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Public Legal Interpretation Series

Public Legal Interpretation No. 4 of 2008 – What constitutes a reporting entity

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Currency

The views on the subject matter set out in this Public Legal Interpretation are the views of AUSTRAC at 4 July 2008.

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Objective

- 1 The purpose of this Public Legal Interpretation is to set out AUSTRAC's views on the provisions of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) as they relate to:
 - who is a provider of a 'designated service'; and therefore, who is a 'reporting entity'
 - what is meant by 'carrying on a business' and acting 'in the capacity of' a provider of designated services
 - the obligation to lodge a compliance report.

Introduction

- 2 The objects of the AML/CTF Act include fulfilling Australia's international obligations and addressing matters of concern in combating money laundering and the financing of terrorism. To fulfil these obligations and to address matters of concern, the AML/CTF Act places obligations on 'reporting entities' (defined in section 5 of the Act) that provide 'designated services' (also defined in section 5).
- 3 Section 5 of the AML/CTF Act states that a reporting entity is a person who provides a designated service.
- 4 AML/CTF Act obligations on certain reporting entities include:
 - adopting and maintaining an anti-money laundering and counter-terrorism financing program (Part 7 of the AML/CTF Act)
 - providing a report on compliance with the obligations under the AML/CTF Act (Part 3 of the AML/CTF Act)
 - registering as a provider of a 'registrable designated remittance service' (Part 6 of the AML/CTF Act)
 - carrying out applicable customer identification procedures (Part 2 of the AML/CTF Act)
 - carrying out of ongoing customer due diligence (Part 2, Division 6 of the AML/CTF Act from 12 December 2008)
 - reporting of suspicious matters (Part 3, Division 2 of the AML/CTF Act, from 12 December 2008)
 - reporting of threshold transactions involving amounts over a set monetary value (Part 3, Division 3 of the AML/CTF Act, from 12 December 2008)
 - reporting of international funds transfer instructions (IFTIs) (Part 3, Division 4 of the AML/CTF Act, from 12 December 2008)
 - including information within electronic funds transfer instructions (EFTIs) and obtaining and providing that information when requested by the AUSTRAC Chief Executive Officer (CEO) (Part 5 of the AML/CTF Act, from 12 December 2008).
- 5 Section 5 of the AML/CTF Act states that 'designated service' has the meaning given by section 6. Section 6 defines the provision of 'designated services' in Tables 1-4, and the person to whom the designated service is provided, the 'customer'. Table 1 denotes financial services at items 1-54. Table 2 denotes bullion services at items 1 and 2. Table 3 denotes gambling services at items 1-14. Table 4 denotes prescribed services and refers to services specified in the regulations. No services have to date been specified in the regulations.

- 6 However, on 31 January 2008, the *Anti-Money Laundering and Counter-Terrorism Financing Regulations 2008*¹ (AML/CTF Regulations) came into effect to amend item 35 to ensure that companies who carry on a business of issuing or selling interests in managed investment schemes are providing a 'designated service' under item 35 of table 1 in section 6 of the AML/CTF Act.

Outline of interpretation

- 7 The obligation to provide a compliance report is set out in section 47 of the AML/CTF Act. The first compliance report was due on or before 31 March 2008 in accordance with the periods specified in the *Anti-Money Laundering and Counter-Terrorism Financing Rules (AML/CTF Rules)*. The AML/CTF Rules include the *Anti-Money Laundering and Counter-Terrorism Rules*, 13 December 2006 and the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No 1)*.
- 8 The items in tables 1, 2 and 3 in section 6 use common phrases to define the designated services in those items. Common phrases include 'in the capacity of' and 'carrying on a business'. This Public Legal Interpretation therefore contains:

Section one:

- discussion of 'carrying on a business'
- discussion of 'in the capacity of'
- designated services under table 1, section 6 of the AML/CTF Act
- designated services under table 2, section 6 of the AML/CTF Act
- designated services under table 3, section 6 of the AML/CTF Act.

Section two:

- discussion of obligations to provide a compliance report.

¹ Federal Register of Legislative Instruments F2008L00137.

Interpretation

Section one – reporting entities that provide designated services including by ‘carrying on a business’ and ‘in the capacity of’

- 9 Section 5 states that a ‘reporting entity’ is a person who provides a designated service. Tables 1, 2 and 3 in section 6 prescribe the designated services, the provision of which means that a person is a reporting entity.
- 10 ‘Provide’ is defined in section 5 as including ‘supply, grant or confer’. In the context of the AML/CTF Act as a whole, ‘provides’ includes an offer to provide. This is consistent with the reporting obligations set out in Part 3 of the AML/CTF Act.

‘Carrying on a business’

