14 February 2017

Financial Crime Section
The Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

By email: antimoneylaundering@ag.gov.au

Attention: Mr Daniel Mossop

Dear Daniel,

AML/CTF Statutory Review Implementation
Phase 1 Amendments

The Australian Financial Markets Association (AFMA) represents the interests of over 120 participants in Australia's wholesale banking and financial markets. Our members include Australian and foreign-owned banks, securities companies, treasury corporations, traders across a wide range of markets and industry service providers. Our members are the major providers of services to Australian businesses and retail investors who use the financial markets. The majority of AFMA's members are reporting entities for the purposes of the AML/CTF Act.

We are pleased to make a submission on the Attorney-General's Department's paper titled "Enhancing Australia's AML/CTF Regime: Phase 1 Amendments to the Anti-Money Laundering and Counter-Terrorism Financing Act 2006" (**the Industry Consultation Paper**).

The format for AFMA's submission is to provide comments in relation to each of the recommendations and reform proposals included in the Industry Consultation Paper relevant to the AFMA members. Our submission builds on those previously provided to the Department and should be read in light of those previous submissions.

Review Recommendation 3.1 – Objects of the Act

AFMA broadly supports the amendments to the Objects of the Act. Our comments in relation to the specific reform proposals are set out below:

- The proposed objects refer in a number of instances to "serious crimes," which we understand is not a term currently included in the Act. The term is quite broad, particularly insofar as it applies to the objects of the Act. Our understanding is that the scope of the Act should be the disruption/deterrence of the financing of serious crimes, and to implement measures to

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disrupt/deter serious financial crimes, but not necessarily to extend to the disruption/deterrence of all serious crimes. This scope should be clarified;

- While AFMA generally supports the proposed object to "provide for the supervision and monitoring of reporting entities' compliance with Australian sanction laws," our members are keen to understand with greater specificity the proposed supervision model and the interaction between AUSTRAC and the Department of Foreign Affairs and Trade.

Review Recommendation 3.2 – Principles of the Act

AFMA generally supports proposed amendments to the Act to incorporate the principles particularly the requirement that administration of the Act occur in a manner proportionate to the money laundering and terrorism financing risks faced by reporting entities. The risk-based approach underpinning the Act and its administration is a fundamental tenet of Australia's AML/CTF framework and embedding the approach into the principles of the Act is entirely appropriate.

In relation to the principle addressing privacy risks and the impacts associated with handling personal information, our understanding for the basis of the inclusion of the principle is to codify the awareness of the privacy risks, as opposed to changing the requirements for reporting entities. Confirmation of this understanding would be appreciated.

Review Recommendation 16.1 – Powers and Functions of the AUSTRAC CEO

In relation to this recommendation, we note, in particular, the proposal to provide the AUSTRAC CEO with a power to "do all things necessary or convenient to be done for or in connection with the performance of his or her functions." The Industry Consultation Paper makes the comment that the conferring of this power on the AUSTRAC CEO would be "consistent with the powers conferred upon other CEO's of Government agencies."

At first instance, the drafting of this proposed power is exceptionally broad, particularly the inclusion of the word "convenient" with respect to the performance of the functions. As such, we request further clarity from the Department of other examples of powers being conferred upon the CEO in a manner consistent with the proposal, particularly in circumstances where such CEO has a rule-making power that is as broad as the AUSTRAC CEO. AFMA cannot support the proposed power in its current form in the absence of such clarity/examples.

Further, greater clarity is sought as to how the proposed amendment will apply given the dual role (and potentially additional roles) AUSTRAC plays as regulator and as the Financial Intelligence Unit.

Review Recommendation 17.1 – Determining Exemptions

AFMA supports the basis of review recommendation 17.1 and the corresponding reform proposal. We are of the view, however, that the assessment of the ML/TF risk arising from the proposed exemption be a matter on which the applicant can provide evidence and the legislation should specifically reflect such an opportunity.

In relation to exemptions, we recommend that the timeframe for a response to an exemption request be hard-coded in the legislation. That is, where an applicant has lodged a request and furnished all relevant information on AUSTRAC, AUSTRAC is compelled to provide a response within, say, 60 days. In this regard, we note that the Australian Taxation Office (**ATO**) has a service standard to respond to all request for Private Binding Rulings within 28 days of receipt of all relevant information and to require the ATO to negotiate a new timeframe with the applicant to the extent that adherence to this timeframe is not achievable.

