

Submission to AUSTRAC for relief from the Anti-Money Laundering (AML) and Counter-Terrorism Financing (CTF) Bill 2006 pursuant to the Consolidated AML/CTF Rules



Australian Mobile Telecommunications Association

31 August 2006

Executive summary

What is AMTA?

The Australian Mobile Telecommunications Association (“**AMTA**”) is the industry body representing Australia’s mobile telecommunications industry. AMTA’s mission is to promote an environmentally, socially and economically responsible and successful mobile telecommunications industry in Australia.

AMTA’s members include mobile carriage service providers (AAPT, Hutchison Telecommunications, Optus, Telstra, Virgin Mobile and Vodafone), mobile handset manufacturers, retail outlets, network equipment suppliers and other suppliers to the industry. For more details about AMTA, see <http://www.amta.org.au>.

The public statements made by the Attorney General’s Department regarding the Bill have not expressly stated that mobile operators would be reporting entities under the Bill. As a result, the implications of the Bill have only recently been highlighted to AMTA and its members. This means that both this submission, and the submission to the Attorney-General’s Department, were prepared within a very short time frame. AMTA’s further assessment of the impact of the Bill may uncover additional issues that will need to be addressed. AMTA’s initial proposals for exemptions may, therefore, need to be refined in consultation with AUSTRAC.

What is the purpose of this submission to AUSTRAC?

AMTA believes that the application of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 (“**Bill**”) to the products and services offered by its members raises matters of critical concern. AMTA and individual members have made submissions to the Attorney General’s Department requesting amendments to exclude certain products and services provided by the telecommunications industry from the list of designated services. AMTA continues to strongly support the solutions recommended in those previous submissions and this submission is not intended to replace those submissions.

The purpose of this submission is to offer an alternative solution by requesting that AUSTRAC exercise its powers under the Bill when enacted to effectively exempt certain designated services provided by the mobile telecommunications industry. This could be done in reliance on AUSTRAC’s general power to make rules prescribing matters required or permitted under the Bill to be so prescribed (see clause 191(1) of the Bill). Appropriate rules could then be made pursuant to clause 203C of the Bill. So far the draft Rules do not contain any rules that specify services or circumstances for the purposes of clause 203C of the Bill.

The process for exemptions under the Rules

AMTA understands that the administrative process for making and determining an application for an exemption under the Rules has not yet been developed. It will be important for the Government, and in particular AUSTRAC, to advise industry as soon possible:

- how exemptions will be expressed in the Rules;
- the administrative process to be followed in applying for an exemption;
- the criteria AUSTRAC will take into account in determining an application for exemption; and

- whether exemptions will be granted to all providers of a designated service or just those covered in the application.

Exemptions will need to be granted well before the relevant obligations under the Bill take effect. This is so that affected industries will have certainty of regulatory treatment and will know in advance whether they will have to invest in systems and procedures to comply with the law.

What exemptions does AMTA seek?

The designated services that AMTA requests be exempted and our suggested drafting for the exemption are set out in the table below. References are made to “Sections” 191 and 203C on the understanding that the relevant exemption powers would not, of course, be able to be exercised until the Bill becomes an Act.

In making this request, AMTA aims to balance the Bill’s objective of combating money laundering and terrorist financing against the impact of the Bill on the mobile telecommunications industry and its customers, by recognising the low money laundering and terrorist financing risks associated with the products and services offered by its members.

The Policy Principles for Anti-Money Laundering Reform stated that one of the key principles in guiding the implementation process was that effective regulation must be balanced by a sensible approach to the impact on industry, including small business and on customers.¹ This is consistent with the Treasurer’s recent commitment to reduce “*the burden of red tape to improve the economic environment further so that all businesses, large and small, can prosper and grow*”.²

Support for AMTA’s request has also been drawn from the regulatory approach in the United States and United Kingdom and the Financial Action Task Force Forty Recommendations on Money Laundering and the Nine Special Recommendations on Terrorist Financing (“**FATF Recommendations**”).

¹ See:

[http://www.ag.gov.au/agd/WWW/rwpattach.nsf/personal/7D725051B1171EE2CA256EAF00015A89/\\$FILE/Policy+0+Principles+Paper+for+Anti-Money+Laundering+reform.PDF](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/personal/7D725051B1171EE2CA256EAF00015A89/$FILE/Policy+0+Principles+Paper+for+Anti-Money+Laundering+reform.PDF).

² The Hon Peter Costello, Report of the Taskforce on Reducing Regulatory Burdens on Business - Final Government Response, 16 August 2006.

