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Public Legal Interpretation No. 2 of 2008 – Item 54 of table 1 in section 6 of the AML/CTF Act

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Objective

- 1 The objective of this Public Legal Interpretation is to provide AUSTRAC's legal view of the meaning and scope of item 54 of table 1 in section 6 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (AML/CTF Act)*.
- 2 This Public Legal Interpretation:
 - explores the concept of what acting in the capacity of the holder of an Australian financial services licence means and explains AUSTRAC's interpretation of the concept having regard to the provisions of the AML/CTF Act and the *Corporations Act 2001 (Corporations Act)*;
 - examines the nature of the designated service that is arranged by the holder of the Australian financial services licence for the transaction to be caught by item 54.
- 3 In addition to providing AUSTRAC's legal view of the meaning of item 54, this Public Legal Interpretation will also contain guidance about the practical application of item 54 that would normally be published separately in an AUSTRAC Guidance Note. Due to the nature of the issues surrounding item 54, AUSTRAC has determined that on this occasion it would be more practical to include specific guidance material at the end of the Public Legal Interpretation.

Introduction

- 4 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 persons covered by the AML/CTF Act (known as reporting entities) when providing financial services known as designated services.
- 5 The effect of providing a designated service, described in section 6 of the AML/CTF Act, is that unless the contrary intention appears all obligations conferred on reporting entities apply to a person providing designated services.
- 6 Those obligations under the AML/CTF Act that may arise include, but are not limited to:
 - carrying out applicable customer identification procedures;
 - carrying out of ongoing customer due diligence;
 - reporting of suspicious matters;
 - reporting of transactions involving amounts over a set monetary value;
 - reporting of international funds transfer instructions;
 - reporting of electronic funds transfer instructions.
- 7 The designated service described in item 54 of table 1 in section 6 of the AML/CTF Act is directed at capturing the arranging of a designated service by a person who also is at the time acting in the capacity of the holder of an Australian financial services licence.

Interpretation

- 8 It is important to understand the scope of item 54, in particular who will be caught by the designated service and what is required for the designated service to apply.
- 9 AUSTRAC is of the view that item 54 comprises two distinct elements, both of which must be satisfied for a person to be engaging in an item 54 designated service. Those two elements are that the person providing the designated service must:

- be a person who is the holder of an Australian financial services licence and who is acting in the capacity of the holder of that licence; and
- make an arrangement for a person to receive a designated service (other than a service covered by item 54).

Holding an Australian financial services licence and acting in the capacity of the holder of that licence

- 10 For the first element of item 54, it is required that the person hold an Australian financial services licence and be acting in the capacity of the holder of such a licence.
- 11 Obtaining an Australian financial services licence is done under the provisions of the Corporations Act. Section 913A provides for the making of the application and section 913B sets out the criteria to be satisfied for the Australian Securities and Investments Commission to grant a licence. AUSTRAC considers, for the purpose of this Public Legal Interpretation, that the act of granting an Australian financial services licence is uncontroversial.
- 12 The issue that is of importance in the first element of the designated service is that the holder of the licence act in the capacity of the holder of an Australian financial services licence.
- 13 Section 911A of the Corporations Act provides that a person who carries on a financial services business must hold an Australian financial services licence.
- 14 Section 761A of the Corporations Act defines financial services business as the business of providing financial services.
- 15 Section 766A of the Corporations Act sets out when a person provides a financial service, that is, they would have to be:
 - providing financial product advice (section 766B); or
 - dealing in a financial product (section 766C); or
 - making a market for a financial product (section 766D); or
 - operating a registered scheme; or
 - providing a custodial or depository service (section 766E); or
 - engaging in conduct of a kind prescribed by the regulations made for the purposes of this paragraph (paragraph 766A(1)(f)).
- 16 Chapter 7 in Part 7.1 of Division 3 of the Corporations Act sets out what is a financial product.

Making arrangements for a person to receive a designated service

- 17 The second element of item 54 requires for the holder of an Australian financial services licence, acting in the capacity of the holder of such a licence, to make arrangements for the person to whom the financial service has been provided to receive a designated service (other than a designated service covered by item 54).
- 18 In considering its position as to the meaning of item 54 AUSTRAC considered whether the words used in item 54 were intended to be interpreted broadly or narrowly. A broad interpretation would be that the designated service that was arranged was any service as set out in section 6 of the AML/CTF Act. A narrow interpretation would be that the service to be arranged by the holder of the Australian financial services licence has to be a financial service under the Corporations Act, thus limiting the types of designated services that would be included to only those that are also within that definition in the Corporations Act.

