.</p>
<p>Identification procedures</p>	<p>The current operation of sections 34 and 34A in the Bill present a</p>	<p>IFSA is continuing to consult with its members to develop an</p>

carried out by another person

number of practical issues for the financial services industry.

Definition of external agents

The industry has serious doubts about whether the present definition in section 12 of the Bill adequately covers all of the relevant relationships in a financial services context as it is only covers agents that are performing designated services on behalf of the Reporting Entity and not other outsourced functions under the Bill.

Issues with Financial Advisers not being Reporting Entities

As financial advisers are no longer reporting entities (and hence allowed under 34(1)(ii) to carry out customer identification procedures on behalf of other Reporting Entities), this poses potentially serious issues for product manufacturer reporting entity's who in the ordinary course of business rely on financial advisers as intermediaries between them and a customer.

In particular there is no current mechanism in the legislation which makes it clear that advisers or holders of Australian Financial Services Licences can be appointed to carry out identification of customers on behalf of product manufacturers or other Reporting Entities, unless they can be separately accredited under the AML Rules under section 34(1)(a)(iii). However there have been no AML Rules created under this provision yet.

Overlap between sections 34 and 12: Written Authorisation

When a Reporting Entity appoints an external agent under section 12 and the agent also carries out identification procedures under section 34, it appears that the agent needs to be authorised in a different way under each section. The two overlapping provisions will only create difficulty in interpretation.

Reasonable reliance

Due to the extent of contractual relationships and regulatory obligations that exist between financial product issuers/manufacturers and regulated financial advisers, the industry does not support the imposition of a requirement that the reliance on a CID procedure

agreed and workable solution to these complex issues. A follow-up submission will be lodged as soon as possible.

conducted by a financial adviser has to be “reasonable”.

The rigorous requirements around the AFSL process (for which ASIC has oversight) include an obligation for the licensee to establish and maintain adequate risk management systems. As stated in ASIC Policy Statement 164, the requirement for risk management systems ensures licensees explicitly identify the risks their businesses face, and have measures, processes and procedures in place to keep those risks to an acceptable minimum.

Therefore, industry feels that reliance on such an entity should not be subject to additional due diligence and submits that such reliance is reasonable and practical.

Finally, paragraph 5.3.3 of the Rules creates the need for a reporting entity to put in place appropriate risk based systems and controls to review whether the authorised person is complying with the reporting entity’s customer ID program and reporting relevant suspicious matters to the reporting entity within the necessary timeframes. This provides an appropriate control without the need for an additional assessment to be carried out by the Reporting Entity.

Industry believes that further discussions are required to arrive at a workable solution that recognises existing obligations and arrangements.

Chapter 5 of the Rules: When an applicable customer identification procedure or an applicable agent procedure can be carried out by another person

Chapter 5 of the Rules imposes serious complications on the industry in that it essentially requires an authorised person to conduct a CID procedure in accordance with the relevant RE’s predetermined CID program.

As it stands, paragraph 5.2.2 of Chapter 5 in the Rules requires any authorised person to conduct a CID procedure in accordance with the reporting entity’s CID program. This will effectively require third parties who deal with multiple reporting entities to conduct different CID procedures depending on which reporting entity’s behalf they are conducting the CID procedure.

This precludes authorised persons from developing their own CID procedure that may be comparable to a number of RE's rather than having to specifically apply the CID program of the relevant RE each time.

Consequently, where advisers offer their customers a large variety of financial products/services (say through investment platform type services) on behalf of reporting entities that they are not related to, this will give rise to a range of practical difficulties.

The present Rule does not appear to allow a financial adviser to reconcile differing CID program obligations from the various RE's on whose behalf it will conduct such procedures. Importantly the rule also does not allow a Reporting Entity to accept an alternate form of identification procedure that might be comparable to its own, but not exactly the same.

Operation of section 34A

Section 34A, in theory, allows reliance on another reporting entity without the need for a written document. However, the present clause requires AUSTRAC to provide for circumstances to be met in the Rules for this to be able to occur. These circumstances have not yet been provided and hence the section may be considered inoperative until such time as a Rule is provided.