- 11 The term ‘carrying on a business’ or a specific delineation of this phrase occurs in many of the items in tables 1, 2 and 3. For example, in table 1, items 6 and 7 define designated services made in the course of ‘carrying on a loans business’, item 8 refers to ‘carrying on a factoring business’, item 9 refers to ‘carrying on a forfeiting business’, items 10 and 11 to ‘carrying on a finance leasing business’.
- 12 Other items in table 1 which use the term ‘carrying on a business’ are:
 - items 12 and 13 (carrying on a business of supplying goods)
 - item 33 (carrying on a business of acquiring or disposing of securities, derivatives or foreign exchange contracts in the capacity of agent)
 - item 34 (carrying on a business of acquiring or disposing of bills of exchange, promissory notes or letters of credit in the capacity of agent)
 - item 35 (carrying on a business of issuing or selling securities or derivatives)
 - item 40 (carrying on a business of providing pensions or annuities)
 - item 46 (carrying on a business of providing custodial or depository services)
 - item 47 (carrying on a business of providing safe deposit boxes or similar facilities)
 - items 48 and 49 (carrying on a business of guaranteeing loans)
 - item 50 (carrying on a business of a currency exchange business)
 - item 51 (carrying on a business of collecting or holding physical currency)
 - item 52 (carrying on a business of preparing payrolls)
 - item 53 (carrying on a business of delivering physical currency).
- 13 Every item in table 2 (bullion services) and table 3 (gambling services) uses the phrase ‘carrying on a business’.
- 14 AUSTRAC is of the view that ‘carrying on a business’ includes the concepts described at paragraphs 15-22.
- 15 The term ‘business’ is defined in the AML/CTF Act in the following terms:

business includes a venture or concern in trade or commerce, whether or not conducted on a regular, repetitive or continuous basis.

- 16 Subsection 15AB(1) of the *Acts Interpretation Act 1901* states that consideration may be given to extrinsic material to assist in ascertaining the meaning of a provision:
- (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or
 - (b) to determine the meaning of the provision when
 - (i) the provision is ambiguous or obscure; or
 - (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd.
- 17 The words of the definition of ‘business’ are not ambiguous or obscure. ‘Business’ is defined broadly, consistently with the objects and purpose of the Act, to mean an activity that is conducted, whether or not it is regular, repetitive or continuous.
- 18 The *Replacement Explanatory Memorandum to the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006* (Replacement Explanatory Memorandum) is in the following terms:
- business – the definition is intended to ensure that when the term is used in the Bill that it will be given a broad interpretation for example when it is used in the phrase (*in the course of carrying on a business*) (see various items in the tables of designated services in clause 6 of the Bill – for example items 6 to 13 inclusive²).
- 19 The Replacement Explanatory Memorandum goes on at page 53, referring to subclause 6(2) table 1 (financial services) to say:
- As a general proposition designated services are limited to services provided to a designated customer in the course of carrying on the core activity of a business and to not capture activities which are peripheral to the core activity of the business. Some particular items in table 1 specifically limit the designated service in this manner where it would be possible for the service to be provided in a non-commercial manner. For example item 6 limits making of a loan to where the loan is provided in the course of carrying on a loans business so that loans provided for non commercial purposes, for example within a family, are excluded, and also loans made by a business whose core activity is not the provision of a loan are not captured. However, some business may have more than one core activity and whether an activity is a core activity of the business will be determined by the circumstances in each case³.
- 20 The definition of ‘business’ in the AML/CTF Act includes activities as business ‘whether or not conducted on a regular, repetitive or continuous basis’. This differs from the reference to core activities of financial services businesses in the Replacement Explanatory Memorandum. AUSTRAC therefore concludes that the reference to core activities of a business in the Replacement Explanatory Memorandum is to be given lesser consideration when determining what constitutes business in relation to the provision of financial services by an entity. This is consistent with the application of subsection 15AB(1) of the *Acts Interpretation Act 1901*.
- 21 The AML/CTF Act reference to business ‘whether or not conducted on a regular, repetitive or continuous basis’ is broader than other legislative constructions of this concept. For example, what is required for taxation purposes is the regular or continuous doing of things for the activity to be classified as a business.

² Anti-Money Laundering and Counter-Terrorism Financing Bill 2006, Replacement Explanatory Memorandum, page 27.

³ Replacement Explanatory Memorandum, pages 53-54.

- 22 From the definition of 'business', there may be circumstances where activities which are not conducted on a regular, repetitive or continuous basis, are done for the carrying on of a business.

Not-for-profit activities

- 23 The essential issue is whether the activities of the business amount to 'a venture or concern in trade or commerce'⁴, regardless of whether the activities form part of a profit-making enterprise.

- 24 The definition of 'business' in the AML/CTF Act diverges from that expounded in other legislation, such as taxation legislation. To constitute a 'business' for taxation purposes, activities must be undertaken for a profit or with the eventual expectation and intention of gain or profit making. This is not the case in the AML/CTF Act where the intention of the legislation is to be construed broadly with respect to services, and anti-money laundering and counter-terrorism financing measures with respect to those services.

- 25 It is AUSTRAC's view that it is not essential that the activities be undertaken for gain or profit, but that the activities must occur as part of 'a venture or concern in trade or commerce'. This is consistent with the objects of the AML/CTF Act described in paragraph 2 above. The Replacement Explanatory Memorandum states:

The reforms are a major step in bringing Australia into line with international best practice to deter money laundering and terrorism financing that includes standards set by the Financial Action Task Force (FATF).⁵

The proposed legislation replaces an outdated regime with a regulatory system more attended to a modern and dynamic financial market characterised by increased electronic commerce and non-face-to-face transactions⁶.

- 26 Reporting entities, regardless of whether they operate on a not-for-profit basis, facilitate transactions that have implications for the administration and enforcement of the anti-money laundering and counter-terrorism financing laws. There is nothing in the AML/CTF Act to suggest that reporting entities who do not charge for facilitating such transactions should have different obligations to those that do charge.

- 27 The Replacement Explanatory Memorandum confirms that the purpose of the AML/CTF Act is to match international best practice and to reform the existing system. The AML/CTF Act is therefore intended to cast a broad net with respect to the definition of designated services.

