



**CPA Australia**  
Level 28, 385 Bourke Street, Melbourne, VIC 3000 Australia  
(GPO Box 2820AA, Melbourne, VIC 3001 Australia)  
Tel: +61 3 9606 9655, Fax: +61 3 9602 1163  
E-mail: sandi.bourke@cpaaustralia.com.au  
www.cpaaustralia.com.au ABN 64 008 392 452



**The Institute of  
Chartered Accountants  
in Australia**

**The Institute of Chartered Accountants in Australia**  
37 York Street, Sydney, NSW 2000 Australia  
(GPO 3921, Sydney, NSW 2001 Australia)  
Tel: +61 2 9290 5630, Fax: +61 2 9262 5469  
E-mail: wendyz@icaa.org.au  
www.icaa.org ABN 58 084 642 571

4 September 2006

The Secretary  
Criminal Law Branch  
Attorney-General's Department  
Robert Garran Offices  
National Circuit  
BARTON ACT 2600

Email: [aml.reform@ag.gov.au](mailto:aml.reform@ag.gov.au)

Dear Secretary

### **Submission on s39 of *Anti-Money Laundering and Counter Terrorism Bill 2006***

CPA Australia and the Institute of Chartered Accountants in Australia (the Institute) wish to present additional issues regarding s39 of the *Anti-Money Laundering and Counter-Terrorism Financing Bill 2006* (the Bill).

The Institute and CPA Australia are concerned with the approach taken in relation to suspicious transaction reporting. There are considerable policy arguments to support of the changes to the draft bill which include:

- The commitment by government to ensure that the revised Bill is no more onerous than the FTRA;
- The need to take account of the Financial Action Task Force ("FATF") Forty Recommendations ("FATF Recommendations");
- the need to introduce a new concept of "materiality" having regard to the "significant" breach reporting requirements in Chapter 7 of the Corporations Act 2001;
- having regard to the Australian Tax Office ("ATO") policy on tax evasion; and
- to avoid over-regulation of business (regulatory creep) which is consistent with the recent endorsement by the Government of relevant recommendations in the January 2006 Report of the Taskforce on Reducing Regulatory Burdens on Business (Banks Report)<sup>1</sup>. The Treasurer said in his press release (in summary) that the Government was on "*an ongoing red tape reduction agenda*" and very much focussed on making sure the benefits of regulation justified their costs. Also relevant is the Government's endorsement of recommendation 5.8 in the Banks Report which is to the effect that the government "*should amend the breach reporting requirements to impose consistency and reduce the compliance burden*". Although clause 39 is about suspicious matter reporting, rather than breach reporting, this principle apparently behind this recommendation would appear to be applicable.

---

<sup>1</sup> See Treasurer Peter Costello's press release of 15 August 2006.

While the government has consistently referred to current reporting obligations under FTRA as providing a benchmark for AML/CTF requirements, this objective should not outweigh the broader goal of achieving an effective AML/CTF regime, which minimizes the regulatory burden on reporting entities. The obligations under FTRA were also developed for a specific sector of industry – the financial services sector. There must be recognition that the same obligations cannot simply be rolled out to the professional services sector without consideration of additional factors relevant to those businesses. Without such consideration, the regulation will fail to achieve its objective. Ideally, we would like to see a consistent framework for all reporting entities, however the current approach would create a significant burden for small professional practices and interfere with client relationships. Therefore, if there is no opportunity to find a workable alternative in the current bill, we would be seeking amendments or exemptions for accounting practices in the second tranche of the bill.

A number of specific issues have been outlined below.

### **New requirement to report breaches of State or Territory laws**

The revised Bill contains additional requirements which are not currently found in the FTRA including:

- a requirement to make a suspicious matter report in relation to information that may be connected with a breach or an attempted breach of a law of a State or Territory that deals with taxation<sup>2</sup>;
- a requirement to make a suspicious matter report in relation to an offence against a law of a State in addition to offences against a law of the Commonwealth or of a Territory<sup>3</sup>; and
- a requirement to make a suspicious matter report in relation to information that may be of assistance in the enforcement of a law of a State or Territory that corresponds to the *Proceeds of Crime Act 2002* or regulations under that Act.

The additional circumstances in which a suspicious matter reporting obligation arises do not appear to be required to comply with the FATF Recommendations as FATF has previously stated that it is satisfied that the “*provisions for suspicious transaction reporting are generally adequate*”.<sup>4</sup> Also, as mentioned above, the focus in FATF Recommendation 13 is on reporting breaches of laws relevant to money laundering and counter terrorism financing, not all laws in the relevant country.