IFSA questions the requirement that AUSTRAC impose additional conditions when arguably this reliance is arguably the lowest-risk form of risk as it involves another reporting entity.

Structural issues

It is vital that any solution to these issues does not significantly alter existing practices or give rise to fresh structural issues for the industry. As IFSA has previously indicated, AML/CTF requirements should not drive the structure of the industry.

"Designated business group" definition

The present definition of Designated Business Group (DBG) and the scope of activities that can be covered-off within the DBG are too narrow.

IFSA believes that a workable and appropriately flexible solution would be to allow any reporting entities to elect to become a DBG. This could occur by way of notification to AUSTRAC or by

	<p>Providing greater flexibility will allow for minimal duplication within conglomerates and between other related parties for whom forming a DBG to perform their respective AML/CTF obligations is desirable.</p> <p>IFSA believes that whether or not such an arrangement is in fact workable should be left entirely to the members of the DBG to determine. Therefore, IFSA supports an “opt-in” mechanism which requires the agreement of existing DBG members as well as an acceptance of individual liability for the maintenance, compliance and the implementation of an effective joint Program.</p> <p>This approach provides the necessary flexibility and at the same time ensures that members are <i>incentivised</i> to ensure that the program is effective and complying with the requirements under the Bill.</p> <p>In addition, to be truly effective, the joint program has to extend to broader matters than just the AML/CTF Program obligations. That is, to matters that are relevant to compliance or purported compliance with AML/CTF obligations under the Bill. Fundamentally, this means allowing for the full sharing of relevant information, not just information specific to "the risks involved in dealing with [a] customer" (as per current tipping off exclusion for DBGs).</p> <p>Therefore, members of a DBG should be able, once they have become part of that DBG, to operate as a DBG in fulfilling all of their obligations under the AML/CTF regime, with liability for ensuring compliance remaining with the individual REs who are part of the DBG.</p> <p>In practice, this would allow each member of the DBG to either conduct AML/CTF functions required under the Bill individually or defer to another member of the DBG for that function to be performed by that other entity in the group on their behalf.</p>	<p>way of a DBG membership register maintained and provided to AUSTRAC as part of any AML/CTF compliance report.</p> <p>This approach would permit a wide range of reporting entities (whether companies or otherwise and whether related or otherwise) to elect to be treated as a DBG.</p> <p>The DBG should be able to implement a joint AML/CTF Program that allows for full reliance and sharing of information in respect of:</p> <ul style="list-style-type: none"> ▪ any relevant AML/CTF information (including relevant reports); ▪ centralised recording keeping; ▪ identification verification for customers and agents ▪ collection of additional KYC ▪ exemption from funds transfer reporting obligations and originator information ▪ shared/joint compliance reports ▪ a single AML/CTF compliance officer ▪ a single level of board oversight where appropriate
<p>Reporting suspicious matters – timeframe and breadth of requirements</p>	<p><u>General issue</u></p> <p>IFSA continues to have concerns about the breadth of the obligations and the timeframe under which suspicious matters must be reported.</p> <p>Section 39(2)(b) obligates an entity to report suspicious matters concerning offences relating to money laundering or the financing of</p>	<p><u>Options to address issues</u></p> <ul style="list-style-type: none"> ▪ 24 hour timeframe should be restricted to terrorist financing (excluding money laundering) and clarified to mean “1 business day”; ▪ Money laundering should be subject to the same time period

terrorism within 24 hours from forming the suspicion. As the majority of suspicious matters will be relate to money laundering, the majority of suspicious matter reports will be required to be lodged within 24 hours.

As a result, it is especially concerning that this extremely short 24 hour timeframe also applies to ML. This period is stricter than the FTR Act requires and those applying in other jurisdictions: FTR Act and UK 'as soon as is practicable'; US 30 days; Canada 30 days; HK 'as soon as reasonable'.

In addition, we note that with respect to reporting of tax-related suspicious transactions there has been a change of wording from the first Bill to the current draft.

Specifically, section 39(1)(d) of the first draft referred to reasonable suspicion that a service 'may be relevant to the evasion or attempted evasion' of a taxation law. Section 39(1)(f)(iii) of the current draft AML/CTF Bill refers to reasonable suspicion that a service 'may be connected with a breach or attempted breach' of a taxation law.