- 28 The term 'business' in the AML/CTF Act has a broad meaning. The term 'trade and commerce' has been considered by the courts with respect to issues centring on how the transaction is carried out, rather than whether it has been done on a continuous or repetitive basis or for profit, in determining if something is done in 'trade or commerce'.

- 29 AUSTRAC therefore concludes that not-for-profit activities may be considered a 'business', if done as part of a venture in trade or commerce, whether or not conducted on a regular, repetitive or continuous basis.

'In the capacity of'

- 30 The phrase 'in the capacity of' is used in the following 30 items in table 1, section 6 'financial services':

items 1, 2, 3, 5, 7, 11, 13, 14, 15, 16, 19, 19A, 20, 20A, 26, 28, 29, 30, 34, 36, 38, 39, 40, 41, 42, 43, 44, 45, 49 and 54.

- 31 It is also used in items 5 and 10 of table 3, section 6.

⁴ 'business', section 5 of the AML/CTF Act.

⁵ Anti-Money Laundering and Counter-Terrorism Financing Bill 2006, Replacement Explanatory Memorandum, page 1.

⁶ Replacement Explanatory Memorandum, page 16.

- 32 AUSTRAC has given a specific interpretation of the phrase 'in the capacity of' as it applies in item 54, table 1 of section 6, in Public Legal Interpretation No. 2, published on 15 May 2008.
- 33 AUSTRAC reasoned that 'in the capacity of' would be given a narrow view so as to apply only where a holder of an Australian financial services licence made arrangements for the provision of a financial service.
- 34 AUSTRAC considers that the phrase 'in the capacity of' limits the phrase following, as described in Public Legal Interpretation No. 2. For example, 'in the capacity of account provider' (items 1, 2 and 3 of table 1) refers to the providing of an account by one of the institutions specified at paragraphs (a) to (e) in those items, to a customer.
- 35 AUSTRAC's view is therefore that a service provider who acts 'in the capacity of' refers to a person who has the specified role, and is acting in the person's capacity as holder of that role.

Geographical link

- 36 'Designated services' provided under the items in section 6 of the AML/CTF Act must have the relevant 'geographical link' to Australia specified in subsection 6(6).
- 37 An item in a table in section 6 does not apply unless:
- the service is provided at or through a permanent establishment of the person in Australia; or
 - the person is a resident of Australia, and the service is provided at or through a permanent establishment of the person in a foreign country; or
 - the person is a subsidiary of a company that is a resident of Australia, and the service is provided at or through a permanent establishment of the person in a foreign country.

Designated services under tables 1, 2 and 3 of subsection 6(2)

- 38 The following discussion does not exhaustively cover all designated services.

Table 1 – Financial services

- 39 Items 1, 2, 3, 4, 5, 17, 18, 18A, 20 and 20A in table 1 are restricted to services provided by an ADI, bank, building society, credit union or a person specified in the AML/CTF Rules. In addition, items 19 and 19A are restricted to services provided by an ADI or bank or by a person specified in the AML/CTF Rules. ADI is defined in section 5 of the AML/CTF Act as:

ADI (short for authorised deposit-taking institution) means:

- (a) a body corporate that is an ADI for the purposes of the *Banking Act 1959*; or
- (b) the Reserve Bank of Australia; or
- (c) a person who carries on State banking within the meaning of paragraph 51(xiii) of the Constitution.

- 40 These items only apply where the designated services are provided by the institutions specified in the relevant items, or when AML/CTF Rules have been made, in those Rules.

Accounts

- 41 Items 1, 2, 3, 14, 15, 16, 18, 18A, 19, 19A, 20 and 20A refer to designated services provided with respect to 'accounts'.
- 42 Section 5 of the AML/CTF Act defines 'account' and 'account provider' as follows:

account includes:

- (a) a credit card account; and

- (b) a loan account (other than a credit card account); and
- (c) an account of money held in the form of units in:
 - (i) a cash management trust; or
 - (ii) a trust of a kind prescribed by the AML/CTF Rules.

To avoid doubt, it is immaterial whether:

- (d) an account has a nil balance; or
- (e) any transactions have been allowed in relation to an account.

account provider: if an account is with a person, the person is the **account provider** for the account.

- 43 The definition of account provider is relevant in determining who the provider of the designated service is with respect to the above items.
- 44 The designated services are those of opening an account (item 1), allowing a person to become a signatory to an account (item 2) and allowing transactions to be conducted on an account (item 3). AUSTRAC considers that allowing transactions to be conducted includes debits or withdrawals, deposits, and any transactions that do not relate to becoming a signatory or opening an account, as these are covered by items 1 and 2. These transactions may be delivered through various channels including electronic and face-to-face transactions.
- 45 Other designated services relating to accounts are: providing a cheque book on an account (item 14), providing a cheque book on a building society or credit union account (item 15).
- 46 In relation to each of the account-related services specified at items 1, 2, 3, 14, 15, 16, 18, 18A, 19, 19A, 20 and 20A, the relevant reporting entity obligations outlined at paragraph 4 must be complied with, as applicable.
- 47 AUSTRAC has issued a guidance note *Opening an account* (see 'Related information') which provides further assistance on the circumstances in which an account will be regarded as opened.