It has been the experience of AFMA and its members that the timing for consideration and ultimate issuance of exemptions can take an indeterminate amount of time and that such delays may have an adverse impact on the ability of reporting entities to formulate their compliance frameworks in a manner consistent with the risk-based approach. Imposing statutory rigour around these timeframes will mitigate risk and enhance the allocation of resources for reporting entities.

Review Recommendation 15.3 – Expanding the Remedial Direction Power

AFMA notes the proposed amendment to Section 191 to confer upon the AUSTRAC CEO the power to issue a reporting entity with a written direction requiring remediation of a past contravention, particularly in relation to the requirement to lodge an outstanding compliance report. We have a number of concerns with this proposed power, both in terms of scope and transition, which are set out below:

- Broadly, members are concerned that the granting of the proposed power will alter the currently collaborative relationship that reporting entities have with AUSTRAC with respect to perceived omissions or contraventions. To the extent that there is a formal remediation power, there should be acknowledgement in the law that the AUSTRAC CEO is not compelled in any circumstances to issue a written direction to remediate and that such direction should only apply to ongoing systemic breaches as opposed to one-off instances;
- In terms of the scope of the power, our view is that remediation cannot be required in respect of a perceived contravention that may have occurred prior to commencement of the power, or prior to AUSTRAC articulating a view that a requirement has arisen. That is, where AUSTRAC changes its view as to when an obligation arises, or indeed has not expressed a view as to when the obligation arises, then remediation cannot be in respect of an occurrence prior to the change/lack of view;
- We submit that generally the reporting entity, as opposed to AUSTRAC, may be better placed to propose appropriate steps for remediation and hence the proposed amendment should not prescribe that AUSTRAC determines the remedial action to be undertaken;
- Specifically in relation to SMR reporting, which is a specific example articulated in the Industry Consultation Paper, the proposed remediation power appears problematic where the failure to lodge the SMR was due to the reporting entity not reaching the requisite standard of suspicion, with that view potentially not shared by AUSTRAC. We are concerned that where AUSTRAC would require remediation in this instance, the appropriate response from reporting entities may be to defensively lodge SMRs even where the requisite level of suspicion has not been reached.

Review Recommendation 15.4 – Expanding the Civil Penalty Provisions

We have a number of concerns associated with the proposed amendments to broaden the range of offences in relation to which the AUSTRAC CEO has the power to issue an infringement notice.

At a macro level, we would like to better understand the tipping point for the power to be exercised. At present, the AUSTRAC CEO needs to undergo a particularly rigorous process and afford reporting entities procedural fairness before pursuing a Civil Penalty Order through the Federal Court. We submit that the same level of rigour and due process be applied prior to the decision to issue an infringement notice.

Further, and consistent with our comments above in relation to the proposal to expand the remedial direction power, in order to preserve the currently collaborative relationship between reporting entities and AUSTRAC, it should be made clear that the AUSTRAC CEO is not compelled in any circumstance to issue an infringement notice.

Our view is that there should be limited scope for an infringement notice to be issued for one-off breaches. Rather, such notices are more appropriate for systemic breaches. Statutory safeguards that prevent the issuance of the infringement notice for a one-off oversight should accordingly be included in the legislation.

AFMA proposes that the infringement notice provisions in the AML/CTF Act should 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 relation to an infringement notice.

In terms of commencement, and again similar to the comments above in relation to the proposed expansion of the remedial direction power, to the extent that there is an expansion in the power for the AUSTRAC CEO to issue infringement notices, it needs to be clear that this power only applies to infringements that occur subsequent to the expansion of the power and is not retrospective in application.

In light of the comments above, it is our preference that the issuance of infringement notices is not made public, and that there is no publicly available register or notification of the reporting entities that have received such notices.