Request for exemption

PREPAID MOBILE PHONES			
Prepaid mobile phone accounts			
DESCRIPTION OF PRODUCT	DESIGNATED SERVICES PROVIDED IN RELATION TO THE PRODUCT	REQUEST FOR EXEMPTION	SUPPORT FOR REQUEST
<p>A prepaid mobile phone allows the user to make local, national and international calls up to the amount "prepaid" by the customer.</p> <p>The prepaid amount is not stored on the phone itself but on a linked account on the mobile network. When the customer has used all of the prepaid amount, recharge vouchers or cards are used to "top-up" the account.</p>	<p>It is arguable that providers of mobiles "issue a debit card" when they set up a prepaid phone account for a customer who has purchased a mobile phone on a prepaid call plan. This is because by using a prepaid mobile phone the customer can debit their account for the cost of phone calls and other services.³</p>	<p>AMTA requests that AUSTRAC exempt debit cards issued by telecommunications companies from the Bill by exercising its powers under Section 191(1) to exempt a designated service by specifying it in the AML/CTF Rules pursuant to Section 203C.</p> <p>AMTA recommends that the following rule be inserted in the AML/CTF Rules (this drafting is based on wording contained in ASIC Class Order 05/740 "Prepaid mobile facilities"):</p> <p>"The following designated services are specified for the purposes of Section 203C(1) of the Act:</p> <p>(a) designated services under Item 18 in Table 1, Section 6 of the Act, where the debit card is a <i>prepaid mobile facility</i>;</p> <p>For the purposes of these rules:</p> <p>prepaid mobile facility means a facility:</p> <p>(a) through which, or through the acquisition of which a person may make non-cash payments;</p> <p>(b) that is part of an arrangement for the supply of a public mobile telecommunication service under which the service may be used to the extent it is covered by the amount (the prepaid amount) paid in advance which remains unused under the arrangement;</p> <p>(c) where the non-cash payments made under it are debited against the prepaid amount;</p> <p>(d) that is not a component of another designated service which is not specified in these rules for the purposes of Section 203C(1) of the Act.</p> <p>facility has the meaning given by Section 762C of the Corporations Act 2001.</p> <p>A person makes a non-cash payment in the circumstances set out in Section 763D of the Corporations Act 2001.</p> <p>public mobile telecommunications service has the meaning given in Section 32 of the Telecommunications Act 1997."</p>	<p>The low value associated with prepaid mobiles and the existing customer identification requirements (see below) make prepaid mobile phone accounts a low money laundering and terrorist financing risk. AMTA submits that any benefit from identifying money laundering and terrorist financing in connection with prepaid mobile phone accounts is far outweighed by the implementation and compliance costs that would be imposed on mobile operators and the inconvenience to customers.</p> <p>Further, the Bill and Rules are inconsistent with existing legislative requirements. Providers of prepaid mobile phones are already required to undertake identity checks on prepaid mobile customers under the Telecommunications (Service Provider - Identity Checks for Prepaid Public Mobile Telecommunications Services) Determination 2000 (the "Determination"). Imposing additional customer due diligence requirements will further increase the costs of providing this product for organisations in the telecommunications sector and add additional inconvenience to customers.</p> <p>If the increased costs associated with compliance are passed on to prepaid mobile customers in the form of higher call costs or increased handset prices it is likely that the use of prepaid mobiles will decline, while the use of post-paid mobiles (to which the Bill does not generally apply) will rise. Any move away from prepaid mobiles would significantly disadvantage sections of the community for the following reasons:</p> <ul style="list-style-type: none"> Prepaid mobile services provide a useful and much supported mechanism to allow those in the community, particularly minors, without good financial management skills to enjoy the benefits of a mobile phone service without the worry of unexpectedly high bills. By effectively reducing consumers' access to prepaid mobile services, the proposals would create serious new problems for the community. In its <i>Telecommunications Performance Report 2004-2005</i>, the telecommunication industry's regulator, the Australian Communications and Media Authority (ACMA) notes the move from post-paid to prepaid accounts as a "positive highlight" for consumers, "giving customers greater flexibility and control over their spending". The Report notes that prepaid accounts are "especially popular with students and other people with low incomes, as they help them manage their budgets and avoid getting into debt."⁴ The application of the Bill to prepaid mobiles is also likely to have an impact on the use of mobiles as a safety or security tool. A study by the Australian Psychological Society in 2004 found that both parents and young people cited safety as the main reason for having a mobile phone – providing a tool for use in emergencies, and a way to parents and children to easily contact each other⁵. Prepaid services are the obvious choice for most parents wishing to provide their children with a phone while imposing a clear control on their spending. The increased identity requirements would also be likely to disadvantage those with limited access to the acceptable documentation required, including minors, those with lower literacy, lower than average income, or those with infrequent contact with formalised authority. The mobile industry is one of the few industries that has been able to find an effective and dignified manner of serving low-spending customers.

³ See issuing a debit card (Item 18, Table 1, Section 6).

⁴ *Telecommunications Performance Report 2004-2005*, p69, Australian Communications and Media Authority.

⁵ *Psychological aspects of mobile phone use among adolescents*, The Australian Psychological Society, November 2004

Request for exemption

			<ul style="list-style-type: none"> AMTA considers that the comments of the Office of the Privacy Commissioner regarding the effect of the Bill on the current ability to transact anonymously provides support for these arguments⁶. We do not consider that the imposition of additional identification requirements for setting up pre-paid phone accounts under the Bill over and above the requirements contained in the Determination would be a proportionate response to the AML/CTF threat posed by such accounts. <p>Finally, the application of the Bill to the telecommunications industry is not consistent with the FATF Recommendations which only impose customer due diligence and suspect transaction reporting requirements on “financial institutions” and “designated non-financial businesses”.⁷ Telecommunications companies are clearly neither a financial institution⁸ or a designated non-financial services business.⁹</p>
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Transfers of value between prepaid mobile phone accounts