Deposits

- 48 Items 4, 5, 46 and 47 refer to designated services with respect to 'deposits'. 'Deposit' is not defined, indicating that the ordinary English meaning is to be applied.
- 49 'Deposit' is relevantly defined in the *Macquarie Dictionary Online 2008* (Macquarie Dictionary Publishers Pty Limited 2008) as set out below, relying on the meanings applicable to the meaning and context of 'deposit' in the AML/CTF Act.

deposit

- 3. to place for safekeeping or in trust
 - 4. to give as security or in part payment.
- noun
- 8. anything laid away or entrusted to another for safekeeping
 - 9. money placed in a bank.
 - 10. anything given as security or in part payment.

50 'Deposit' is relevantly defined in the *Encyclopaedic Australian Legal Dictionary*⁷ as:

Deposit

1. A sum of money placed into an account with a bank or other financial institution.

2. A sum of money or other thing provided as part payment or security for the fulfillment of an obligation.

51 Items 4 and 5 relate to making deposits otherwise than by way of deposit to an account. 'Account' is broadly defined to include loans, credit cards, cash management trusts and other types of accounts. AUSTRAC considers that items 4 and 5 relate to taking of deposits for other purposes than accounts. For example, this may include arranging for a bank cheque and payment of a fee for a bank cheque, making a payment to send funds electronically to another person's account, or by transfer internationally.

52 AUSTRAC considers that arranging for a bank cheque may be included in item 4.

53 Items 46 and 47 are the designated services of custodial or depository services and safe deposit boxes.

54 The phrase used in item 46, 'providing a custodial or depository service', is defined in section 5:

providing a custodial or depository service includes engaging in conduct that, under subsection 766E(1) of the *Corporations Act*, constitutes providing a custodial or depository service within the meaning of Chapter 7 of that Act, but does not include:

- (a) conduct covered by subsection 766E(3) of that Act; or
- (b) conduct specified in the AML/CTF Rules.

55 Item 46 requires that a provider provide a 'financial product' (as defined in section 763A of the *Corporations Act*) or a beneficial interest in a financial product to the deposit-maker. In basic terms, a 'financial product' needs to be a facility through which a person makes a financial investment, manages financial risk or makes non-cash payments. It is a financial investment product which generates some kind of financial return on an amount contributed, deposited or transferred.

56 Item 47 relates principally to the first limb of the definition of 'deposit' consisting of a sum of money or other item of value placed into a safe deposit box with a bank or other institution.

Loans

57 Items 6, 7, 48 and 49 relate to designated services with respect to loans.

58 Section 5 of the AML/CTF Act defines loan:

loan includes:

- (a) an advance of money; and
- (b) the provision of credit or any other form of financial accommodation; and
- (c) the payment of an amount for, on account of, on behalf of or at the request of a person where there is an obligation (whether expressed or implied) to repay the amount; and
- (d) a transaction (whatever its terms or form) which in substance effects a loan of money;

but does not include:

⁷ LexisNexis 2008.

- (e) if goods (within the meaning of the *Trade Practices Act 1974*) are sold on credit—the provision by the seller of that credit; or
- (f) if services (within the meaning of the *Trade Practices Act 1974*) are provided on credit—the provision by the provider of the service of that credit; or
- (g) anything that, under the AML/CTF Rules, is taken not to be a loan for the purposes of this Act.

59 Item 6 denotes the designated service of ‘making a loan’ in the course of carrying on a loans business. Item 7 refers to the designated service of conducting a transaction in relation to a loan, in the capacity of lender or assignee of the lender for a loan.

60 Items 48 and 49 relate to guaranteeing a loan (item 48) and making a payment to the lender (item 49), where the guarantee is given in the course of carrying on a business of guaranteeing loans.

61 ‘Make a loan’ (item 6) is not defined in the AML/CTF Act. The expression ‘make a loan’ (in conjunction with the phrase ‘in the ordinary course of the ordinary business of the company advancing the money’), has been considered in relation to corporations legislation in *Ex Parte D*⁸ and *Brick and Pipe Industries Ltd v Occidental Life Nominees Pty Ltd*⁹. In those cases, the court held that the nature of a transaction is to be considered in determining whether it has the effect of making a loan. In reaching that conclusion, the court followed the reasoning of the Privy Council in *Chow Yoong Hong v Choong Fah Rubber Manufactory*¹⁰:

The task of the court in such cases is clear. It must look at the nature of the transaction which the parties have agreed. If in form it is not a loan, it is not to the point to say that its object was to raise money for one of them or that the parties could have produced the same result more conveniently by borrowing and lending money.

62 The decision of the Privy Council in regard to what constitutes a loan was also accepted by the High Court in *Handevel Pty Ltd v Comptroller of Stamps (Victoria)*¹¹ and forms the basis of the state company cases and is consistent with paragraphs (a) to (d) of the definition of ‘loan’ in the AML/CTF Act.

63 The second part of the designated service in item 6 of table 1 is that the loan is ‘made in the course of carrying on a loans business’. The Western Australian Supreme Court in *Ex Parte D*¹² cited the Privy Council in *Steen v Law*¹³ with approval in relation to a similar phrase:

(a) Where the lending of money is part of the ordinary business of a company, the lending by a company of money in the ordinary course of its business.

The board considered the proviso specifically at 302. It was stated that to come within the proviso the money lending must be part of the ordinary business of a registered money-lender or bank and in that sense it must be what may be called a lending of money in general. It was then stated:

Such lenders are not obliged to accept their borrowers; but it is characteristic of their business that, if they do lend, the money made available is at the borrowers free disposition and is not, except in special circumstances, confined to special uses or restricted to particular and defined purposes.

