THE TAX INSTITUTE

THE MARK OF EXPERTISE

7 February 2017

Attention: Financial Crime Section
Mr Daniel Mossop
Attorney-General's Department
3-5 National Circuit
Barton, ACT 2600

By email: antimoneylaundering@ag.gov.au

Dear Mr Mossop

Report on the Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 and Associated Rules and Regulations

The Tax Institute (TTI) welcomes the opportunity to comment on the **Report on the Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 and Associated Rules and Regulations (the Report)** released by the Minister for Justice, the Honourable Michael Keenan MP.

TTI provided comments on the exposure draft **Anti-Money Laundering and Counter-Terrorism Financing Bill 2006** in a submission dated 9 August 2006 and on the proposed schedules to be added to that Bill in a submission dated 19 September 2007 (copies attached). Much of the concern expressed in those submissions remains relevant in relation to the Report and are not repeated here in detail. However, there are particular concerns we wish to highlight again:

- The scope of the measures is far too wide extending as it does to normal business transactions imposing identification and reporting requirements (with considerable compliance costs) on advisors and their business clients.
- The measures have the potential to fundamentally alter the relationship between a person and their professional advisor.

Scope of the measures

As highlighted in the Institute's September 2007 submission, the reach of this legislation is enormous creating unnecessary compliance costs on many SME and small businesses operating as sole practitioners or in partnerships of less than four persons with much of those compliance costs being passed on to clients. Such a major imposition on businesses of this kind, when the policy intent was to target major

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financial organisations, makes a mockery of the Government's announcements of reducing red tape and compliance costs for businesses.

One example of the additional compliance measures which will require careful consideration is the proposed expansion of the customer identification requirements to include the beneficial owners of client entities. What is meant by the term "beneficial ownership" and what steps are required to be taken in order to determine such ownership need to be made very clear.

By imposing obligations which go well beyond offences concerning money laundering and terrorism financing, there is a large risk of undermining the effectiveness of the rules by requiring unnecessary over reporting.

Relationship between clients and advisors

The Institute also remains concerned that imposing obligations on professional advisors will significantly affect the relationship between our members and their clients. Matters of client confidentiality and, for those of our members who are lawyers, legal professional privilege, have not been given sufficient attention in the legislation.

The Institute desires to be consulted if this matter proceeds, but urges caution in government progressing measures that have such large implications for many small businesses. Our Senior Adviser, Bruce Quigley can be contacted on (02) 8223 0011 to facilitate further consultation.

If you would like to discuss any of the above, please contact either me or Senior Adviser, Bruce Quigley on 02 8223 0011.

Yours sincerely

Matthew Pawson
President

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9 August 2006

The Secretary
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Barton ACT 2600

aml.reform@ag.gov.au

Dear Sir/Madam

Exposure Draft: Anti-Money Laundering and Counter-Terrorism Financing Bill 2006

The Taxation Institute of Australia welcomes the opportunity to provide comments on the draft legislation that requires relevant persons or entities to have the necessary systems in place to identify, mitigate and manage (IMM) money laundering risks covered by the legislation. Our comments, which follow, are limited to two key aspects of the draft legislation:

- The scope of draft paragraph 39 of the Draft Bill requires reporting entities to report "suspicious matters". These "suspicious matters" include (under para 39(1)(f) (iii) and (iv)) the provision of a service (provided or prospective) and may be in the connection with a breach, or an attempted breach, of a taxation law or a state or territory law that deals with taxation matters; and
- The future expansion of the categories of persons required to report such transactions by the use of draft paragraph 6, Table 4 (which provides for the regulation of additional non-financial services).

Proposed paragraphs 39(1)(f)(iii) and (iv)

As currently drafted, the scope of matters required to be reported under paragraphs 39(1)(f) (iii) and (iv) are so wide they capture every and any breach of an income tax law including by way of illustration, the client:

- lodged their BAS a day late,
- paid their required PAYG withholding remittances a day late,
- paid their GST a day late,
- lodged a tax return late,
- paid their tax bill a day late,
- did not have a receipt in the required form.