DESCRIPTION OF PRODUCT	DESIGNATED SERVICES PROVIDED IN RELATION TO THE PRODUCT	REQUEST FOR EXEMPTION	SUPPORT FOR REQUEST
<p>Some mobile operators allow customers to transfer value between prepaid mobile phone accounts (for example, Telstra's Credit Me2U service).</p> <p>This may be used, for example, by a parent to transfer value to their child's prepaid mobile phone account.</p>	<p>A mobile operator will provide a remittance arrangement, when they accept money from the holder of a prepaid mobile phone account for transfer to the holder of another prepaid mobile phone account. This is because a “remittance arrangement” is defined in the Bill to include any arrangement for the transfer of money or property regardless of whether the transfer results in the movement of money or property from one geographic location to another.¹⁰</p> <p>As a consequence mobile operators will be required to perform the applicable customer identification procedure and undertake other customer due diligence measures for every customer that uses the transfer service.</p>	<p>AMTA requests that AUSTRAC exempt debit cards issued by telecommunications companies from the Bill by exercising its powers under Section 191(1) to exempt a designated service by specifying it in the AML/CTF Rules pursuant to Section 203C.</p> <p>AMTA recommends that the following rule be inserted in the AML/CTF Rules:</p> <p>“The following designated services are specified for the purposes of Section 203C(2) of the Act:</p> <p>(a) designated services under Item 32 in Table 1, Section 6 of the Act; and</p> <p>(b) designated services under Item 33 in Table 1, Section 6 of the Act,</p> <p>in circumstances where those services are provided as part of a transaction involving the transfer of credit between prepaid mobile facilities.”</p> <p>See above for a definition of prepaid mobile facility.</p>	<p>Generally, the amount transferred between prepaid mobile accounts is very small. For example, under Telstra's Credit Me2U service there are several thousand transactions per day with an average amount transferred of less than \$3. Further, the transferred value can only be used to purchase telecommunications services, it cannot be converted to cash.</p> <p>Given the low value of the transactions, the services that are purchased and the existing customer identification requirements in relation to prepaid mobiles (see above) AMTA submits that there is a very low money laundering and terrorist financing risk associated with this service.</p> <p>Further, transferring value between prepaid mobile accounts does not allow a customer to move funds from one country to another. AMTA submits that the movement of funds between countries should be a requirement for a remittance arrangement to be subject to customer due diligence reporting requirements. For example:</p> <ul style="list-style-type: none"> FATF's definition of a money or value transfer system requires that the money or value is accepted in one location and paid to a beneficiary in another location.¹¹ FATF's International Best Practices Paper on Combating the Abuse of Alternative Remittance Systems makes it clear that to constitute an alternative remittance system the funds must be moved from one geographic location to another;¹² the Asia Pacific Working Group on Money Laundering (of which Australia is a member) defines an alternative remittance system as a system for moving money or other forms of stored value between countries;¹³ and the current definition of an alternative remittance system in the Financial Transaction Reports Act 1988 (Cth) (in this regard AMTA notes that FATF's Mutual Evaluation Report on Australia did not find that the coverage given by this definition failed to meet the requirements of the Recommendations).¹⁴

⁶ See page 5 of the submission of the Office of the Privacy Commissioner: Consultation on the second exposure draft of the Anti-Money Laundering and Terrorism Funding Bill 2006, Submission to the Attorney General's Department, August 2006.

⁷ See Part B of the Financial Action Task Force on Money Laundering's 40 Recommendations (20 June 2003 (incorporating the amendments of 22 October 2004)).

⁸ See page 13 Financial Action Task Force on Money Laundering's 40 Recommendations (20 June 2003 (incorporating the amendments of 22 October 2004)). The term “financial institution” is defined in the Glossary of the Recommendations as an entity that conducts one or more specified financial activities “as a business”. Included in the list of financial activities is “lending”. An all inclusive definition of lending is not provided. However it is said to include consumer credit, mortgage credit, factoring and finance of commercial activities.

⁹ The term designated non-financial business is defined to include casinos, real estate agents, dealers in precious stones, trust and company services providers and lawyers, notaries and other independent legal professionals and accountants: page 12 Financial Action Task Force on Money Laundering's 40 Recommendations (20 June 2003 (incorporating the amendments of 22 October 2004)).

¹⁰ See accepting money to be transferred under a remittance arrangement (Items 32 and 33, Table 1, Section 6).

¹¹ Interpretive Note to Special Recommendation VI: Alternative Remittance.

¹² Combating the Abuse of Alternative Remittance Systems: International Best Practices at paragraph 1.

¹³ Asia Pacific Group on Money Laundering, Alternative Remittance Regulation Implementation Package (July 2003) at page 10.