In relation to the specific sections on which it is proposed that infringement notices may be issued, we note the following:

- With respect to Subsection 41(2), we understand that it is current practice for reporting entities to undertake enhanced investigations where there is unusual activity, with such investigation potentially giving rise to the requisite degree of suspicion. Given that this may take some time, it needs to be made clear that the appropriate time for the commencement of the clock to lodge the SMR is when the reporting entity has formed the requisite level of suspicion;
- Concern has been expressed regarding the potential application of the expanded infringement notice power to subsections 50(3),(4)&(5) with respect to foreign debit card or credit card transactions, given that limited information is obtained in relation to the identity of the holders of the cards, particularly at the time of the transaction;
- In relation to the issuance of infringement notices for Section 49 notices, an element of "reasonableness" needs to be included to ensure that the reporting entity is aware of the specific information that has been requested and the timeframe for responding is realistic based on the information that has been sought.

Review Recommendation 15.5 – Power to Issue Infringement Notices and Apply for Civil Penalty Orders

There is general concern regarding the proposal to extend the power to issue infringement notices to other partner agencies, namely the Australian Taxation Office, the Australian Federal Police, the Australian Criminal Intelligence Commission and the Australian Commission for Law Enforcement Integrity. The concern is that given AUSTRAC is the regulator of the AML/CTF Act and the administration thereof, and removing a centralised approach to compliance would threaten regulatory consistency and the benefit of having a centralised point of contact for reporting entities in relation to the Act.

In the alternative, there will need to be processes put in place to mitigate duplication and inefficiency, such as a register of penalties levied by all agencies and a requirement that all agencies engage with a particular person within the reporting entity/designated business group.

Finally, any changes to the powers of other agencies to issue infringement notices and apply for civil penalty orders needs to be prospective in operation.

Review Recommendation 5.12 – Reliance

Broadly, AFMA is very supportive of the proposed changes to the reliance framework. As was noted in AFMA's initial submission to the review of the Act, a better application of the reliance provisions would give rise to significant cost savings and more effective regulatory supervision, and the proposed amendments will largely deliver these benefits.

We provide the following comments in relation to the proposed reliance framework:

- In relation to the definition of prescribed third parties, we support the classes of entities that are listed such as approved deposit-taking institutions, licensed financial advisers and other members of the designated business group. In addition, we submit that custodians be included as prescribed third parties, as defined with reference to those entities providing custodial and depository services under Australian law and foreign equivalents;
- Similarly, the Act should provide for the potential for AML utilities or other centralised repositories of customer information to be prescribed third parties to allow for reporting entities to rely upon them, with such providers being included in AUSTRAC's regulatory oversight;
- There appears to be some ambiguity with reference to the interaction between the requirements of 2.5.1(i), which requires the reporting entity to obtain the customer identification information from the prescribed third party prior to the commencement of the designated service, and 2.5.1(ii) which states that the reporting entity is able to obtain copies of the documentation from the prescribed third party without delay. Clarity on the requirements is sought, as is the indicative timeframe for obtaining copies "without delay";
- In relation to the requirement that the reporting entity remaining liable for any failure to comply with the CDD requirements, there may be circumstances where a particular reporting entity has the primary customer relationship and should retain the primary liability to ensure that the CDD requirements are adhered to. For example, where the prescribed third party is a licensed financial adviser or a lead arranger for a syndicated facility, given the nature of the client relationship, it may be unreasonable that another reporting entity retains joint and several liability for any CDD shortcomings. The retention of joint and several liability may result in the reporting entity conducting its own CDD, thereby eroding the regulatory benefit that would arise from the proposed approach;
- We support the approach in relation to the determination of a jurisdiction where regulation and supervision is comparable to Australia, that is utilisation of the risk-based approach with AUSTRAC providing "safe-harbour" guidance as to the jurisdictions that clearly fall within scope;
- Finally, the legislation should make it clear that a reporting entity is under no obligation to use the reliance provisions and whether to place reliance is a decision solely for the reporting entity.

Review Recommendation 5.9 – Prohibition on Providing a Service if CDD Cannot Be Performed

AFMA acknowledges the basis for the recommendation, especially in light of the comments in the FATF Mutual Evaluation. Our concern, however, is the extent to which implementation of the recommendation may be inconsistent with existing practices, as endorsed by AUSTRAC, and impose regulatory costs through necessitating changes to systems and compliance frameworks.