Rationale for adopting a broad interpretation

- 19 The terminology used in item 54 gives no direct indication that the nature of the designated service arranged by the holder of the Australian financial services licence is to be limited in any way. The terminology used in item 54 clearly refers to a term that is defined in section 6 of

the AML/CTF Act. The definition of designated service also clearly refers the reader back to the designated services set out in section 6 of the AML/CTF Act.

- 20 The terminology used in item 54 does not give an indication that the designated service that was arranged, had to be provided by the holder of the Australian financial services licence. Such a situation would have limited the types of designated service that could be provided, to designated services that were also financial services under the Corporations Act.
- 21 The meaning of 'making arrangements' in item 54 of the AML/CTF Act is very broad given the definition of 'arrangement' in section 5 and includes any scheme, plan, proposal, action, course of action or course of conduct whether unilateral or otherwise.
- 22 Considering the definition of designated service and making an arrangement, together with the terminology used in item 54, that is, that it is unqualified, and adopting a literal interpretation of the words used in item 54, indicates that there is a strong argument to be made that the nature of the designated service to be arranged will include any designated service set out in section 6 of the AML/CTF Act. It should be noted that some of the designated services set out in section 6 are not financial services under the Corporations Act.
- 23 It may be considered that the adoption of such an interpretation is consistent with the overall scheme of the AML/CTF Act in that it would catch more rather than less transactions, and thus potentially reduce the money laundering and terrorism financing risk. It may be further considered that such an outcome is consistent with the objects of the AML/CTF Act set out in section 3 of fulfilling Australia's international obligations to combat money laundering and the financing of terrorism.

Rationale for adopting a narrow interpretation

- 24 The alternative narrow approach to the interpretation of item 54 is that the designated service that is to be arranged by the holder of the Australian financial services licence has to be a financial service under the Corporations Act, thus limiting the types of designated services that would be included to only those that are also within that definition in the Corporations Act.
- 25 Much of the argument put in support of this more narrow approach is predicated on the fact that the broad approach would cause confusion or that the broad approach did not sit well with the Corporations Act provisions. It is necessary to interpret the words in the legislation in accordance with the accepted rules of statutory interpretation.
- 26 Adopting a purposive approach it would be reasonable to interpret the words in item 54 'in the capacity of holder of an Australian financial services licence, making arrangements' as implying that the designated service will only apply when the service provided is also a financial service.
- 27 Such an outcome is predicated on the view that the activity, of arranging for the provision of the designated service contemplated by item 54, must be one for which the person is required to be the holder of the Australian financial services licence. For the person to act 'in the capacity of' a licensee requires the person to act in accordance with the express authority conferred by the licence granted under the Corporations Act, and as such the provision of the designated service under item 54 must be a designated service for which the person is authorised to act under the Corporations Act.
- 28 The reference to 'making arrangements' in the capacity of the holder of an Australian financial services licence is a reference specifically to the activity of arranging for a person to engage in conduct referred to in section 766C of the Corporations Act which, by section 766C(2) is deemed to be dealing in a financial product. Dealing in a financial product is an activity which, by section 766A of the Corporations Act, constitutes a financial service the provision of which requires the person to be the holder of an Australian financial services licence.

Which approach to adopt

- 29 Faced with two competing interpretations of item 54 AUSTRAC looked for some guidance as to the meaning of item 54. The Replacement Explanatory Memorandum to the *Anti-Money*

Laundering and Counter-Terrorism Financing Bill 2006 is in part in the following terms in relation to item 54:

Item 54 – in the capacity of holder of Australian financial services licence, making arrangements for a person to receive a designated service - this item implements paragraph 8 of the Glossary definition of *financial institutions*.

- 30 Paragraph 8 of the Glossary definition of *financial institutions* is set out in the Financial Action Task Force's (FATF) Methodology for Assessing Compliance with the 40 Recommendations and 9 Special Recommendations and states:

Financial institutions means any person or entity who conducts as a business one or more of the following activities or operations for or on behalf of a customer:

...