Further, given the complexity of tax laws (the Income Tax Assessment Acts alone are currently 10,000 pages in length) it imposes an obligation upon people who can never hope to comply as they can never hope to recognise all circumstances where such breaches occur even if they could be said to be aware of the factual circumstances that give rise to them (remembering that the reporting entity is considered under Australian law to know the law).

The concept of a breach of a law relating to taxation is not in the same category as money-laundering or terrorism. If the purpose is to combat illegal activity in respect of tax and revenue laws, then the paragraphs should be reworded to focus on notifying where there is evidence of tax evasion.

Given the criminal and civil sanctions that arise from failing to report it is not sufficient to merely clarify the intended scope of the law via the Explanatory Memorandum, a clear statement of the intended operation of the law in the law is required. Anything less will counter-productive and will significantly increase the costs of these services which will ultimately be passed on to the general public (as consumers).

It is not clear under paragraph 39(1)(f), that the information that the reporting entity has (or alternatively the things that are identified) must relate to either money-laundering or terrorism. In the absence of this, when in contra-distinction the other provisions focus on such a connection, it is difficult to see how a court would consider that Parliament intended such a qualification to be read into the provisions of paragraph 39(f). For example, if it were clear that a reporting entity (ie prescribed service provider) should suspect on reasonable grounds that information it has concerning the past or future provision of the service may be connected with an offence under the Dog Act, there would be a reporting obligation. It is not appropriate to respond to this by saying that such an offence would not be prosecuted. It should be clear that an offence does not arise in the first place. It is also clear that leaving the provision in its current form will merely encourage someone prosecuted in respect of a breach to argue that the provision is unconstitutional which if successful might nullify the true intended consequences of the legislation.

Use of draft subsection 6(5), Table 4

Although the list of proposed "designated services" are principally in the financial services industry, the rules will have limited applicability outside that sector (eg where a professional offers security of document services or acts as a trustee of an SMSF or they run payroll bureau for a client). Therefore, most tax service providers will not be directly affected by the first tranche of the legislation.

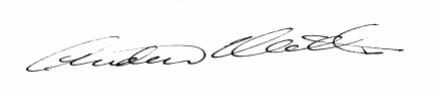
However, it has been suggested that non-financial services may be included in a second tranche of regulation. Such inclusion will result in high compliance costs and high administrative costs without necessarily delivering the crucial money laundering information, particularly given the width of the definition of suspicious transactions.

Regardless of the veracity of this suggestion there is a concern, that such serious obligations will be able to be imposed without full Parliamentary scrutiny by the use of regulation.

In light of the compliance costs, and the prospect of criminal and civil sanctions arising from a failure to report, any additions to the list of designated services should not proceed without open consultation and only with full Parliamentary scrutiny. Therefore, draft paragraph 6, Table 4 should be deleted.

Should you require clarification of any of the matters contained in this submission, please do not hesitate to contact in the first instance Dr Michael Dirkis, Senior Tax Counsel of the Taxation Institute of Australia on (02) 8223 0011.

Yours faithfully



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19 September 2007

Assistant Secretary
Strategic Policy Coordination Branch
Attorney-General's Department
Robert Garran Offices
National Circuit
Barton ACT 2600

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Dear Sir/Madam

Proposed schedules to be added to Anti-Money Laundering and Counter-Terrorism Financing Act 2006

The Taxation Institute of Australia (Taxation Institute) welcomes the opportunity to provide comments on the proposed schedules to be added to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* ("the AML/CTF Act") and, in particular, those concerning professional services. Our submission will first highlight our key concerns before addressing each in more detail.

1. Key concerns

Our key concerns are as follows:

- The definition of professional services in the schedules (and, in particular, the "tailored advice" Items 1BA, 2A, 4, 5A and 7), is drafted so wide that it encompasses most if not all services provided by our members provide regardless of the innocence of the transaction. As a result, of this poorly targeted drafting normal business transaction will trigger identification and reporting requirements, thereby imposing unnecessary compliance costs on advisors and their business clients, and unnecessary administrative costs on Government agencies. This process runs counter to the Government's express policy of reducing unnecessary red tape on business.

- As the existing identification and reporting requirements under the AML/CFT Act are designed with large financial institutions in mind, they are inappropriate for professional advisors, many who operate in small suburban practices or operate as sole practitioners. Therefore there is a need to tailor the identification and reporting requirements that are to be imposed on professional advisors to better recognise the variations in business structures and size.