Further, it is unreasonable to expect that each reporting entity will be familiar with the law (generally and in relation to taxation matters) in each State (and Territory in relation to corresponding Proceeds of Crime legislation). For example, State taxation laws that a reporting entity would need to be familiar with in Victoria would include the *Land Tax Act 2005*, the *Pay-Roll Tax Act 1971*, the *Duties Act 2000* and the *Debits Tax Act 1990*. It is difficult to see how an offence against these Victorian Acts would be relevant to money laundering or terrorism financing.

The imposition of these additional requirements would thus seem to be:

- inconsistent with the FTRA;
- not required by the FATF Recommendations; and
- inconsistent with the Governments recently stated policies about reducing the regulatory burden.

---

<sup>2</sup> Clause 39(1)(f)(iv)

<sup>3</sup> Clause 39(1)(f)(v)

<sup>4</sup> Financial Action Task Force, Third Mutual Evaluation Report on Anti-Money Laundering and Combating The Financing of Terrorism - Australia, page 90

## Current obligations with respect to State and Territory law

At the meeting with Attorney General's department on 28 August, it was stated the government does not wish to remove the abovementioned requirements on the basis that they are currently provided for in the FTRA. With respect, we do not agree that that is the case for the following reasons:

- **Evasion of taxation laws:** section 16 (1)(b)(i) of the FTRA relevantly requires reporting of information that *"may be relevant to investigation of an evasion, or an attempted evasion, of a taxation law"* (our emphasis). The term *"taxation law"* in section 16 of the FTRA is defined in relation to the definition of *"taxation law"* in the *Taxation Administration Act 1953*<sup>5</sup>. That definition in turn provides that a taxation law means:
  - i. in section 2(1);
    - (a) this Act;
    - (b) any other Act of which the Commissioner has the general administration (other than an Act prescribed for the purposes of this paragraph);
    - (ba) *the A New Tax System (Australian Business Number) Act 1999*;
    - (c) *regulations under an act referred to in paragraph (a), (b) or (c)*<sup>6</sup>.
  - ii. in section 14A - *"a law of the Commonwealth or of a Territory imposing a tax or otherwise dealing with Australian tax"*.
  - iii. in section 17(1) - *"any law of the Commonwealth of which the Commissioner has the general administration"*;

The definition of *"taxation law"* does not cover taxation laws enacted by the States such as laws on stamp duty, pay-roll tax and land tax (amongst others) and the Commissioner of Taxation does not administer these laws. Therefore, we conclude that section 16 (1)(b)(i) of the FTRA does not extend to State laws that deal with taxation;

- **Offences against State laws:** section 16 (1)(b)(ii) of the FTRA relevantly requires reporting of information about *"an offence against a law of the Commonwealth or a Territory"* This section clearly does not extend to State laws.

Accordingly, the FTRA does not require a suspicious matter report in relation to an offence against a law of a State.

However, there do appear to be requirements under State laws themselves that provide for the making of reports to AUSTRAC. It may be that these are the requirements that the Attorney-General's Department had in mind. AUSTRAC has said in this regard in Guideline No 1, that *"All Australian States require that suspect transactions be reported to AUSTRAC (for referral to relevant State law enforcement agencies) in respect of certain serious offences under State laws. Reports under these State laws are to be made to AUSTRAC in the same way as reporting under Federal and Territory laws as reflected in this guideline"*.<sup>7</sup>

In Victoria, the requirement to make a suspicious matter report is contained in section 119 of the *Confiscation Act 1997* which states that:

- "(1) A cash dealer<sup>8</sup> who is a party to a transaction and who has reasonable grounds for suspecting that information that the cash dealer has concerning the transaction -

<sup>5</sup> Sections 2(1), 14A and 17(1) of the Taxation Administration Act 1953

<sup>6</sup> Section 2(1) of the Taxation Administration Act 1953

<sup>7</sup> AUSTRAC Guideline No 1, Suspect Transaction Reporting, page 12

<sup>8</sup> Cash dealer is defined in section 3(1) of the Confiscation Act 1997 by reference to the FTRA

- (a) *may be relevant to an investigation, or prosecution, of a person for an offence against a law of Victoria; or*
- (b) *may be of assistance in the enforcement of this Act or the regulations made under this Act -*

*must as soon as practicable, prepare a report of the transaction and communicate the information contained in it to the Director<sup>9</sup>.*

- (2) *Sub-section (1) applies only where the cash dealer is not required to report the transaction under Division 2 of Part II of the Financial Transaction Reports Act 1988 of the Commonwealth<sup>10</sup>.*

The existence of these State laws of the abovementioned type are further support for the argument that there should not be a reference to State laws in the Bill. This is on the basis that otherwise there will be dual reporting obligations which in some respects cover the same subject but in other respects are inconsistent. The regulatory burden would be considerable and arguably unnecessary.