IFSA submits that 'connected' is too broad and that a tighter nexus should be required. In addition, 'breach' is considered to be broader than the previous 'evasion'. This exacerbates the concerns that already exist with respect to the breadth of these obligations generally.

Uncertainty about when time "starts to run"

As with other reporting regimes, this is a key issue that requires additional guidance. IFSA supports a process that will allow for proper consideration of the facts and circumstances by appropriate risk management personnel prior to a 'reasonable suspicion' being deemed to have been formed. This will help prevent poorly considered reporting and/or "defensive filing" to AUSTRAC.

Further, the 24 hour period in respect of terrorist financing activities should be amended to "1 business day". It is impractical to expect that such reports will be made on a Saturday or Public holiday where they arise late in the preceding day.

Section 34 complication

An additional issue arises with the interaction of this provision with a

as for suspicion of other matters/offences, which IFSA believes ought to be 5 business days;

- Clarifying that time runs from the time that a qualified compliance or investigations officer with responsibility for suspicious transaction reporting under the reporting entity's AML/CTF Program forms the view that there are reasonable grounds for a relevant suspicion;
- In prescribing offences, non-compliance and late compliance be distinguished with late compliance potentially met with an appropriate daily penalty;
- To address the s34 issue, where the s34 authorised person passes a suspicious matter report to a reporting entity as opposed to AUSTRAC, the relevant time should either:
 - Re-start upon being received by the reporting entity; or
 - 24 hours should be provided to the reporting entity to "pass it up the line" to AUSTRAC.

	<p>section 34 authorised person. It is possible for an RE to be held liable due to a section 34 authorised person not passing a suspicious matter report to AUSTRAC or the RE within the specified timeframe. In addition, where the section 34 authorised person provides the SUSTR “1 minute before the relevant time expires”, the RE will be held liable for the SUSTR breaching the relevant time period.</p> <p><u>Penalties</u></p> <p>It does not seem appropriate to apply the same penalty for late lodgement as for non lodgement.</p>	
<p>"Politically Exposed Person" (PEP) definition</p>	<p>The definition included in the prior Bill that referred to PEPs being defined in a Rule has been deleted.</p> <p>Industry requires certainty on this matter given that CID procedures will need to be implemented, including taking into account risks associated with PEPs.</p>	<p><u>Definition</u></p> <p>IFSA believes that the Bill should specify the definition of a PEP by clearly defining the various categories of a PEP. The explanatory memorandum should also include examples of each category and the possible titles of individuals within each category.</p> <p><u>Identification</u></p> <p>The preferred approach to the identification and verification of PEPs is for government to assist by providing access to government operated, sponsored and/or funded lists of individuals it considers to be PEPs.</p> <p>This method will allow for a uniform approach to be taken to this issue and avoid industry incurring a potentially unnecessary cost in having to subscribe to one or a number of available commercial PEP lists.</p> <p>A further benefit of such an approach for AUSTRAC and industry is that it would provide a safe harbour for reporting entities that rely on the Government “approved” list and at the same time allow AUSTRAC to easily enforce any entity’s lack of compliance with the list.</p>