In 2007, AUSTRAC released a Guidance Note titled "Opening an Account." This Guidance Note focussed on when an account has been "opened" for the purpose of applying the provisions of the Act and the Rules. Noting that a reporting entity was not able to provide a designated service to a customer if the entity has not carried out a customer identification procedure, AUSTRAC expressed the view that the account (in the context of a deposit account) would be opened when the customer was able to withdraw or transfer funds from the account.

This view has resulted in accounts being established for the customer, with a stop on any transactions being conducted until such time as completion of CDD has occurred. A prime example of circumstances where this practice has been beneficial in practice is in the context of migrant banking, where customers immigrating to Australia are able to place funds in a local account and then undertake appropriate identification on arrival to Australia.

Accordingly, in the implementation of Review Recommendation 5.9, it should be made clear that the mere establishment of the account is not either a designated service or a business relationship where the customer is unable to transact on the particular account.

More broadly, clarity as to what is meant by the term "business relationship" for the purpose of implementing the review recommendation is sought.

Review Recommendation 10.1 – Correspondent Banking

AFMA is very supportive of the proposed amendments in relation to correspondent banking.

In relation to the nostro/vostro issue, we are keen to review the specific legislative amendment that will clarify that the requirement to conduct due diligence applies to the respondent bank performing due diligence on the correspondent institution. We also seek confirmation that the proposed amendments to the reliance provisions (i.e. Review Recommendation 5.12) referred to above apply equally to due diligence conducted by a respondent bank on a correspondent bank.

In relation to the proposed expansion of the definition of correspondent bank, our preference is to ensure that the correspondent banking definition is sufficiently broad to encompass all institutions appropriately regulated in offshore jurisdictions but not currently included as a financial institution. We support the reference to the Wolfsberg Principles as the appropriate mechanism to ensure global consistency, noting that the ambit of the term "authorised institution" may require clarity.

Review Recommendation 4.5 – Carrying on a Business

AFMA is supportive of the proposal to qualify the term "in the course of carrying on a business." Our only issue is why the change is limited to tables 2 and 3 of section 6 of the Act and not more broadly.

Review Recommendations 14.1 and 14.2 – Secrecy and Access

AFMA strongly supports the proposed amendments to the extent that they facilitate the sharing of information within the designated business group (noting Review Recommendation 2.7.1) and other private sector entities where that information formed the basis of an SMR.

Specific comments in relation to the proposals, including feedback in relation to some of the consultation questions, is set out below:

- AFMA particularly supports the proposed changes to the tipping-off offences to ensure that the information may be shared across the corporate group, and not just to the foreign parent;
- We also strongly support the proposed amendment to the US PATRIOT Act to allow SMR related information to be shared between reporting entities outside of the designated

business group with appropriate safeguards, both in relation to liability and also in terms of the use of the information;

- Consideration should also be given to permitting the sharing of SMR information with legal advisers so that, where necessary, reporting entities 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;
- In terms of granting the AUSTRAC CEO with greater powers to disseminate "AUSTRAC information" to other agencies, both domestic and global, it may be appropriate for AUSTRAC to redact or otherwise remove the identity of the reporting entity that was the source of the particular information such that the identity of the reporting entity cannot be identified. In addition, the detailed information forming the grounds for suspicion should not be shared with other agencies;
- Similarly, in terms of specifically allowing other agencies AUSTRAC information, the source of the information should be protected and there should be appropriate constraints on the other agencies to seek additional information from the reporting entity. There is particular concern to ensure that commercially sensitive information not be disclosed to other private sector entities;
- For enhancing the ability of reporting entities to disclose information to the AUSTRAC CEO outside of the formal Section 49 Notice structure, our members generally support enhancements to the ability of reporting entities to self-report. As identified in the Industry Consultation Paper, there will need to be appropriate protections for reporting entities that seek to volunteer information to the AUSTRAC CEO outside of the established compliance protocols; and
- AFMA supports the proposed amendment to allow reporting entities that have lodged an SMR with AUSTRAC to disclose to a Financial Intelligence Unit in another country. The scope of this proposed amendment should extend solely to the disclosure of the existence of the SMR and not the information contained therein, as these may be obtained by the foreign country FIU under existing information exchange protocols.

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Thank you for the opportunity to provide a submission in relation to the Industry Consultation Paper. Please contact me with any queries on 02 9776 7996 or rcolquhoun@afma.com.au .

Yours sincerely

Rob Colquhoun
Director, Policy