- **State Proceeds of Crime Acts:** section 16 (1)(b)(iv) of the FTRA relevantly requires reporting of information that “*may be of assistance in the enforcement of the Proceeds of Crime Act 2002 or the regulations made under that Act*”. This section clearly does not extend to a State or Territory law that “*corresponds to the Proceeds of Crime Act 2002 or the regulations under that Act*”<sup>10</sup>.

Accordingly, the FTRA does not require a suspicious matter report in relation to information that may be of assistance in the enforcement of a State law which corresponds to the *Proceeds of Crime Act 2002*.

### **Recommendation**

***CPA Australia and the Institute suggest that section 39(1)(f)(vii) of the revised Bill be deleted on the basis that otherwise there will be dual reporting obligations which in some respects cover the same subject but in other respects are inconsistent. The regulatory burden would be considerable and arguably unnecessary***

### **Materiality**

As currently drafted, the revised Bill requires a suspicious matter report to be made under clause 39(1)(f)(iii) and (v) irrespective of whether the breach or offence is serious or minor. To put it another way, regardless of the triviality of the relevant breach.

We suggest that a concept of materiality be introduced into clause 39. Considerations supporting this approach are:

- it is consistent with the Government’s stated aim, in response to the Banks Report, of reducing the regulatory burden on business;
- it would help reduce the risk of AUSTRAC from being inundated with suspicious matter reports in relation to matters of a minor or trivial nature;
- the approach is consistent with the breach reporting requirements in Chapter 7 of the Corporations Act 2001 where only “*significant*” breaches are required to be reported to ASIC;
- in relation to tax evasion, the ATO’s Prosecution Policy recognises the difference between serious offences against taxation laws and minor offences against taxation laws. The Prosecution Policy specifically states that:

<sup>9</sup> Director is defined in section 3(1) of the Confiscation Act 1997 as the Director of AUSTRAC

<sup>10</sup> Section 39(1)(f)(vii)

- i. "A matter will not proceed to prosecution where an administrative penalty by itself, or some other administrative response is appropriate"<sup>11</sup>;
- ii. "There will always be cases where a firm response involving prosecution action is the only appropriate response eg: ...cases involving significant or serious taxation fraud"<sup>12</sup>;
- iii. "The DPP has agreed that ATO officers may conduct summary prosecutions for offences under the Income Tax Assessment Act 1933 and other taxation laws provided cases which fall into the following categories are referred to the DPP:...all offences where the maximum penalty available includes a term of imprisonment exceeding 12 months; any case where, in the ATO's view there is a realistic possibility of the court sentencing the defendant to a term of imprisonment in the event of a conviction..."<sup>13</sup>;
- iv. "Where the ATO suspects a serious fraud has been committed, the case will be referred to the AFP [Australian Federal Police] for investigation.....Serious fraud is commonly seen as a deliberate or organised course of conduct undertaken to evade a substantial amount of tax."<sup>14</sup>; and

Such an approach reflects the FATF Recommendations.

- FATF Recommendation 1 notes that "*predicate offences should at a minimum comprise all offences which are punishable by a **maximum penalty of more than one years imprisonment.***"<sup>15</sup>
- FATF Recommendation 13 recommends that financial institutions should be required to make a suspicious matter report if they suspect or have reasonable grounds to suspect "*that funds are the proceeds of a criminal activity, or are related to terrorist financing.*"<sup>16</sup>

The interpretive notes to the FATF Recommendations note that the reference to criminal activity in Recommendation 13 is a reference to:

- i. "*all criminal acts that would constitute a predicate offence for money laundering in the jurisdiction; or*
- ii. "*at a minimum to those offences that would constitute a predicate offence as required by Recommendation 1*"

It is unlikely that an offence against every law of the Commonwealth or of a Territory will constitute an offence for money laundering or terrorism financing. However, given the difficulty in defining precisely which such offences would meet this description, we suggest that, in line with the FATF recommendations, reporting entities should only be required to make a suspicious matter report where an offence against a law of the Commonwealth or of a Territory is punishable by a maximum penalty of more than one years imprisonment.