<p>Extra-territorial application of AML/CTF Bill in NZ (as required under the AML/CTF Program Rule)</p>	<p>There is a requirement under the AML/CTF Programs Rule (para 8.9) for Reporting Entities to put in place risk based systems and controls in respect of any permanent establishments through which it provides designated services to the extent it is ‘reasonable and practicable to do so having regard to local laws and circumstances’.</p> <p>In addition, where a foreign country is regulated by AML/CTF legislation that is comparable to our own, only minimal additional controls need to be considered.</p> <p>Given the scope of these obligations, many financial services providers who have substantial operations in NZ will be required to implement Australian compliant AML/CTF risk based systems and controls in that jurisdiction.</p> <p>Importantly, New Zealand is “in the process” of drafting and implementing its own AML/CTF legislation. However, we understand that the timing of this legislation is at a slight delay to our own.</p> <p>Therefore, many Australian reporting entities face having to “roll-out” AML/CTF procedures twice in NZ as a result of Australia’s regime having extra-territorial application.</p>	<p>IFSA is seeking a full class exemption from the requirement to meet Australian AML/CTF requirements for permanent establishments in NZ, until NZ legislation in this area has been implemented and assessed.</p> <p>As a result, permanent establishments in NZ should not be subject to Australian AML/CTF obligations in any way.</p>
<p>Threshold Transactions</p>	<p>There is considerable uncertainty about the nature of transactions that will be caught under the threshold transactions reporting requirement.</p> <p>Specifically, the definition of ‘threshold transaction’ has a number of sub-definitions (‘physical currency’, ‘e-currency’ and ‘transfer’) which combine to produce the uncertainty in this area.</p> <p>Firstly, ‘physical currency’ is essentially defined as ‘coin and legal money’ designated as legal tender.</p> <p>Secondly, the definition of ‘e-currency’ requires that it be backed either directly or indirectly by precious metal; or bullion; or a thing prescribed by the Rules.</p> <p>Finally, the definition of ‘transfer’ is very broad and includes anything that may ‘reasonably be regarded as the economic equivalent of a</p>	<p>In respect of the first issue, the definition could either be amended or further clarification provided in the Explanatory Memorandum to the Bill.</p> <p>In respect of the threshold amount issue, IFSA believes that it should be increased from \$10,000 to \$20,000 to bring it closer into line with other jurisdictions such as in Europe and the US where the amount is the European and US equivalent of \$20,000.</p> <p>In addition, allowing AUSTRAC to set the threshold in the Rules would allow greater flexibility over time and would reduce the likelihood of AUSTRAC being inundated by threshold transaction reports that do not reflect any real significance.</p>

	<p>transfer'. An example is also provided which includes debiting an amount from a person's account and crediting an equivalent amount to another person's account.</p> <p>As a result, it is not clear whether an EFT or journal credit/debit entry, for example, is caught. Clarification of this is required.</p> <p>In the event that EFTs and other transfers are caught, IFSA believes that the threshold of 'an amount not less than \$10,000' is too low having regard to the range of designated services that the threshold will apply to and the historical time at which the threshold was originally introduced.</p> <p>IFSA understands that this amount was introduced on/around 1988 along with the FTR Act and is therefore not reflective of today's operating environment.</p>	
<p>Ceasing to provide designated services</p>	<p>As IFSA has previously raised, in many cases it will not be possible to cease to provide the designated service – both as a practical matter (for example, where a scheme is illiquid) and as a matter of law (for example, where that action might give rise to a legal claim or where the act of ceasing to provide one designated service inevitably results in the provision of a different designated service).</p> <p>Further, the words “must not continue to provide” are problematic for contractual arrangements such as life insurance where the entity cannot cease providing the insurance cover until the relevant identification has been conducted where an insurance contract is already in place.</p> <p>Interestingly, in other cases, ceasing to provide the designated service does not prevent the reporting entity from releasing funds. For example, on current drafting, securities are caught only when issued, not redeemed. Hence a reporting could theoretically be free to allow a suspicious customer to withdraw their funds.</p> <p>Finally, there are serious concerns about how these obligations interact with the tipping-off offence.</p>	<p>IFSA believes that the general rule ought to be that ceasing to provide a designated service should be interpreted as meaning: "funds are not able to be returned to the customer or to any other person as directed by the customer".</p> <p>Beyond this, IFSA believes that it should be left to reporting entities to make an ML/TF risk based assessment as to the appropriate course of action. This approach is consistent with a risk-based approach whereas the present requirement to cease to provide the designated service regardless of the risks is not.</p> <p>Such an approach is also consistent with existing wording in the Rules which allows but does not mandate ceasing the designated service, so that a reporting entity must take “appropriate and reasonable steps or other appropriate action [for example, ceasing to provide the designated service]”.</p>
<p>Electronic verification</p>	<p>IFSA has made a submission to the Consumer and Privacy Taskforce in relation to extending the functionality of the Government's proposed “Access Card” to enable reporting entities to rely on the Card as an</p>	<p>See <u>Attachment B</u>.</p>