- These measures have the scope to fundamentally alter the relationship between a person and their professional advisor, and act to facilitate rather than mitigate the targeted behaviours. Therefore, the imposition of these reporting obligations should be carefully considered.

- Finally, by imposing obligations which go well beyond offences concerning money laundering and terrorism financing, there is a large risk of undermining the effectiveness of the rules by requiring unnecessary over reporting, or worse, a culture of wholesale non-compliance, particularly in the SME market place.

In summary, without commitments to an in-depth consultation on the actual obligations to be imposed on professional advisors the Taxation Institute has serious reservations as to the proposed inclusion of professional services within the AML/CTF Act.

2. Detailed discussion

2.1 Scope of the proposals

2.1.1 Unnecessary width of the operation of the reporting obligation

The reach of the legislation is enormous. Therefore, despite the reasons for adoption of particular clauses, in the context of the original legislation, it cannot be justified in a situation where there is an extension of the operation of the legislation to a large number of people who carry on business in the SME market. This point was stressed in the Taxation Institute's submissions in respect of the original Bill, in particular in respect of section 41(1)(f)(iii).

These reporting requirements create unnecessary compliance issues and encourage a climate of non-compliance by requiring the within three day reporting of offences which are inconsequential and non-related to either money laundering or terrorism. For example, it is hard to envisage how a suspected breach of a Dog Act is likely to indicate that the person is likely to be involved in terrorism.

These rules need to be balanced against the likely outcomes if there is complete compliance. Complete compliance would impose unsustainable administrative costs on AUSTRAC as it attempts to deal with a large volume of inconsequential reports and, at the same time, remain vigilant for something that is actually a "suspicious matter".

See Example One in the attachment for a further illustration of circumstances in which it is difficult to envisage that the activities engaged in were intended to be caught by this legislation and require reporting. It illustrates the prospective compliance nightmare for both reporting entities and the AUSTRAC if they continue to be caught by the legislation.

In summary, the enormous width of section 41(1)(f)(iii) needs to be reconsidered in the light of the policy outcomes which are sought. Either this section needs to be deleted altogether or alternatively it needs to be qualified in such a way that it does not make a mockery of what is a fundamental piece of necessary legislation.

2.1.2 Scope of legislation

Due to the broad definition of professional services, most if not all services provided by our members will fall within the legislation. In short, the "tailored advice" Items 1BA, 2A, 4, 5A and 7 will be triggered in almost every occasion of providing advice (otherwise than to a private individual in a non-business capacity). In practice, this will mean that our members will have to operate on the basis that all services will be subject to the legislation, with the consequential increase in compliance costs to be borne directly by our members, and indirectly by all recipients of services from our members. The Taxation Institute believes that most if not all professional services should be defined as "low risk" within the AML/CTF framework.

This imposition is some what curious given that Recommendation 16 of the Financial Action Task Force's Forty Recommendations recommends that the suspicious matter reporting obligations should apply to lawyers and accountants in more limited circumstances namely when, on behalf of a client, they engage in a financial transaction. The thrust of the proposed changes is to ignore this recommendation.

2.2 Implementation concerns

Given the enormous scope of the legislation, it would be expected that the proposal would set out the specific nature and extent of the obligations to be imposed. However, this discussion is not included in the proposed schedules. In short, it is impossible to comment positively on the proposed measures without having detail as to the nature and extent of the obligations imposed.

Given the potential negative impact upon Australian business of theses rules the Taxation Institute assumes that mandated processes and procedures designed for large financial institutions will not the applied to the professional service providers (ie by inserting these tables in section 6 of the Act), as the vast majority of operate small businesses as sole practitioners or in partnerships of less than four persons. Financial services organisations are vastly different in their financial resources to implementation such extensive compliance systems when compared to most professional service providers. Such a major imposition of compliance obligations at a time when the government is announcing steps forward to minimise red tape and compliance costs in this area is inexplicable.

Therefore, this submission proceeds on the basis that, together with other industries and professions which may be impacted by tranche 2 of the legislation, the Taxation Institute will be given an extended opportunity to consider the nature and extent of obligations which may be imposed on our members and that there will be full opportunity for in-depth consultation.