Request for exemption

POST PAID MOBILE PHONES			
Premium content or information services			
DESCRIPTION OF PRODUCT	DESIGNATED SERVICES PROVIDED IN RELATION TO THE PRODUCT	REQUEST FOR EXEMPTION	SUPPORT FOR REQUEST
<p>Mobile phones can be used to access premium content or information which is not provided by the mobile operator that provided the phone.</p> <p>For example, premium content or information is accessed when a customer uses SMS to:</p> <ul style="list-style-type: none"> • vote on television polls and programs such as Australian Idol; • make donations to charity appeals (such as the Tsunami appeal in 2004); • enter competitions; or • request a ring tone to be sent to the consumer's mobile phone. 	<p>It is arguable that the mobile phone operator makes a "loan" each time a customer uses their post-paid mobile to access premium content or information provided by a third party.</p> <p>This is because under the payment arrangements for premium services mobile operators may pay the third party for the content or information provided to the customer prior to the customer paying the mobile operator for that content or information.</p> <p>A loan is made under subparagraph (c) of the definition of loan at the time the mobile operator makes the payment to the third party because in doing so it extends credit to the customer.¹⁵</p> <p>The exclusion of credit provided in the supply of goods and services from the definition of loan does not apply in these circumstances because the mobile operator (the credit provider) did not provide the good or service to which the credit relates.</p> <p>Mobile operators will be required to perform the applicable customer identification procedure and undertake other customer due diligence measures for each customer that accesses premium content or information from their post-paid mobile service.</p> <p>This would impose enormous implementation and compliance costs on mobile operators without any anti-money laundering or counter-</p>	<p>AMTA requests that AUSTRAC exempt loans made by telecommunications companies in connection with premium content and information from the Bill by exercising its powers under Section 191(1) to exempt a designated service by specifying it in the AML/CTF Rules pursuant to Section 203C.</p> <p>AMTA recommends that the following rule be inserted in the AML/CTF Rules:</p> <p>"The following designated services are specified for the purposes of Section 203C(2) of the Act:</p> <ul style="list-style-type: none"> (a) designated services under Item 6 in Table 1, Section 6 of the Act; (b) designated services under Item 7 in Table 1, Section 6 of the Act, <p>in circumstances where those services are provided in order to allow a person to obtain or access goods or services using a postpay mobile facility.</p> <p>postpay mobile facility means a facility:</p> <ul style="list-style-type: none"> (a) that is part of an arrangement for the supply of a public mobile telecommunication service under which the use of the service is charged and paid for in arrears; and (b) that is not a component of another designated service which is not specified in these rules for the purposes of Section 203C(1) of the Act." 	<p>AMTA submits that there is no or minimal opportunity for customers to use the "loans" provided in connection with premium content and information for money laundering or terrorist financing.</p> <p>The "loan" is given in respect of services that have already been purchased, are not transferable or capable of being re-sold and are of a low value. In these circumstances it is difficult to see how the loan could be used for money laundering or terrorist financing. The exemption should be given on the same policy basis as that relied on to exclude credit provided in course of supplying goods or services from the definition of loan.</p>

¹⁴ Financial Action Task Force, Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism in Australia (14 October 2005), page 109.

¹⁵ See making a loan Items 6 and 7, Table 1, Section 6.

Request for exemption

	terrorism financing benefit.		
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Request for exemption

OTHER SERVICES			
Calling Cards			
DESCRIPTION OF PRODUCT	DESIGNATED SERVICES PROVIDED IN RELATION TO THE PRODUCT	REQUEST FOR EXEMPTION	SUPPORT FOR REQUEST
<p>Calling cards allow the holder to make local, national and international phone calls and have the cost of the call debited to an account.</p> <p>Although not directly related to mobile phones, calling cards are offered by some members of AMTA (such as Telstra and AAPT).</p> <p>The calling cards are issued with a PIN that is linked to an account on the mobile operator's network. This account records the value associated with the card (initially this may be as low as \$10, \$20, \$30 or \$50). When the holder of the card makes a call the cost of the call is debited to this account. Holders of calling cards can also transfer money from their calling card to the holder of another calling card.</p> <p>Some operators also provide a card that allows customers to make phone, fax and modem calls in Australia and overseas and have the cost billed to their home or business account.</p>	<p>It is arguable that providers of calling cards and cards that allows customers to have the cost of a call billed to their home or business account will "issue a debit card" when they sell such cards.¹⁶ Providers of calling cards may also provide a "remittance arrangement" when they transfer money from one calling card to another.¹⁷</p> <p>Providers of such cards will be required to perform the applicable customer identification procedure and undertake other customer due diligence on the holder of the account linked to the card.</p> <p>Calling cards are generally sold at a wide range of outlets (including newsagencies and convenience stores) and are not reliant on the purchaser having any other product with the provider. Therefore, this would be an extremely costly and difficult obligation to comply with, without any anti-money laundering or counter-terrorism financing benefit.</p>	<p>AMTA requests that AUSTRAC exempt calling cards issued by telecommunications companies from the Bill by exercising its powers under Section 191(1) to exempt a designated service by specifying it in the AML/CTF Rules pursuant to Section 203C.</p> <p>AMTA recommends that the following rules be inserted in the AML/CTF Rules:</p> <p>"The following designated services are specified for the purposes of Section 203C(2) of the Act:</p> <p>(a) the designated services described in Item 18 of Table 1, Section 6 if:</p> <p>(i) the debit card is an article or token that allows the holder to make telephone calls and have the cost of the call debited to the account that is linked to the article or token ("calling card"); and</p> <p>(ii) the issuer of the calling card is a participant in the telecommunications industry (as that term is defined in the <i>Telecommunications Act 1997</i> (Cth)).</p> <p>(b) the designated services described in Items 32 and 33 of Table 1, Section 6 if the transfer involves the transfer of value between accounts linked to a calling cards issued by a participant in the telecommunications industry (as that term is defined in the <i>Telecommunications Act 1997</i> (Cth))."</p>	<p>AMTA submits that there is a low money laundering and terrorist financing risk associated with calling cards particularly as the card can only be used to purchase telecommunications services and generally the maximum that may be held in an account connected to a calling card is low.</p> <p>As discussed above the application of the Bill to the telecommunications industry is not consistent with the FATF Recommendations or the regulatory approach in other jurisdictions. The anti-money laundering and counter-terrorist financing legislation in both the United Kingdom and the United States do not specifically refer to issuing debit cards.</p>

¹⁶ See issuing a debit card (Item 18, Table 1, Section 6).

¹⁷ See accepting money to be transferred under a remittance arrangement (Items 32 and 33, Table 1, Section 6).