Their Lordships stated that the words and the exemption seemed to refer more particularly to advances of a scale and for a purpose similar to those regularly made by the company in carrying out its business. They continued:

⁸ (1995) 17 ACSR 52.

⁹ [1992] 2 VR 279; (1992) 3 ACSR 649.

¹⁰ [1962] AC 209, at 216-217.

¹¹ (1985) 157 CLR 177.

¹² (1995) 17 ACSR 52 at 65.

¹³ [1964] AC 287.

Such a construction accords naturally with the idea of general money lending, provided that the advances do not amount to a departure from the usual order of business: but it is, on the other hand, virtually impossible to see how loans, big or small, deliberately made by a company for the direct purpose of financing a purchase of its share could ever be described as made in the ordinary course of its business.¹⁴

- 64 The processes which form part of the ordinary course of the loans business need to be considered as part of determining whether a reporting entity is providing the designated service in item 6.
- 65 'Loan' is defined in section 5 of the AML/CTF Act as including an advance of money and the provision of credit or any other form of financial accommodation and a transaction which effects a loan. Item 6 relates to making the loan – given the definition of loan, the making of the loan can be a variety of acts depending on the type of loan, including a transaction in itself, but it will constitute an agreement, whether formal or informal, that the loan be made by the lender and repaid by the borrower.
- 66 Item 7 relates to 'allowing the borrower to conduct a transaction in relation to the loan, where the loan was made in the course of carrying on a loans business'.
- 67 The process of assessing a customer's application for a loan usually involves a number of steps such that it is not possible to definitively describe the particular moment in time when a loan is 'made'. Until a transaction is able to be carried out a loan is not operational.
- 68 AUSTRAC considers that a loan account is opened no later than when a customer is able to withdraw or transfer funds from the account. Applicable AML/CTF Act obligations including customer identification would need to be completed no later than this point.

Designated remittance arrangements

- 69 AUSTRAC refers to Public Legal Interpretation No. 3 which provides a discussion of designated services provided under items 31 and 32 of table 1, section 6, and the requirement to register as a provider of registrable designated remittance services.

Stored value cards

- 70 Items 21 to 24 define the designated services relating to stored value cards. Section 5 of the AML/CTF Act provides an inclusive definition of 'stored value card' as follows:

stored value card includes a portable device that is:

- (a) capable of storing monetary value in a form other than physical currency; and
- (b) of a kind specified in the regulations.

- 71 There are currently no regulations which specify a kind of stored value card.
- 72 There are many different ways in which stored value cards can work. Most are designed for handling relatively small payments to be made to merchants participating in the scheme, or work as a pre-paid credit with the issuer (for example, phone cards). Some systems allow for anonymity (or a degree of anonymity) and/or exchange of value between card holders (as opposed to between card holder and merchants only).
- 73 A device that is 'capable of storing monetary value' is a card that contains value. This means that the card is capable of being scanned by an electronic device for the purposes of access to the stored funds and determination of the value of funds stored on the card. This includes telephone cards, student university cards (for payment of on campus books and food), photocopying cards, some gift cards and similar items that fall within the definition.

¹⁴(1995) 17 ACSR 52 at 66.

- 74 Conceptually the definition also covers the range of prepaid value cards which may not require formal identification of the buyer or ultimate user, and which if misplaced or lost, may not be recoverable.
- 75 Items 21 to 24 in table 1 of section 6 specify designated services by reference to monetary thresholds. If the thresholds are not met then a person is not providing a designated service and is therefore not a reporting entity. Thus many of the smaller value prepaid stored value cards in common use (examples provided at paragraph 73) will not be caught as designated services.
- 76 Items 21 and 22 relate to stored value cards of not less than \$1,000. Item 21 is the service of issuing a card which permits withdrawal in cash of the stored amount of not less than \$1,000 or another amount specified in the regulations. Item 22 is the service of increasing the value of the amount stored where the increased monetary value is not less than \$1,000.
- 77 Items 23 and 24 relate to cards where no part of the monetary value may be withdrawn in cash, and where the value stored is not less than \$5,000 (or another amount specified in the regulations). Item 23 is the service of issuing the card and item 24 is the service of increasing the monetary value on the card.
- 78 It is therefore apparent that the minimum amount of \$1,000 must be stored on such cards for the designated service provisions to apply. Where cash amounts cannot be withdrawn from the cards, items 23 and 24 provide that a minimum of \$5,000 storage is applicable.

Item 35

- 79 A view was formed that paragraph (b) in item 35 as originally passed excluded the issuing of interests in managed investment schemes issued by the responsible entity of the scheme. That is, the view was that item 35(b) excludes issues of a security or derivative that is issued by a company of a security of the company or of an option to acquire a security of the company. To ensure the inclusion of managed investment schemes in the operation of item 35, the AML/CTF Regulations were made on 25 January 2008. The AML/CTF Regulations provide:

2 These Regulations commence on the day after they are registered¹⁵.

....

4 Table 1 in section 6 of the Act is amended as set out in Schedule 1.

Schedule 1 Amendment of section 6 of Act

[1] Table 1, item 35, paragraph (b)

substitute

(b) in the case of an issue of a security or derivative – the issue does not consist of the issue by a company of either of the following:

- (i) a security of the company (other than an interest in a managed investment scheme); or
- (ii) an option to acquire a security of the company (other than an option to acquire an interest in a managed investment scheme)

- 80 From 31 January 2008 all issuing of interests in managed investment schemes must comply with the relevant AML/CTF obligations set out at paragraph 4, as applicable.
- 81 AUSTRAC issued a declaration on 4 April 2008 in relation to issuing of interests in managed investment schemes (see 'Related information'). The effect of the declaration is to modify

¹⁵ The Regulations were registered on 30 January 2008 and commenced on 31 January 2008.

the application of section 28 (pre-commencement customers) so that for designated services covered by the AML/CTF Regulations, pre-commencement customers are customers to whom a reporting entity commenced to provide a service prior to 31 January 2008.