	acceptable form of identification and encouraging the Government to provide a simple, yet robust, electronic mechanism to verify the authenticity of an Access Card.	
Certification of copies	<p>Under Chapter 1 of the rules, “certified copy” is defined as a document that has been certified as a true copy of the original document by a range of persons, including:</p> <p>“(n) an officer with, or authorised representative of, a holder of an Australian financial services licence, having 5 or more continuous years of service with one or more licensees.”</p> <p>Critically, an Australian financial services licence has only been on issue since March 2002, and mandatory since March 2004. Therefore, no current officer or authorised representative is able to meet this definition.</p>	<p>IFSA suggests that the relevant text in paragraph 1.3.1 could be reworded as follows:</p> <p>“...having 5 or more years continuous service with one or more entities, each being an Australian Financial Services Licensee at the time of certification.”</p> <p>This formulation retains the link to “5 years” but ensures that it is actually possible for a person to meet the relevant requirement.</p>
Compliance reports	<p>The purpose of such reports is unclear. No guidance or indication has thus far been provided in relation to what they are intended to achieve; what they will require; and how often they will be required.</p> <p>Relevantly, there is no UK requirement to file an AML/CTF compliance report with the UK regulator. Instead, the UK approach relies on internal compliance reports commissioned by senior management (on at least an annual basis) that enable the organisation to identify deficiencies in its compliance with relevant obligations etc.</p> <p>IFSA believes that this purpose, as an internal compliance report, is in practice already covered by the AML/CTF Programs Rule in paragraphs 8.4.1, 8.5.1 and 8.7.1 of the Rules.</p>	<p>IFSA believes that unless there is a strong case for requiring such reports, in addition to all the other obligations in the Bill, they should be removed.</p>
STRUCTURAL/LEGISLATIVE DESIGN ISSUES		
Industry developed Guidelines	<p>IFSA strongly supports the use of industry guidelines as part of Australia’s AML/CTF regime. Industry commitment to the development of a workable regime to date demonstrates that there is sufficient goodwill amongst industry participants to establish similar industry developed guidance in Australia.</p> <p>IFSA strongly believes that given the detailed level at which Guidelines will need to be focussed – it is likely that AUSTRAC issued Guidelines</p>	<p>Bodies representing the financial services industry will further develop a proposal for the Minister’s consideration. Amendments to the Bill are not required to given effect to this proposal.</p>

	<p>will not meet industry needs.</p> <p>Broadly, IFSA is of the view that a UK equivalent model is the most likely to provide appropriate Guidelines for industry application that are the product of robust consultation with Government.</p>	
AUSTRAC's Rule making powers (Section 191 and generally)	<p>Other than requirements under the Legislative Instruments Act, there is no explicit consultation requirement contained in the legislation.</p>	<p>Industry would like to work with Attorney-General's Department and AUSTRAC to develop workable and reasonable parameters around a specific consultation process relating to the Rules. This could include minimum public disclosure periods prior to coming into force (except in "emergency situations") as well as a requirement to provide a copy of any Regulatory Impact Statement accompanying the Rule in advance of it being introduced.</p>
AUSTRAC Powers (including Monitoring warrants – section 128)	<p>The industry has been unable to fully consider the scope of powers now provided to AUSTRAC under the Bill.</p> <p>However, given the broad scope of powers available to AUSTRAC, industry believes that it is critical that AUSTRAC develop an enforcement policy in advance of the legislation coming into force.</p>	<p>A thorough and independent examination of the scope of AUSTRAC powers should be undertaken.</p>
Customer dispute resolution	<p>Industry has not had sufficient time to consider this issue more fully.</p> <p>However, at a later stage, industry believes it will be necessary to consider whether there is a need for some type of formal external dispute resolution system/process for customers vis-a-vis RE's where, for example, an RE has done something in purported compliance with AML/CTF laws but the customer is dissatisfied with the outcome.</p> <p>Specifically, further consideration of the following is suggested:</p> <ol style="list-style-type: none"> 1. Whether a new body is required or whether existing dispute resolution bodies could hear such disputes – eg. banking and financial services ombudsmen, FICS, SCT etc 2. In the case of existing dispute resolution bodies, whether they would currently be able to review matters relating to AML/CTF laws or whether their "laws of incorporation" would require amendments. 3. How such bodies would deal with sensitive information relating to an RE's AML/CTF risk based systems and controls etc. 	<p>Given our member's direct funding of existing external dispute resolution bodies such as the SCT (via APRA levies) and FICS, IFSA would like to be involved in any consultation on these matters.</p>