8. Participation in securities issues and the provision of financial services related to such issues.

- 31 Looking at the Replacement Explanatory Memorandum and the definition that item 54 was meant to implement, AUSTRAC has formed the view that the better interpretation is that item 54 is to apply only where the person who holds an Australian financial services licence arranges a designated service that is also a financial service under the Corporations Act.
- 32 The wording of paragraph 8 of the Glossary definition of *financial institutions* seems to imply that the definition relates to financial services provided where the financial services are related to securities issued. In the context of item 54, AUSTRAC considers this to be an indication that the intent of item 54 was that the designated service that is arranged by the holder of the Australian financial services licence is also to be a financial service under the Corporations Act.
- 33 Adopting such an interpretation of item 54, premised on paragraph 8 of the FATF's Glossary Definition of *financial institutions*, would also be consistent with the approach to the interpretation of legislation set out in sections 15AA and 15AB of the *Acts Interpretation Act 1901 (AIA)*. Those provisions of the AIA enable regard to be had to extrinsic material to assist in the interpretation which is to promote the purpose or object underlying the AML/CTF Act.
- 34 This means that if the holder of an Australian financial services licence provides advice, in the capacity of the holder of a licence, to a person and then arranges for a person to receive a designated service that is not a financial service, such as a loan, then item 54 will not apply.

Practical guidance in relation to item 54

AML/CTF Act obligations related to item 54

- 35 Reporting entities providing designated services falling within item 54 have reduced obligations under the AML/CTF Act regarding customer identification and record keeping. For example, under subsection 36(3) those reporting entities are exempt from the ongoing customer due diligence requirements prescribed by subsection 36(1). Reporting entities providing only item 54 services may adopt a 'special' AML/CTF program, which sets out the entity's applicable customer identification procedures (Part B) but not the general requirements (Part A) of a standard AML/CTF program.
- 36 Chapters 4 and 5 of the AML/CTF Rules in *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)* are relevant to providers of item 54 designated services. Chapter 5 of the AML/CTF Rules requires a reporting entity to implement appropriate risk-based systems and controls as part of its special AML/CTF program. Chapter 5 requires certain aspects of chapter 4 of the AML/CTF Rules to be incorporated in a special AML/CTF program.

- 37 When developing its AML/CTF program, a reporting entity should consider factors including the type of money laundering or terrorism financing (ML/TF) risk it may reasonably face. In identifying ML/TF risk, the reporting entity must consider its customer types, the types of services it offers, delivery methods and any dealings it may have with foreign jurisdictions. The risk-based systems and controls in the reporting entity's special AML/CTF program should be sufficient for the entity to determine whether and to what extent the identity details relating to a customer should be verified considering the relevant level of ML/TF risk the entity may reasonably face.
- 38 For more information about special AML/CTF programs and ML/TF risk, refer to AUSTRAC's guidance note *Risk management and AML/CTF programs* (available on AUSTRAC's website www.austrac.gov.au).

Financial product under the Corporations Act

- 39 Under the Corporations Act, an Australian financial services licence authorises the holder of that licence to carry on a 'financial services business' as defined in the Corporations Act. This term includes dealing in a 'financial product' which is also defined in the Corporations Act. Financial products include:
- an interest in a managed investment scheme;
 - a derivative;
 - a security;
 - a certain type of life policy or sinking fund policy;
 - a retirement savings account within the meaning of the *Retirement Savings Accounts Act 1997*;
 - a certain type of foreign exchange contract;
 - an approved deposit fund;
 - a superannuation fund.
- 40 Designated services in table 1 in section 6 of the AML/CTF Act include the above financial products.

Examples of the application of item 54

Example 1

- 41 The following is an example of a situation where item 54 would capture arrangements that involve arranging a designated service that is also a financial service under the Corporations Act:
- 42 A financial planner holds an Australian financial services licence in order to provide product advice regarding a financial product (as defined in Chapter 7 of the Corporations Act), such as a security (for example a share), debenture or a life policy. As part of the provision of financial product advice, the financial planner arranges for the customer to receive a life policy. The issuing of the life policy that is being 'arranged' for the customer to receive is a designated service under item 37 of table 1 in section 6 of the AML/CTF Act and a 'financial product' under the Corporations Act.

Example 2

- 43 Where a person or administrator (carrying out administration services on behalf of a superannuation trustee) holds an Australian financial services licence and makes an arrangement for another person to receive a designated service described in item 40, 42 or 44

(in table 1 of section 6 of the AML/CTF Act) and making the arrangement is not in the administrator's capacity of an Australian financial services licence holder, the administrator's provision of such services does not fall within the AML/CTF Act. Where the administrator makes that arrangement in the capacity of an Australian financial services licence holder, the administrators' provision of such services does fall within item 54. Under subsection 39(7) of the AML/CTF Act, in these circumstances the administrator is not required to carry out the customer identification procedures in Part 2 of the AML/CTF Act. However, the administrator is subject to the suspicious matter reporting obligation under Division 2 of Part 3 of the AML/CTF Act.