Request for exemption

Gaming			
DESCRIPTION OF PRODUCT	DESIGNATED SERVICES PROVIDED IN RELATION TO THE PRODUCT	REQUEST FOR EXEMPTION	SUPPORT FOR REQUEST
<p>Mobile operators may run games in connection with the sale of a mobile phone. This is known as a trade promotion and is used as a marketing tool to encourage customers to take up the product.</p> <p>Mobile phones can also be used to access games in which prizes may be awarded.</p>	<p>Given the broad list of services described in Table 3 - Gambling Services of Section 6 it is possible that games run by a mobile service provider in connection with a product or that are accessible using a mobile phone involve the provision of a designated service. For example, Item 5 of Table 3, Section 6 which provides that accepting the entry of a person into a game where:</p> <ul style="list-style-type: none"> the game is played for money or anything else of value; and the game is a game of chance or skill; and the services is provided in the course of carrying on a business, <p>is a designated service.</p>	<p>AMTA requests that AUSTRAC exempt gambling services provided by mobile operators from the Bill by exercising its powers under Section 191(1) to exempt a designated service by specifying it in the AML/CTF Rules pursuant to Section 203C.</p> <p>AMTA recommends that the following rules be inserted in the AML/CTF Rules:</p> <p>“The following designated services are specific for the purposes of Section 203C(2) of the Act:</p> <p>(a) designated services under Table 3, Section 6 of the Act where those services are provided by a carriage services provider through a prepaid mobile facility or a postpay mobile facility;</p> <p>carriage services provider has the meaning given in Section 87 of the Telecommunications Act 1997.”</p>	<p>Generally, the value of any “winnings” or “prize” in connection with a mobile operators games is very low and the customer is unable to affect the amount of money won. Accordingly, it is unlikely that these games are of a kind that would be used to launder money or finance a terrorist organisation.</p> <p>Further, the application of the Bill to the providers of all gambling services is not consistent with the FATF Recommendations. The FATF Recommendations only impose customer due diligence and suspect transaction reporting requirements on “financial institutions” and “designated non-financial businesses”.¹⁸ A designated non-financial business is defined to include “casinos” (which also includes internet casinos).¹⁹</p> <p>Other jurisdictions also only impose anti-money laundering and counter-terrorism financing obligations on a limited range of casinos and gaming establishments.</p> <p>For example, in the United Kingdom the <i>Money Laundering Regulations 2003</i> impose obligations on persons “carrying on a relevant business”.²⁰ A relevant business includes “operating a casino by way of business”.²¹ The term casino is not defined in either the <i>Money Laundering Regulations</i> or the principal act the <i>Financial Services and Markets Act 2000</i>. However, in discussing the regulation of the gambling industry, the Gambling Commission, which is responsible for regulation of gambling in the United Kingdom, draws a distinction between casinos, betting premises outside of casinos, adult gaming centres and club gaming premises.²² The Gambling Commission specifically states that general betting operators, pool betting operators and betting intermediaries are not part of the regulated sector under the <i>Money Laundering Regulations</i>.²³</p> <p>AMTA’s members do not expect to be exempt from the Bill for all gaming services regardless of the AML/CTF risk posed by those services. In this regard, AMTA would be happy to consult with AUSTRAC regarding the imposition of reasonable limits on any exemption granted (such as monetary thresholds, or limits of the type of prize offered (for example, non-monetary prizes)).</p>

¹⁸ See Part B of the Financial Action Task Force on Money Laundering's 40 Recommendations (20 June 2003 (incorporating the amendments of 22 October 2004)).

¹⁹ Financial Action Task Force on Money Laundering's 40 Recommendations (20 June 2003 (incorporating the amendments of 22 October 2004)) at page 12.

²⁰ Regulations 3 to 7 *Money Laundering Regulations*.

²¹ Regulation 2(2)(g) *Money Laundering Regulations*.

²² Gambling Commission, Licence Conditions and Codes of Practice, Consultation document (March 2006) para 4.5.13. See also example, Gambling Commission, Guidance to Licensing Authorities Consultation Document (December 2005).

²³ Gambling Commission, Licence Conditions and Codes of Practice, Consultation document (March 2006) para 4.5.13.

**Comments on the Revised Exposure Draft
AML/CTF Bill 2006 and draft AML/CTF Rules**



Australian Mobile Telecommunications Association

4 August 2006

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1. Introduction and Summary

- 1.1 The Australian Mobile Telecommunications Association (**AMTA**) is the peak industry body representing Australia's mobile telecommunications industry. AMTA's mission is to promote an environmentally, socially and economically responsible and successful mobile telecommunications industry in Australia. AMTA members include mobile Carriage Service Providers (CSPs), handset manufacturers, retail outlets, network equipment suppliers and other suppliers to the industry. For more details about AMTA, see <http://www.amta.org.au>.
- 1.2 AMTA recognises the challenge facing government in developing policy that balances the interests of law enforcement agencies, consumers and industry. AMTA is pleased to provide comment to the Attorney General's Department (**AGD**) on the proposed reforms to Australia's anti-money laundering and counter-terrorism financing (**AML/CTF**) system and welcomes the Minister for Justice and Customs, Senator the Hon Chris Ellison's statement that the current consultation aims "to ensure the proposed reforms minimise the impact on legitimate business activity and members of the public"¹.
- 1.3 AMTA understands that the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 (**the Bill**) will form an important part of Australia's response to emerging money laundering and terrorist financing risks, and that it addresses key issues raised in the recent Financial Action Task Force on Money Laundering (**FATF**) evaluation report on Australia. AMTA also understands that the Government agreed to implement the FATF Recommendations in two tranches, with the current consultation process relating to the first tranche of reforms. This covers a range of services provided by the financial services sector, gambling service providers and bullion dealers. The second tranche of reforms will separately consider extending AML/CTF obligations to real estate agents, jewellers and professionals, such as accountants and lawyers, when they provide specified non-financial services.
- 1.4 AMTA understands that the Bill addresses key issues such as enhancing the fight against money laundering and extending it to combating terrorism financing. AMTA is keen to contribute to this consultation as services provided by AMTA members, in particular mobile telecommunications operators, may fall under the scope of the Bill, and that the impact of current Bill is not, in fact,