	No doubt other issues will need to be considered.	
Appeal mechanism for Reporting Entities	It is unclear what process is open to a reporting entity in the event that they wish to resolve a 'dispute' with AUSTRAC, in relation to either the exercise of AUSTRAC's powers or a determination made by AUSTRAC in relation to acts or omissions of the RE.	Industry would like to continue to consult with both Attorney-General's Department and AUSTRAC as to what mechanisms may be able to be developed to alleviate these concerns.



Investment & Financial Services Association Ltd

**IFSA SUBMISSION ON THE EXPOSURE DRAFT
AML/CTF BILL 2006**

ATTACHMENT A

CONTENTS

TREATMENT OF SUPERANNUATION AS A DESIGNATED SERVICE

SUPERANNUATION PROPOSAL

1. Definition of designated service

In respect of superannuation, the following designated services will replace existing items 46 - 51 in table 1 of section 6 of the Bill:

- The cashing* out of all or part of a member's interest in a superannuation fund or RSA, but only where the value of the member's interest is greater than \$25,000.
- Designated service item 45 in Table 1 of Section 6 of the Act (which deals with the payment of pensions), but with an exemption for SMSFs.

The new designated service of cashing an interest could be defined as follows:

- I. In the capacity of Trustee of a super fund (other than a SMSF) or of an ADF – cashing* all or a part of an interest held by a member of the fund where the member's interest is greater than \$25,000.
- II. In the capacity of an RSA provider – cashing* all or a part of an interest held by an RSA holder where the RSA holder's interest is greater than \$25,000.

*Importantly, cashing out does not include a transfer or rollover.

2. Customer identification

Pre-commencement customers

A pre-commencement superannuation customer must be defined to include any superannuation fund member prior to the commencement of the Bill rather than by reference to the provision of the relevant designated service.

Other customers

New customers (those joining a fund after the commencement of the Act) will be required to be identified at the point at which the fund provides them a designated service.

Importantly, we stress that where a reporting entity has identified a customer at any time before providing a designated service, commencing to provide the designated service should not trigger an obligation for the reporting entity to undertake the identification procedure again. This is consistent with our interpretation of section 29 of the AML/CTF Bill.

3. Re-verification obligations

Pre-commencement customers

Where a pre-commencement customer is the subject of a suspicious matter report, identification, including re-identification, will be undertaken prior to the provision of the designated service. This is consistent with the nature of the designated service and the negligible ML/TF risk that exists while the money remains in the superannuation system.

Other customers

Any re-identification due to the lodging of a suspicious matter report or otherwise will occur upon commencing to provide the designated service or earlier time as determined by the reporting entity. This is consistent with the nature of the designated service and the negligible ML/TF risk that exists while the money remains in the superannuation system.

4. Reporting

Threshold transactions

Clarification is sought on the scope of threshold reporting requirements under the Bill generally. This issue has been raised in the main submission.

Suspicious matter reporting

Section 39(1)(a) states that a suspicious matter reporting obligation arises if the reporting entity provides, or **proposes to provide**, a designated service etc.

Confirmation is required as to whether the issuing of an interest in a superannuation fund or RSA is conclusive evidence that the Trustee “proposes to provide” the designated service of cashing* a member’s benefit and/or making a payment of a pension or annuity.

5. Death benefits or other special circumstances

In relation to the applicable identification and verification procedures under the Bill, there may be some uncertainty for trustees where the “customer” who would otherwise be identified is deceased and the death benefit is instead to be paid to a nominated beneficiary.

The Act needs to recognise the distinction between the fund member and a beneficiary of a fund member’s interest and make provision such that superannuation funds, RSAs and pension providers can determine the appropriate customer for identification purposes.