Items 33 and 54 designated services

- 44 Item 33 of table 1 in section 6 of the AML/CTF Act (rather than item 54) would apply where a person acts in the capacity of an agent of a person (**the customer**) in the acquisition or disposal of a financial product being a security, derivative or foreign exchange contract (rather than arranging for that customer to receive the product). The acquisition or disposal is carried out in the course of the agent carrying on a business of acquiring or disposing of such products. An agency relationship must exist between the person and the agent. Whether an agency relationship exists is determined on a case-by-case basis having regard to all the circumstances – for example, the agent's authority to deal in those products on behalf of the customer.
- 45 Item 33 typically applies to Australian financial services licence holders who are authorised to carry out broker-type activities as agents for another person in the acquisition or disposal of securities (for example, shares) and who are also market participants as defined in the Australian Securities Exchange market rules. Market participants are also commonly known as stockbrokers, brokers and trading participants. Where a person provides an item 54 designated service and also brokerage-type services as a market participant in the acquisition or disposal of securities on behalf of another person (item 33), the person is caught by both items 33 and 54. In these circumstances, the person's AML/CTF program must comprise both Parts A (general) and B (customer identification). The above example is only one situation to which item 33 applies. Other situations may apply. Whether a person is acting on behalf of another person in the acquisition or disposal of a financial product (a security, derivative or foreign exchange contract) in the course of the person carrying on the business of this kind of acquisition or disposal, would depend on the facts of the particular case.
- 46 Where a person is not acting in the capacity of agent of another person but makes an arrangement, in the capacity of an Australian financial services licence holder, for another person (customer) to receive a designated service such as the issue or sale of a security (an item 35 designated service), then the Australian financial services licence holder may only be caught by item 54.
- 47 General indicators of a course of action or conduct which is likely to amount to 'making arrangements' include, but are not limited to, the following activities:
 - the person is integral to the introduction and completion of the receipt of the designated service, which is a financial service under the Corporations Act, to the customer and the receipt of that designated service may not have occurred without that person's involvement;
 - the person negotiated the terms and conditions between the product issuer and the customer involved in the transaction;
 - the person aided in the completion of product issuer documentation including;
 - assisting and providing guidance as to completing the product issuer's documentation;
 - explaining the meaning of questions and suggesting answers in order to complete the product issuer's documentation.

- the person collects and transmits the customer's funds to the product issuer to facilitate the completion of the designated service.

Legislation attachment

The relevant provisions of the AML/CTF Act are set out below:

Section 5 Definitions

arrangement includes:

- (a) any agreement, arrangement, understanding, promise or undertaking, whether express or implied, and whether or not enforceable, or intended to be enforceable, by legal proceedings; and
- (b) any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.

Australian financial services licence has the same meaning as in Chapter 7 of the *Corporations Act 2001*.

designated service has the meaning given by section 6.

Section 6 Designated services

- (1) For the purposes of this Act, the following tables define:
 - (a) the provision of a **designated service**; and
 - (b) the person (the **customer**) to whom the designated service is provided.

Table 1—Financial services

- (2) Table 1 is as follows:

Table 1—Financial services		
Item	Provision of a designated service	Customer of the designated service
54	in the capacity of holder of an Australian financial services licence, making arrangements for a person to receive a designated service (other than a service covered by this item)	the person

The relevant provisions of the Corporations Act are set out below:

Section 761A

Australian financial services licence means a licence under section 913B that authorises a person who carries on a financial services business to provide financial services.

766A When does a person provide a *financial service*?

- (1) For the purposes of this Chapter, subject to paragraph (2)(b), a person provides a ***financial service*** if they:
 - (a) provide financial product advice (see section 766B); or
 - (b) deal in a financial product (see section 766C); or
 - (c) make a market for a financial product (see section 766D); or
 - (d) operate a registered scheme; or
 - (e) provide a custodial or depository service (see section 766E); or
 - (f) engage in conduct of a kind prescribed by regulations made for the purposes of this paragraph.
- (2) The regulations may set out:
 - (a) the circumstances in which persons facilitating the provision of a financial service (for example, by publishing information) are taken also to provide that service; or
 - (b) the circumstances in which persons are taken to provide, or are taken not to provide, a financial service.
- (3) To avoid doubt, a person's conduct is not the provision of a ***financial service*** if it is done in the course of work of a kind ordinarily done by clerks or cashiers.
- (4) For the purposes of this section, a person is not ***operating a registered scheme*** merely because:
 - (a) they are acting as an agent or employee of another person; or
 - (b) they are taking steps to wind up the scheme.

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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