¹ Minister for Justice and Customs, Senator the Hon Chris Ellison, 16 December 2005
<http://www.ag.gov.au/agd/WWW/justiceministerHome.nsf/AllDocs/B8D9EAFB4FED18E6CA2570D8007C616D?OpenDocument>

limited to services provided by the financial sector.

- 1.5 AMTA is concerned that an unintended consequence of the drafting of the current Bill is that its impact extends beyond services provided by the financial sector. As currently drafted, the Bill could directly and negatively impact mobile telecommunication operators. Given the Government's stated intention was to address non-financial sector issues in the second tranche, after appropriate consultation with relevant stakeholders, and Minister Ellison's commitment to ensure that the impact on legitimate business activity and members of the public was minimised, AMTA assumes that this digression is an unintended consequence for the following reasons.
- 1.6 AMTA struggles to see how pre-paid accounts could be effectively used to facilitate money laundering. AMTA submits that even if pre-paid accounts could in theory be used for money laundering, the activity would concern amounts so low as not to meet any reasonable threshold such as would justify regulation. The majority of prepaid plans available in the market do not enable customers to pay more than \$200 to credit their accounts. For example, \$149 will buy customers services to the value of \$1000 on the Vodafone \$149 "mega cap". It is important to note that this entitles a customer to \$1000 in telecommunications services and the customer is not entitled to receive this amount in 'cash' as a refund (unused credits simply expire at the end of the period). Accordingly, if the Bill extends to mobile telecommunications services, the obligations imposed on those providers would be completely disproportionate to the risks the Bill seeks to address.
- 1.7 AMTA therefore makes the following recommendations:
 - (a) AGD to amend the definitions in the Bill including "debit card" and "remittance arrangement" to clearly exclude telecommunications services accounts.
 - (b) If that is not possible, AMTA urges AGD to include a clear statement in the Explanatory Memorandum that the Bill is not intended to apply to mobile telecommunication services.
- 1.8 However, If the Bill intentionally captures mobile telecommunication services, AMTA requests that there be further consultation with industry players to ensure the impact and implications of the proposed Bill are clear; to ensure processes are transparent; and to ensure that the impact on legitimate business activity and members of the public is minimised. AMTA also requests that they be consulted in advance if it is intended that the Draft Rules be at any time

excluded to include mobile telecommunication services.

- 1.9 AMTA also submits that to the extent possible the Bill should maintain consistency with other jurisdictions also seeking to fulfil their obligations in relation to AML and CTF.

2. Context: mobile phone services

Mobile Operator Services

- 2.1 There are two types of mobile account available to allow consumers to access mobile phone services: pre-paid, or post-paid. Pre-paid mobile accounts enable consumers to pay in advance for services that can be accessed from a mobile handset connected to a mobile network. Consumers purchase credit or stored value for their pre-paid mobile account and these credits can be applied to a range of mobile telecommunications services. Post-paid accounts enable a consumer to pay for services after they have been consumed, with the consumer receiving a bill on a regular basis, usually monthly or quarterly.
- 2.2 The trend in Australia and worldwide is towards greater use of pre-paid mobile telecommunications services, with recent subscriber growth in Australia driven mainly by the increase in pre-paid customers². Pre-paid accounts comprised 51 per cent of second generation (2G) retail accounts, representing 8.5 million customers in June 2005, up from 48 per cent the previous year³.
- 2.3 In its *Telecommunications Performance Report 2004-2005*, the Australian Communications and Media Authority (ACMA) notes the move from post-paid to pre-paid accounts as a “*positive highlight*” for consumers, “*giving customers greater flexibility and control over their spending*”⁴. The Report notes that pre-paid accounts are “*especially popular with students and other people with low incomes, as they help them manage their budgets and avoid getting into debt.*” AMTA agrees with this analysis.
- 2.4 In addition, safety and security concerns are one of the main drivers for the take-up of mobiles by young people. A study by the Australian Psychological Society in 2004 found that both parents and young people cited safety as the main reason for having a mobile phone – providing a tool for use in

² *Australian Mobile Telecommunications Industry, Economic Significance*, September 2005, p. 21

³ *Telecommunications Performance Report 2004-2005*, p69, Australian Communications and Media Authority.

⁴ *Ibid*, p80.

emergencies, and a way to parents and children to easily contact each other⁵. Pre-paid services are the obvious choice for most parents wishing to provide their children with a phone, but who wish to impose a clear control on their spending. Industry assists parents and young people to manage their spending through good credit management. For example, in most cases AMTA members do not sign customers to post-paid service contracts unless they are at least 18 years old or show evidence of steady employment or have a suitable credit rating.