Investment & Financial Services Association Ltd

**IFSA SUBMISSION ON THE EXPOSURE DRAFT
AML/CTF BILL 2006**

ATTACHMENT B

**SUBMISSION ON THE CONSUMER AND PRIVACY TASKFORCE'S
DISCUSSION PAPER ON THE AUSTRALIAN GOVERNMENT HEALTH
AND SOCIAL SERVICES ACCESS CARD**



Investment & Financial Services Association Ltd

27 July 2006

Professor Allan Fels, AO
Access Card Consumer and Privacy Taskforce
PO BOX 3959
MANUKA ACT 2603

Dear Professor Fels

AUSTRALIAN GOVERNMENT HEALTH AND SOCIAL SERVICES ACCESS CARD

Thank you for the opportunity to comment on the Consumer and Privacy Taskforce's Discussion Paper on the Australian Government Health and Social Services Access Card (Access Card).

IFSA represents the retail and wholesale superannuation, funds management and life insurance industries and has over 125 members who are responsible for investing over \$950 billion, on behalf of more than nine million Australians.

IFSA supports the introduction of the new Access Card and believes that it will provide greater integrity and efficiency in the delivery of Government services. Furthermore, IFSA shares the Government's view that this is a critical piece of national 'infrastructure'. Moreover, IFSA's view is that the 'infrastructure' being contemplated will be able to provide additional benefits to consumers beyond the delivery of Government services.

An Access Card, with appropriate safeguards, could become a very useful and reliable mechanism to allow financial institutions and others to verify the identity of their customers on an ongoing basis with minimal inconvenience for customers.

Indeed, under proposed anti-money laundering and counter-terrorism financing laws, a larger number of financial institutions and other entities will be required to verify the identify of new and existing customers (in certain circumstances).

Just as the Access Card will reduce the incidence of identity fraud being used to illegally obtain Government services, IFSA believes that through the careful and tailored extension of the Access Card's functions to allow regulated financial institutions to use the Access Card as a robust identification source, there is substantial scope to further reduce identity fraud and identity related financial crimes.

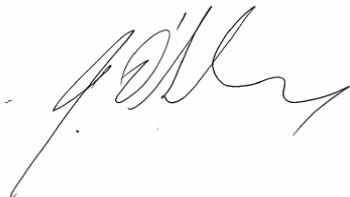
These offences impose a significant cost on the public and private sector, as well as posing a risk to national security.

Arguably, use of the Access Card in this manner would also reduce the number of identification related records kept by financial institutions and others soon to be regulated by anti-money laundering and counter-terrorism financing laws.

Further benefits for consumers include that it could simplify the process of obtaining financial services by allowing the use of the Access Card as one piece, if not the only piece, of evidence that a person would be required to produce to verify their identity.

Ultimately, IFSA believes that this could mean less time spent in queues, less time spent verifying one's identity over the phone or internet and greater security and privacy as a result of less 'paper-based' and other records being kept by an increasing number of financial institutions and others.

Yours sincerely

A handwritten signature in black ink, appearing to read 'John O'Shaughnessy', written in a cursive style.

John O'Shaughnessy
Deputy Chief Executive Officer

PROPOSAL FOR VERIFICATION MECHANISM OUTSIDE OF THE PUBLIC SECTOR

One effect of the proposed anti-money laundering and counter-terrorism financing laws will be to require a much broader range and greater number of entities to identify their customers and maintain appropriate records of those procedures going forward.

In its submission on the exposure draft Anti-Money Laundering and Counter-Terrorism Financing Bill (AML/CTF Bill), IFSA suggested that the availability of a wide range of electronic and other procedures to give effect to the identification and verification purposes under the Bill would be highly desirable to ensure customers were not unduly inconvenienced.

While the Discussion Paper notes that the Government has determined that the Access Card will not be a national ID card, it is important that the Government permits the Card to be used by entities regulated under the AML/CTF Bill to verify customers' identities under the AML/CTF regime.

The Access Card would sit alongside other potential Government-based identifiers such as Tax File Numbers, Medicare cards, passports and driver's licences etc for use as part of any identification process.

Ideally, the Government could provide an electronic confirmation process that enables verification, with the issuing authority (say the Office of Access Card or similar), of the individual's name and any other information "on the face of the card" or otherwise provided by the customer in respect of the card.