- 82 The AML/CTF compliance report requirements of Part 3, Division 5 of the AML/CTF Act came into effect on 12 June 2007. AML/CTF compliance reports relate to a reporting entity's compliance with the AML/CTF Act and AML/CTF Rules during the reporting period.
- 83 The 'first reporting period' specified in the AML/CTF Rules was the period beginning on 13 December 2006 and ending on 31 December 2007. Entities that provided a designated service during the reporting period were required to lodge a compliance report by 31 March 2008. Entities that did not provide any designated services during that reporting period were not required to lodge an AML/CTF compliance report.
- 84 As a result, where the only designated service provided by a reporting entity was the issuing or selling of interests in a managed investment scheme, that reporting entity was not required to submit an AML/CTF compliance report with respect to the first reporting period.

Superannuation

- 85 Items 40, 41, 42 and 43 define designated services with respect to superannuation and pensions.
- 86 Item 40 is the designated service of accepting payment of the purchase price of a new pension or annuity, where the provider is not a self managed super fund, or the pension or annuity is provided in the course of carrying on the relevant business.
- 87 Item 41 is the designated service of making a payment of a pension or annuity, or an amount resulting from commutation of the pension or annuity, or the residual capital value of the pension or annuity, where the provider is not a self managed super fund. AUSTRAC considers that the reporting entity obligations of customer identification would not need to occur with every payment of the pension or annuity. However, appropriate customer due diligence measures should occur over the life of the pension or annuity in relation to the item 41 service.
- 88 Item 42 is the service of accepting a contribution, roll-over or transfer of a new or existing member of the fund, provided by a trustee of an approved deposit fund or a superannuation fund (other than a self managed superannuation fund).
- 89 Item 43 is the service of cashing an interest of a super fund, provided by a trustee of an approved deposit fund or a superannuation fund (other than a self managed superannuation fund). AUSTRAC considers that cashing refers to paying out the interest in whole or in part of the member, and includes electronic transfer payments of the member's interest.
- 90 Item 44 is the service provided by a person in the capacity of RSA provider of accepting a contribution, roll-over or transfer to an RSA in respect of a new or existing RSA holder. 'RSA provider' is defined in section 5 as follows:

RSA provider (short for retirement savings account provider) has the same meaning as in the *Retirement Savings Accounts Act 1997*.

- 91 Subsection 39(6) of the AML/CTF Act provides that the AML/CTF Act Part 2, excepting Division 2, does not apply to a designated service covered by items 40, 42 or 44. This means that providers of services under items 40, 42 and 44 must comply with customer due diligence requirements and are not required to comply with customer identification requirements.

Table 2 – Bullion services

- 92 Table 2 in section 6 of the AML/CTF Act provides that the buying and selling of bullion is a designated service, where the buying or selling is in the course of carrying on a business.

93 Section 5 of the AML/CTF Act provides an inclusive definition of 'bullion' as follows:

bullion includes anything that, under the regulations, is taken to be bullion for the purposes of this Act.

94 There are currently no regulations in relation to the definition of bullion.

Table 3 – Gambling services

Eligible gaming machine venues

95 Items 5 and 10 of table 3 define designated services provided by persons 'in the capacity of controllers of eligible gaming machine venues.

96 Section 13 of the AML/CTF Act defines 'eligible gaming machine venue' and 'controller' of an eligible gaming machine venue, as follows:

13 Eligible gaming machine venues

For the purposes of this Act, if:

- (a) a person (the **first person**) is in control of a particular venue; and
- (b) one or more gaming machines are located at the venue; and
- (c) the first person is neither the owner nor the lessee of the gaming machines; and
- (d) such other conditions (if any) as are specified in the AML/CTF Rules are satisfied;

then:

- (e) the venue is an **eligible gaming machine venue**; and
- (f) the first person is the **controller** of the venue.

97 An 'eligible gaming machine venue' is therefore a venue where the person who controls the venue is neither the owner nor the lessee of the gaming machines located at the venue. This addresses situations where large gaming companies provide machines that are neither owned nor leased by the persons in control of the venues in which the machines are located.

98 Item 5 of table 3 is the service of 'allowing a person to play a game on a gaming machine located at the venue, where the service is provided in the course of carrying on a business', provided by a person 'in the capacity of a controller of an eligible gaming machine venue'.

99 Item 5 covers accepting a person's entry into the venue and subsequently accepting entry of the person into the game played on the machines at the venue. Accepting entry into premises and into games played at the venue is acting 'in the capacity of controller of an eligible gaming machine venue'.

100 Item 10 of table 3 is the service provided by a person 'in the capacity of controller of an eligible gaming machine venue', of:

paying out winnings, or awarding a prize, in respect of a game, where:

- (a) the game is played on a gaming machine located at the venue; and
- (b) the winnings are paid out, or the prize is awarded, by the controller as agent of the owner or lessee of the gaming machine; and
- (c) the service is provided in the course of carrying on a business.