Accordingly, in the following exploration of implementation issues this submission does not consider how the current provisions of the AML/CTF Act, particularly in relation to customer (client) identification and suspicious matter reporting, will impact our members and other professional practitioners generally. If this assumption is incorrect, then we would seek the opportunity to make further and more detailed submissions on these issues of substance.

Our specific concerns are set out in the following.

2.2.1 Inappropriateness of the present Rules to extended Designated Services

First, the requirements under the present Rules seem to be focused around "ongoing financial arrangements". However, the proposed extension of Designated Services is not limited solely to people in "ongoing financial arrangements" with customers. The Rules need to reflect this much more clearly.

2.2.2 Cessation of Provision of Designated Services

The requirements seem to have no end date and seem to impose obligations to put in place precise procedures to track the activities of the person who sought (or even just enquired about) the provision of a designated service even if no service is ultimately provided or having been provided the business relationship does not continue. It is not clear why the termination of the relationship would be the basis for a suspicious matter reporting obligation to arise.

2.2.3 Compliance with the Privacy Act where this was not previously required for a reporting entity

Members have raised the concern that presently they are not required to comply with the Privacy Act (because of turnover and small size). However, once they become a reporting entity, they will be required to comply with the Privacy Act and the onerous reporting and compliance obligations under that legislation.

The Policy Objective of ensuring that legislation introduced is not going to encourage non-compliance when that could be avoided and still achieve the policy outcomes

There is a serious risk of significant (but largely non-consequential) compliance of the onerous obligations introduced which obligations arise out of matters that have nothing to do with money laundering or terrorism.

2.2.4 Customer identification requirements

We further note that, in relation to the timing within which the customer (client) identification requirements must be carried out, it may often not be possible for our members to fully identify a client before beginning to provide the designated service, in particular, in matters on which advice is sought where the particular factual scenario requires urgent attention.

An example is where a client in the process of purchasing business assets at an auction seeks urgent structuring and financing advice. Without requiring the client to leave the auction and provide identification (and thereby forfeit their business opportunity) it is not always possible that the customer (client) identification be carried out before provision of the designated service.

In addition, it is often the case that our members (and other professionals in similar situations) will meet with a potential client for a preliminary meeting before a "retainer" (whether formal or informal) is entered into.

In light of these examples, consideration should be given to these matters when the timing of customer (client) identification requirements are considered in more detail.

2.3 Effect on relationships with professional advisors

The Taxation Institute has concerns that imposing reporting obligations on professional advisors will significantly affect the trusted relationship between our members and their clients.

In this regard we note that:

- potential clients may be less willing to seek professional advice if they are under the (potential mis-) apprehension that they can/will be reported for any illegal activities (particularly where the advice sought does not relate to the illegal activities (if any) that they are engaged in); and

- far from increasing compliance with the laws, this will increase non-compliance, for reasons including that it will not give professional advisors a chance to bring these clients back into the system.

In such circumstances professional advisors are already under their own professional and ethical obligations not to advise on illegal activities (even putting aside criminal sanctions). Thus, it would not be anticipated that such a measure will result in many offences being reported.

Further, the "carve-out" for legal professional privilege in section 237 is not adequate, even for providers of legal advice, let alone for other professionals. In this regard, we note that:

- the privilege is that of the client not of the legal advisor;

- it will be necessary for the provider of legal advice to effectively self assess the existence of privilege (and its potential waiver) on each piece of communication; and

- much legal advice will technically not qualify for legal professional privilege.

Given the importance of the relationship of client confidentiality between our members and their clients, this confidentiality should be considered as paramount when determining the nature and extent of suspicious transaction reporting obligations which may be imposed on our members. The importance of the confidence the clients must have in their advisor, and the role this confidence plays in ensuring open and frank ongoing dialogue, should not be under estimated. In this context

due consideration should be given to the existing professional rules and regulations which govern our members.

For those of our members who are lawyers, there will of course be legal professional privilege considerations. Again it is noted that recommendation 16 provides that lawyers and accountants would not be required to report their suspicions if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege.