Such a system would not require anything more than a simple "green light" or "red light" confirmation to be returned to the relevant entity seeking the confirmation. The receipt of a "green light" would indicate that the Access Card is authentic. A "red light" would indicate that some aspect of the information sought to be verified was inaccurate or unavailable. This would prompt the relevant entity to conduct further inquiries to properly and confidently ascertain the individual's identity.

Importantly, and to be entirely clear, IFSA is not proposing:

- a mandatory requirement for individuals to present an Access Card if requested;
- a power to prohibit the opening of an account (however broadly defined) without the presentation of an Access Card; or
- AML/CTF regulated entities be provided access to any personal information that may be stored on the Access Card.

IFSA believes that the approach outlined above is workable and in the interests of consumers who ultimately suffer the biggest cost in the event of identity theft and/or fraud, and who going forward will be faced with greater obligations in respect of providing sufficient identification documentation to satisfy financial institutions and others that they are who they claim to be.

Following below is an analysis of issues identified in the Report which IFSA believes are relevant in this context.

1. Identical issues need to be considered for both the Access Card and AML/CTF customer identification and verification

Many of the key issues considered in the Paper in relation to establishing the identity of individuals prior to issuing the Access Card are indeed the same issues that each financial institution will grapple with in relation to conducting customer identification procedures for AML/CTF purposes. We therefore welcome the Government's acknowledgement of the difficulties posed in accurately verifying a customer's identification.

Examples of issues highlighted in the paper which will apply to individuals applying for an Access Card from Government, which are just as pertinent for entities proposed to be regulated under the AML/CTF legislation include:

- "How will people be able to establish their identity with sufficient integrity for the purposes of the Access Card if, for whatever reasons, they are unable to provide key primary identification documents such as birth certificates?"
- "Will the arrangements for establishing proof of identity for the issue of the Access Card in the first instance be of sufficient integrity while at the same time not being unduly burdensome for the vast majority of Australians?"
- "What special measures may need to be adopted if primary documents such as birth certificates are not available? In many cases these documents may have been lost or destroyed, or primary records may be held overseas and difficult to access."

IFSA believes it would be far more efficient, where an individual's identity has been established robustly by Government agencies for the purposes of the Access Card, to utilise this for other purposes. This will avoid consumers facing the same practical difficulties as identified above and would also increase the integrity of identification procedures by ensuring that a core element of establishing an individual's identity was based on a robust identity document/card.

2. Links with the Document Verification System (DVS)

The Discussion Paper notes that the Access Card is likely to benefit from the DVS system, thereby increasing the integrity of the Card. IFSA requests that the Government consider "opening" the DVS system to the private sector to resolve some of the customer identification issues that currently exist.

IFSA believes the industry will greatly benefit from the use of the DVS system, or being able to use the Access Card which has had the benefit of the DVS system, by making customer identification verification more robust.

Although the Discussion Paper highlights that the DVS and the Access Card are being developed for different purposes, IFSA agrees with the Government's intention that "there is great benefit to the Australian community in being able to establish questions of personal identity with the highest degree of certainty."¹

Access to government databases as reliable and independent sources of data for use to verify customer identification information is essential. This is likely to considerably reduce the impact of customer identification procedures on customers by making such verifications faster, more reliable/accurate and less reliant on intermediaries.

3. Permitted uses of the Access Card/function creep

While we acknowledge the Government's announcements concerning what the card will not be – namely a national ID card – we request that the Access Card be permitted to be used as one piece of evidence that a person may produce to verify their identity.

In this regard, IFSA encourages the Government to consider a permitted use of the card to include "identity verification for the purposes of the AML/CTF regime". The proposal outlined in this paper provides a simple and effective additional function which the Access Card could provide as a means of streamlining identification based processes more generally.

In light of the pending introduction of the AML/CTF regime, IFSA believes it is pertinent to provide this added functionality at the same time as the enhanced identification obligations come into force and hence we think it is important that this function be included at the outset of the establishment of the Access Card rather than as an additional feature "down the track".

Allowing the use of the Access Card to form part of the identification procedure for the purposes of the AML/CTF regime will allow direct verification against Government records – providing an identity verification system that places Australia at the forefront of identity verification for the purposes of combating money-laundering and terrorist financing.

¹ Discussion Paper Number 1: The Australian Government Health and Social Services Access Card. See page 24, paragraph 3.