### **Recommendation**

**The Institute and CPA Australia recommend that a concept of materiality be introduced in s39(f)(iii) and (iv) and s39(g)(iii) and (iv) and s39(h)(iii) and (iv).**

<sup>11</sup> ATO Prosecution Policy, Section 2.3D

<sup>12</sup> ATO Prosecution Policy, Section 3.4.5

<sup>13</sup> ATO Prosecution Policy, Section 3.4.4.1

<sup>14</sup> ATO Prosecution Policy, Sections 4.5.1 and 4.5.2

<sup>15</sup> Financial Action Task Force, The Forty Recommendations, 20 June 2003 (incorporating the amendments of 22 October 2004) - Recommendation 1

<sup>16</sup> Financial Action Task Force, The Forty Recommendations, 20 June 2003 (incorporating the amendments of 22 October 2004) - Recommendation 13

### **Suggested drafting**

CPA Australia and the Institute have sought advice from Mallesons Stephen Jacques on this issue. A suggested approach to re-drafting s39 to include a concept of materiality is attached at Attachment 1.

Should you have any queries about the comments raised in this submission, please do not hesitate to contact Catherine Kennedy, Professional Standards Consultant on (02) 9290 5626 or Judy Hartcher, CPA Australia's Business Policy Advisor on (03)9606 9808.

Yours sincerely

A handwritten signature in black ink, appearing to read 'GR', with a small dot above the 'i'.

**Geoff Rankin FCPA**  
Chief Executive Officer  
CPA Australia

**Graham Meyer**  
Chief Executive Officer  
The Institute of Chartered Accountants in  
Australia

**39 Reports of suspicious matters**

*Suspicious matter reporting obligation*

- (1) A suspicious matter reporting obligation arises for a reporting entity in relation to a person (the **first person**) if, at a particular time (the **relevant time**):
- (a) the reporting entity commences to provide, or proposes to provide, a designated service to the first person; or
  - (b) both:
    - (i) the first person requests the reporting entity to provide a designated service to the first person; and
    - (ii) the designated service is of a kind ordinarily provided by the reporting entity; or
  - (c) both:
    - (i) the first person inquires of the reporting entity whether the reporting entity would be willing or prepared to provide a designated service to the first person; and
    - (ii) the designated service is of a kind ordinarily provided by the reporting entity,

and any of the following conditions is satisfied:
  - (d) at the relevant time or a later time while the relevant designated service is being supplied by the reporting entity:
    - (i) the reporting entity; or
    - (ii) a person who is authorised under section 34 to carry out applicable customer identification procedures and applicable agent identification procedures on the reporting entity's behalf;

suspects on reasonable grounds that the first person is not the person the first person claims to be;
  - (e) at the relevant time or a later time while the relevant designated service is being supplied by the reporting entity:
    - (i) the reporting entity; or
    - (ii) a person who is authorised under section 34 to carry out applicable customer identification procedures and applicable agent identification procedures on the reporting entity's behalf;

suspects on reasonable grounds that an agent of the first person who deals with the reporting entity in relation to the provision or prospective provision of the designated service is not the person the agent claims to be;

- (f) at the relevant time or a later time while the relevant designated service is being supplied by the reporting entity:
- (i) the reporting entity; or
  - (ii) a person who is authorised under section 34 to carry out applicable customer identification procedures and applicable agent identification procedures on the reporting entity's behalf;

suspects on reasonable grounds that information that the reporting entity has concerning the provision or prospective provision of the service:

- (iii) may be relevant to the investigation of an evasion, or an attempted evasion, of a taxation law which is material in nature; or
  - (iv) may be relevant to the investigation of, or prosecution of a person for, an offence against a law of the Commonwealth or of a Territory which is material in nature;
  - (v) may be of assistance in the enforcement of the *Proceeds of Crime Act 2002* or regulations under the Act;
- (g) at the relevant time or a later time while the relevant designated service is being supplied by the reporting entity:

- (i) the reporting entity; or
- (ii) a person who is authorised under section 34 to carry out applicable customer identification procedures and applicable agent identification procedures on the reporting entity's behalf;

suspects on reasonable grounds that the provision, or the prospective provision, of the service is preparatory to the commission of:

- (iii) an offence covered by paragraph (a), (b) or (c) of the definition of **financing of terrorism** in section 5 which is material in nature; or **[Note: given the changes suggested to clause 39 it is also arguable that paragraphs (c) and (d) of the clause 5 definition of "financing of terrorism" should also be deleted - these paragraphs do not appear in the equivalent FTRA definition. It seems especially anomalous that regard must be had to the possibility of an offence against foreign laws.]**
  - (iv) an offence covered by paragraph (a) or (b) of the definition of **money laundering** in section 5 which is material in nature **[Note: given the changes suggested to clause 39 it is also arguable that paragraphs (b) and (c) of the clause 5 definition of "money laundering" should also be deleted.];**
- (h) at the relevant time or a later time:
- (i) the reporting entity; or
  - (ii) a person who is authorised under section 34 to carry out applicable customer identification procedures and applicable agent identification procedures on the reporting entity's behalf;



suspects on reasonable grounds that information that the reporting entity has concerning the provision, or prospective provision, of the service may be relevant to the investigation of, or prosecution of a person for:

- (iii) an offence covered by paragraph (a), (b) or (c) of the definition of **financing of terrorism** in section 5 which is material in nature; or
- (iv) an offence covered by paragraph (a) or (b) of the definition of **money laundering** in section 5 which is material in nature;

#### *Report*

- (2) If a suspicious matter reporting obligation arises for a reporting entity in relation to a person, the reporting entity must give AUSTRAC a report about the matter within:
  - (a) if paragraph (1)(d), (e) or (f) applies - 3 business days after the day on which the reporting entity forms, or becomes aware, of the relevant suspicion;
  - (b) if paragraph (1)(g) or (h) applies - 24 hours after the time when the reporting entity forms, or becomes aware, of the relevant suspicion.
- (3) A report under subsection (2) must:
  - (a) be in the approved form; and
  - (b) contain such information relating to the matter as is specified in the AML/CTF Rules; and
  - (c) contain a statement of the grounds on which the reporting entity, or the person authorised under section 34, holds the relevant suspicion;

Note 1: For additional rules about reports, see section 203

Note 2: Section 45 deals with the provision of further information, and the production of documents, by the reporting entity

- (4) Subsection (2) does not apply if:
  - (a) the person authorised under section 34 formed the relevant suspicion; and
  - (b) the person gave AUSTRAC a report about the matter under subsection (6)
- (5) A person who wishes to rely on subsection (4) bears an evidential burden in relation to that matter.

#### *Report by person authorised under section 34*

- (6) If:
    - (a) If a suspicious matter reporting obligation arises for a reporting entity in relation to a person; and
    - (b) the relevant suspicion was formed by a person authorised under section 34:  
the person authorised under section 34 must either:
      - (c) give AUSTRAC a report about the matter; or
      - (d) give the reporting entity a report about the matter;
- within:

- (e) if paragraph (1)(d), (e) or (f) applies - 3 business days after the day on which the person authorised under section 34, forms, or becomes aware, of the relevant suspicion;
  - (f) if paragraph (1)(g) or (h) applies - 24 hours after the time when the person authorised under section 34, forms, or becomes aware, of the relevant suspicion.
- (7) A report under subsection (6) must:
- (a) be in the approved form; and
  - (b) contain such information relating to the matter as is specified in the AML/CTF Rules; and
  - (c) contain a statement of the grounds on the person authorised under section 34, holds the relevant suspicion.

*Offence*

- (8) A person commits an offence if:
- (a) the person is subject to a requirement under subsection (2) or (6); and
  - (b) the person engages in conduct; and
  - (c) the person's conduct breaches the requirement

Penalty: Imprisonment for 2 years or 120 penalty units, or both

*Civil penalty*

- (9) Subsections (2) and (6) are civil penalty provisions

*Materiality*

- (9A) For the purposes of subsection 39(1)(f)(iii), whether an offence is "of a material nature" is to be determined having regard to:
- (a) whether the relevant information demonstrates a deliberate or organised course of conduct undertaken to evade a substantial amount of tax which is related to **money laundering** or **financing of terrorism**; and
  - (b) the number and frequency of previous evasions or attempted evasions of taxation laws which are related to **money laundering** or **financing of terrorism**;

- (9AB) For the purposes of subsection 39(1)(f)(iv), whether an offence is "of a material nature" is to be determined having regard to whether the relevant offence:

**(a) is an indictable offence punishable by imprisonment for 12 months or more ; and**

**(b) is related to money laundering or financing of terrorism.**

- (9AC) For the purposes of subsections 39(1)(g)(iii) and (iv), whether an offence is "of a material nature" is to be determined having regard to whether the offence is an indictable offence punishable by imprisonment for 12 months or more.

*Reasonable grounds for suspicion*

- (10) the AML/CTF Rules may specify matters that are to be taken into account in determining whether there are reasonable grounds for a reporting entity, or a person

authorised under section 34, to form a suspicion of a kind mentioned in paragraph (1)(d), (e), (f), (g) or (h).

Note: For specification by class, see subsection 13(3) of the *Legislative Instruments Act 2003*.