101 Item 10 therefore relates to paying out winnings or awarding prizes with respect to games played on machines that are neither owned nor leased, by controllers of eligible gaming machine venues. This includes accepting entry of a person to the venue, and paying out winnings which the person has won on the machines at the venue. A person acts as the agent of the owner or lessee of the venue, within the meaning of paragraph (b) where the machine is not owned or leased by the person in control of the venue where the machines are located, and the person pays out the winnings or awards prizes relevant to those machines.

Other gaming machines

102 Items 6 and 9 of table 3 relate to games of chance which are not played at eligible gaming machine venues. Persons who own or lease machines are not 'controllers of eligible gaming machine venues'. Items 6 and 9 therefore include games played on electronic gaming machines which are owned or leased by persons in charge of the venues.

103 Item 6 refers to:

accepting the entry of a person into a game, where:

- (a) the game is played for money or anything else of value; and
- (b) the game is a game of chance or of mixed chance and skill; and
- (c) the service is provided in the course of carrying on a business; and
- (d) the game is not played on a gaming machine located at an eligible gaming machine venue.

104 In line with paragraph (d), the game is not played at 'an eligible gaming machine venue'. Therefore it is *not* a venue where the person neither owns nor leases the gaming machines located at the venue. Therefore the designated service includes games at venues where controllers own and lease the machines located at the venue.

105 Similarly to item 5 (except that the game is not played at an 'eligible gaming machine venue'), item 6 includes accepting a person's entry into the venue and subsequently accepting entry of the person into the game played on the machines at the venue.

106 Item 9 is the service of:

paying out winnings, or awarding a prize, in respect of a game, where:

- (a) the game is played for money or anything else of value; and
- (b) the game is a game of chance or of mixed chance and skill; and
- (c) the service is provided in the course of carrying on a business; and
- (d) the game is not played on a gaming machine located at an eligible gaming machine venue

107 In line with paragraph (d), the game is not played at 'an eligible gaming machine venue'. Therefore it is *not* a venue where the person neither owns nor leases the gaming machines located at the venue. Therefore the designated service includes games at venues where controllers own and lease the machines located at the venue.

108 Similarly to item 10 (except that the game is not played at an 'eligible gaming machine venue'), item 9 includes accepting a person's entry into the venue and subsequently paying out winnings or awarding prizes relating to games played on machines at the venue.

General gaming machine issues

109 In either case (eligible gaming machines or gaming machines which come within items 6 and 9, table 3, section 6), AUSTRAC considers that the licensee or authority holder of a gaming permit under State or Territory jurisdiction is the person who is in a position to accept entry or pay out winnings with respect to the games played on the machines.

Section two – compliance report obligations

- 110 Section 47 states that the obligation to provide a compliance report under that section applies if a certain period is specified in the AML/CTF Rules. Section 47 applies if the AML/CTF Rules provide that a specified period is a reporting period, and the specified period beginning at the end of the reporting period is a lodgment period in which the compliance report must be lodged.
- 111 Subsection 47(5) states that the obligations under section 47 do not apply 'if all the designated services provided by the reporting entity are covered by item 54 of table 1 in section 6'.
- 112 Chapter 11 of the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)* (AML/CTF Rules 2007) was registered on 1 August 2007. Chapter 11 of the AML/CTF Rules 2007 commenced on 12 December 2007¹⁶ and provides:
- 11.2 For paragraph 47(1)(a) of the AML/CTF Act, a reporting period is the period beginning on 13 December 2006 and ending on 31 December 2007.
- 11.3 For paragraph 47(1)(b) of the AML/CTF Act, the lodgment period for a reporting period is the period of 3 months beginning at the end of the reporting period.
- 113 Section 47 of the AML/CTF Act requires a reporting entity to submit a compliance report to the AUSTRAC CEO, except as provided in subsection 47(5) – that is, designated services under item 54, table 1, section 6.
- 114 If an entity provided designated services at any time within the reporting period (other than designated services under item 54, table 1, section 6) the entity must submit a compliance report within the lodgment period. This includes designated services which were commenced within the reporting period and were not provided for the entirety of the reporting period.
- 115 As discussed at paragraph 10, in the context of the AML/CTF Act, 'provides' includes an offer to provide a designated service. If a person offers to provide a designated service at any time in the reporting period, the person is a reporting entity and should comply with reporting entity obligations including lodgment of a compliance report under section 47.
- 116 If an entity ceases to provide or offer to provide a designated service prior to the commencement of a reporting period, the entity is not obliged to lodge a compliance report under section 47. The entity is not a 'reporting entity' for the purposes of that reporting period and the obligations of section 47 therefore do not apply.
- 117 Similarly, an entity that occasionally provides or offers to provide designated services and that has not provided or offered designated services within a reporting period, is not a reporting entity within that period. For the relevant period, the entity therefore has no obligation to provide a compliance report.
- 118 AUSTRAC considers that a reporting entity remains a reporting entity regardless of whether or not an exemption is granted under section 248 with respect to provision of the designated service. If the effect of the exemption instrument is that the reporting entity is not providing or offering to provide a designated service during the reporting period, then the entity is not required to provide a compliance report. In addition, an exemption instrument may specify that an entity is exempt from the obligation in section 47.
- 119 The steps to be undertaken by a reporting entity in lodging a compliance report are outlined at AUSTRAC Online found at www.austrac.gov.au/online/index.html.

¹⁶ Clause 3 of the AML/CTF Rules 2007 provides that Schedule 2 of the instrument, in which Chapter 11 resides, commences on 12 December 2007.