- 2.5 Customer identification requirements are already in place in relation to prepaid mobile accounts under the *Telecommunications (Service Provider – Identity Checks for Pre-paid Public Mobile Telecommunications Services) Determination 2000 (Prepaid Determination)*. This Determination falls within the Telecommunications regulatory regime and is enforced by the Australian Communications and Media Authority. One of the purposes of the determination is to provide assistance to law enforcement and national security agencies. The Determination requires information to be collected from customers before a prepaid mobile account is activated. Some of the identification processes rely on identification procedures undertaken by financial institutions so as to avoid duplication. The Determination also requires that a prepaid service be disconnected or terminated upon the request of law enforcement and national security agencies, or if a mobile operator suspects that the information it holds in relation to a customer is incorrect (eg. fictitious names).

Third Party Services

- 2.6 Both pre-paid and post-paid accounts enable consumers to access a range of services. These services are either provided directly by the Mobile Operator (Mobile Operator Services), or by a third party (Third Party Services). Mobile Operator Services include voice calls, SMS, data usage, and ring tones and games sent to the consumer's mobile phone. Third Party Services include the use of SMS to vote on television polls and programs such as Australian Idol, to make donations to charity appeals (such as the Tsunami appeal in 2004), to enter competitions, or to request a ring tone to be sent to the consumer's mobile phone.
- 2.7 Commercial arrangements between Mobile Operators and selected third parties enable the Mobile Operator's customers to use Third Party Services (Third Party Service Facilities). These commercial arrangements can be structured in

⁵ *Psychological aspects of mobile phone use among adolescents*, The Australian Psychological Society, November 2004

different ways, however the common elements are:

- (a) The Mobile Operator enables carriage of the Third Party Services (in the form of voice, text, pictures, data or a combination of these) over the operator's mobile network;
- (b) The Mobile Operator is liable to pay the third party for the customer's use of third party services;
- (c) The Mobile Operator charges the price of the Third Party Service to the customer's pre- or post-paid mobile account; and
- (d) The Mobile Operator periodically accounts for all third party services used by its customers and makes payment for those services to the relevant third party. Usually the Mobile Operator will deduct from this payment its fees for providing the Third Party Service Facility.

2.8 In relation to pre-paid services, there is no direct payment or transfer of funds from the customer's account to the third party. For post-paid services, billing arrangements vary: For example, the Mobile Operator may pay the third party on the customer's behalf and then bill the customer. Alternatively, the Mobile Operator may on-sell the content.

3. AMTA's concerns

3.1 AMTA does not question the objectives of the Bill. Our concern is with the scope of the Bill and the obligations related to it: AMTA is concerned about the expansive changes that its members would need to implement to existing practices for the provision of mobile services. As currently drafted, however, the Bill would negatively impact both pre and post-paid mobile phone services.

3.2 As noted above, the current tranche of the legislation was only intended to apply to designated services associated with debit cards issued by financial institutions. That is, AMTA understood it would be restricted to an Authorised Deposit-taking Institution (ADI), or a bank, or a building society, or a credit union. These organisations were targeted in the first instance as they present the highest risk. AMTA suggests that the application of the Bill to financial institutions only in the first instance is appropriate. The risk from services provided by other bodies, including mobile operators, is low.

Impact on Prepaid Mobile Services

- 3.3 The two main issues associated with pre-paid services are:
- (a) prepaid mobile SIM cards may fall within the definition of a “debit card” and therefore the issue of them may constitute a “designated service”. This is because the SIM card can be used in a mobile handset to debit a customer’s prepaid account for the cost of goods and services (i.e. voice calls, SMS etc) purchased; and
 - (b) services that allow pre-paid credit to be transferred between customer prepaid accounts might fall within the definition of a “remittance arrangement” and therefore constitute “designated services”. These services enable a parent, for example, to transfer low amounts (for example \$10) of their mobile credit to their child’s mobile credit account.
- 3.4 AMTA struggles to see how these pre-paid accounts could be used effectively used to facilitate money laundering. As set out above, even if pre-paid accounts could in theory be used for money laundering, the activity would concern amounts so low as not to meet any reasonable threshold to justify regulation. AMTA does not believe that pre-paid mobile telephone accounts present an attractive mechanism for criminals to launder money or finance terrorist acts, yet the obligations imposed by the Bill and CTF rules would be extremely expensive and difficult for the industry to comply with, potentially threatening the commercial viability of such services. Accordingly, if the Bill extends to mobile telecommunications services, the obligations imposed on those providers would be completely disproportionate to the risks the Bill seeks to address.
- 3.5 Notably, any threat to pre-paid mobile services would significantly disadvantage already vulnerable sections of the community, including minors. The mobiles industry is one of the few industries that have been able to find an effective and dignified manner of serving low-spending customers. Pre-paid mobile services also provide a useful and much supported mechanism to allow those in the community, particularly minors, without good financial management skills while enjoying the benefits of a mobile phone service without the worry of unexpectedly high bills. By effectively reducing consumers’ access to pre-paid mobile services, the proposals would create serious new problems for the community.
- 3.6 AMTA proposes that the adoption of any anti-money laundering measures in relation to prepaid accounts should be along the following lines:

- (a) the risks of money laundering via mobile platforms is so limited that it cannot justify the application of the entire Bill to mobile services;
- (b) should the application of the Bill not be waived for low risk services such as those delivered over mobile platforms, its obligations should be proportionate to the risk addressed.

3.7 AMTA notes that the Australian Securities and Investments Commission (**ASIC**) recently considered whether the financial services licensing regime should apply to prepaid mobile accounts. ASIC's policy on the matter is stated in PS 185⁶ Non-cash payments facilities:

[PS 185.36] We have granted unconditional class order relief to persons providing financial services in relation to prepaid mobile phone accounts constituting NCP facilities from:

- (a) certain provisions in Part 7.6, including the licensing requirements;
- (b) conduct requirements in Parts 7.7 and 7.8;
- (c) the product disclosure requirements in Part 7.9; and
- (d) the hawking prohibition in s992A.