Such an exception has precedence. For example, under section 316 of the *Crimes Act 1900 (NSW)* (for failure to bring information relating to an offence a person knows or believes has been committed to the attention of the Police) there is a prescribed exception if the knowledge or belief that an offence has been committed was formed or the information was obtained in the course of following a profession prescribed by the regulations which includes legal practitioners.

2.4 Offences covered

The offences covered go well beyond money-laundering and terrorism funding. In this regard, it is noted with approval the changes to the original section 39(1)(f)(iii) and (f)(iv) relating to tax offences, limiting those offences to "evasion" type offences. However, the inclusion in section 39(f)(v) of [all] offences against a law of the Commonwealth or one of the States or Territories means that the limitation reflected in paragraphs 39(1)(f)(i) and (ii) is narrower than the ambit of those paragraphs and has no effect on the interpretation of section 39(1)(f)(iii), which is a completely separate head of attraction.

Although not within the formal scope of this consultation process, we submit that the scope of section 39(f)(v) be explicitly limited to offences other than taxation related offences.

It is submitted that the extensive scope of offences covered makes it all the more important that appropriate consideration is given to the potential effect on the relationship between professional advisors and the provision of professional advice.

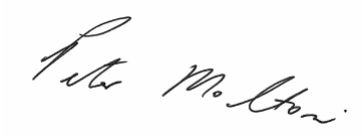
3. Other matters

Finally, there are three other minor areas of concern, being:

- that the measures dealing with partners of partnerships apply appropriately, particularly given the deemed knowledge of partners of the affairs of the partnership;
- that the scope of "professional services" adopted has the potential to apply to a wide range of independent contractors who would not necessarily consider themselves to be performing professional services; and
- that all existing sections of the AML/CTF Act should be reviewed to ensure their scope is correctly targeted. One section needing review is section 141 which has application in inappropriate circumstances (see Example 2 in the attachment).

Should you require clarification of any of the matters contained in this submission, please do not hesitate to contact in the first instance Dr Michael Dirkis, Senior Tax Counsel of the Taxation Institute of Australia on (02) 8223 0011.

Yours faithfully,



Peter Moltoni
President

Attachment

Example One: A further illustration of the over reach of the reporting requirements in of section 41(1)(f)(iii).

Case One - I am a solicitor. A new client comes in on the basis of a first consultation free to discuss his/her options as a result of running up huge gambling debts. In the course of the meeting after considering the client's personal circumstances advice is given that it might be best to declare bankruptcy.

Case Two – I am an accountant. A new client comes in on the basis of a first consultation free to discuss the client's options as a result of over-committing on the size of their housing mortgage and having real difficulty in meeting repayments and looking for a solution to avoid defaulting on the mortgage. In the course of the meeting after considering the client's personal circumstances advice is given that it might be best to try to sell the house and repay the debt now rather than wait until a default occurs and the house is sold out.

Case 3 – I am a tax agent. A new client comes in to have me prepare an overdue BAS statement for them. In the course of the meeting after considering the client's personal circumstances advice is given that it might be best to prepare a personal explanation of the reason for the late lodgement of the BAS statement and seek relief from the ATO.

In all three cases, after the conclusion of the meeting the advisors accompany the client to the client's vehicle and notice that it is unregistered. The advisor also notices that the client's child has been left unattended in the car for the hour conference. At that point the client states that life is so difficult and that they wish that they could manage to lodge their outstanding tax returns, afford to register the car and the dog and renew the driving licence.

In each of the above cases there are suspicious matter reporting obligations arising which must be reported within three days because of the operation of section 41(1)(f)(iii), but none of the potential offences indicate neither money laundering nor terrorist involvement. What this illustrates is that inadequate regard has been given to the practical impact (especially in relation to compliance costs) this legislation will have when extended to sole practitioners and other SME business operators.

Example 2: An illustration of the overreach of the reporting requirements in of section 141

Mary, a recently married woman, opens up a new joint account with a new financial service provider with her partner. However, she decides to retains her single name for pre-existing accounts with her existing financial institution for the time being as she does not have time to change her name. In these circumstances she is deemed to have committed an offence under section 141 and is subject to imprisonment for 2 years or 120 penalty units.

Again another innocent circumstance, but the outcome is severe.