Related information

Legislative instruments

The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) provides at section 5 that the 'registrable details' are to be specified in the AML/CTF Rules. The *Anti-Money Laundering and Counter-Terrorism Financing Rules* made on 13 December 2006¹⁷ (AML/CTF Rules 2006), at Schedule 4, provide for registrable details to be included on the Register of Providers of Designated Remittance Services. The AML/CTF Rules 2006 are found at:

www.frli.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/0/FAFB001EFFC88CAFCA2572490025BDA9?OpenDocument

The *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)*¹⁸, can be found at:

www.comlaw.gov.au/comlaw/management.nsf/lookupindexpagesbyid/IP200730563?OpenDocument

The AML/CTF Rules at Chapter 1 provide relevant definitions in Part 1.2 'Key terms and concepts'. For example, totalisator agency board, on-course bookmaker and online gambling service.

The AML/CTF Rules at Chapter 21 relating to issuing or selling a security or derivative, specify conditions for paragraph (d) of item 35 of table 1 in subsection 6(2). These Rules exempt certain types of services from the operation of the AML/CTF Act. The Explanatory Statement for these Rules is found at:

www.comlaw.gov.au/comlaw/Legislation/LegislativeInstrument1.nsf/0/3F659D7324884197CA25743B0002A2E6?OpenDocument&VIEWCAT=attachment&COUNT=999&START=1

The AML/CTF Rules at Chapter 22 provide conditional exemptions of certain types of derivatives transactions (in items 33 and 35 of table 1 in section 6 of the AML/CTF Act) from the AML/CTF Act in specified over-the-counter derivatives markets in Australia. Those derivatives markets relate to the wholesale price of electricity, gas or renewable energy certificates involving specified market participants in the National Electricity Market (NEM) and Wholesale Electricity Market (WEM). The Explanatory Statement for these Rules is found at:

www.comlaw.gov.au/comlaw/Legislation/LegislativeInstrument1.nsf/0/A494FCB8FD6E8C1ECA25744300043528?OpenDocument&VIEWCAT=attachment&COUNT=999&START=1

AUSTRAC has proposed draft AML/CTF Rules for designated remittance arrangements in relation to paragraph 10(1)(c) of the AML/CTF Act. These draft AML/CTF Rules have been circulated for public consultation and are available (as at the date of this PLI) on the AUSTRAC website at: www.austrac.gov.au/aml_ctf_rules.html

Modification and exemption instruments under the AML/CTF Act

A declaration (modification) instrument was made under section 248 on 4 April 2008. This modifies the application of section 28 (pre-commencement customers) so that for designated services covered by the AML/CTF Regulations, pre-commencement customers are customers to whom a reporting entity commenced to provide a service prior to 31 January 2008. This instrument is available on the AUSTRAC website at: www.austrac.gov.au/exe_granted.html

¹⁷ Federal Register of Legislative Instruments F2006L04232.

¹⁸ Legislative Instrument Compilation F2008C00235.

Anti-Money Laundering and Counter-Terrorism Financing Regulations 2008

The Anti-Money Laundering and Counter-Terrorism Financing Regulations 2008¹⁹ amend the AML/CTF Act to resolve an unintended exemption in the Act. These Regulations ensure that companies who carry on a business of issuing or selling interests in managed investment schemes are providing a 'designated service' under item 35 of table 1 in section 6 of the AML/CTF Act. The Regulations are found at:

www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/asmade/bytitle/D8C82DC458DCCBE2CA2573D30016EF8F?OpenDocument

AUSTRAC publications

The AUSTRAC *Public Legal Interpretation No. 2 of 2008 – Item 54 of table 1 in section 6 of the AML/CTF Act* provides AUSTRAC's legal view of the meaning and scope of item 54 of table 1 in section 6 of the AML/CTF Act and contains guidance about the practical application of item 54 in relation to holders of Australian financial services licence holders.

The AUSTRAC *Public Legal Interpretation No. 3 of 2008 – Registration as a provider of registrable designated remittance services* provides AUSTRAC's views on the provisions of the AML/CTF Act relating to providers of a 'registrable designated remittance service'.

These public legal interpretations can be accessed via AUSTRAC's website at:

www.austrac.gov.au/pli.html

The AUSTRAC guidance note *Register of Providers of Designated Remittance Services*²⁰ provides information and assistance to those reporting entities required to register with AUSTRAC as providers of registrable designated remittance services.

The AUSTRAC guidance note *Opening an account*²¹ provides information about when an account has been 'opened' for the purposes of the AML/CTF Act.

These guidance notes can be accessed via AUSTRAC's website at

www.austrac.gov.au/guidance_notes.html

The *AUSTRAC Regulatory Guide* contains guidance on obligations under the AML/CTF Act and is available on the AUSTRAC website at: www.austrac.gov.au/regulatory_guide.html

Legislation attachment

The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* is available in consolidated form at:

www.comlaw.gov.au/comlaw/management.nsf/lookupindexpagesbyid/IP200627290?OpenDocument

Further information

AUSTRAC officers are able to assist reporting entities, their staff and the public in providing general information relating to the AML/CTF Act. Enquiries can be directed to the AUSTRAC Help Desk via:

- email to help_desk@austrac.gov.au
- telephone 02 9950 0827 or 1300 021 037 (a local call within Australia).

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¹⁹ (Legislative Instrument - F2008L00137).

²⁰ July 2007, original issue (v1).

²¹ December 2007, original issue (v1).