See Class Order [CO 05/740].

[PS 185.37] Our relief means that the financial services licensing, conduct and disclosure obligations of the Corporations Act (together with the hawking prohibition) will not apply to these accounts.

[PS 185.37] Our relief means that the financial services licensing, conduct and disclosure obligations of the Corporations Act (together with the hawking prohibition) will not apply to these accounts.

3.8 This ASIC relief for prepaid mobile phone accounts is consistent with the following principles⁷:

[PS 185.43] In adopting a flexible approach to NCP facilities, we have taken into account the consumer protection and market integrity goals of the Corporations Act, the risks posed by NCP facilities and the need to avoid unnecessary or disproportionately burdensome regulation. In doing so, we have been guided by the factors in [PS 185.8] in tailoring our relief.

3.9 AMTA commends ASIC's approach to the unintentional application of financial

⁶ http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC+PDFW?opendocument&key=ps185_pdf

⁷ http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC+PDFW?opendocument&key=ps185_pdf

services regulation to mobile services, and recommends that the Bill adopt similar principles when considering the impact of the Bill on consumers and providers of mobile services.

Interaction with Telecommunications Regulatory Regime

- 3.10 All Carriers and Carriage Service Providers (CSP) are also required under the Telecommunications Act 1997 to do their best to prevent their networks being used in connection with criminal activity. These requirements would equally apply to criminal activity relating to money laundering and the financing of terrorism. CSP's also intercept communications for national security and law enforcement agencies on an ongoing basis. On proper request, CSPs also provide information to a range of agencies, including the Australian Tax Office. Mobile operators will also have internal processes in place to identify and mitigate the risk of fraud. These processes would include place mechanisms whereby any identified or suspected fraud is forwarded to the relevant area, investigated, recorded and reported, where appropriate, to law enforcement agencies.
- 3.11 Another key concern for AMTA relates to customer identification requirements in the Bill, as currently AMTA members are already subject to customer identification requirements under the Prepaid Determination. While these requirements are not designed to meet the requirements of the Bill, AMTA members have already made significant investments in changing sales and account activation processes and systems to align with the introduction of the Prepaid Determination. As mentioned above, the Determination recognises the customer identification requirements that currently apply to the financial services sector and therefore enables the telecommunications industry to rely on those processes. Requiring mobile operators, under the Bill, to carry out the same processes that would apply to the financial services sector would only result in a duplication of regulation. The operation of the Prepaid Determination is currently subject to review by the Australian Communications and Media Authority.
- 3.12 AMTA strongly recommends that the Government ensures adequate consultation on the interaction of the existing telecommunications regulatory regime and the AML / CTF regulatory regime to minimise the burden on industry and to avoid the unnecessary duplication of regulation. AMTA considers that any additional benefit of apply AML / CTF requirements to mobile operators would be outweighed by the costs of complying with such requirements in addition to obligations that already apply to mobile operators to assist government agencies.

European Developments in AML / CTF

3.13 AMTA has compared the Bill to measures in the EU to meet similar international obligations in relation to anti-money laundering and counter-terrorism financing. The latest EU development, Directive 2005/60/EC of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (**EU AML Directive**) was issued of 26 October 2005.⁸ Recital 5 has distinct parallels with the objectives of the Bill under consideration:

- (5) Money laundering and terrorist financing are frequently carried out in an international context. Measures adopted solely at national or even Community level, without taking account of international coordination and cooperation, would have very limited effects. The measures adopted by the Community in this field should therefore be consistent with other action undertaken in other international fora. The Community action should continue to take particular account of the Recommendations of the Financial Action Task Force (hereinafter referred to as the FATF), which constitutes the foremost international body active in the fight against money laundering and terrorist financing. Since the FATF Recommendations were substantially revised and expanded in 2003, this Directive should be in line with that new international standard.

3.14 That Directive imposes similar builds upon the two previous AML Directives and reflects the developments in the FATF, in the same way that the Bill attempts to do. However, the EU AML Directive applies a more proportionate approach. Article 11.5 of the EU AML Directive recognises that customer due diligence requirements need not apply to electronic money (which applies to an extent to prepaid accounts in the EU) or other products or transaction which represent a low risk but which are caught by the technical criteria in the Directive. Article 11.5 is extracted below:



10 ML - Third Money
Laundrying Directive

⁸ See Attached

5. By way of derogation from Articles 7(a), (b) and (d), 8 and 9(1), Member States may allow the institutions and persons covered by this Directive not to apply customer due diligence in respect of:

- (d) electronic money, as defined in Article 1(3)(b) of Directive 2000/46/EC of the European Parliament and of the Council of 18 September 2000 on the taking up, pursuit of and prudential supervision of the business of electronic money institutions ⁽¹⁾, where, if the device cannot be recharged, the maximum amount stored in the device is no more than EUR 150, or where, if the device can be recharged, a limit of EUR 2 500 is imposed on the total amount transacted in a calendar year, except when an amount of EUR 1 000 or more is redeemed in that same calendar year by the bearer as referred to in Article 3 of Directive 2000/46/EC,

or in respect of any other product or transaction representing a low risk of money laundering or terrorist financing which meets the technical criteria established in accordance with Article 40(1)(b).

3.15 The EU AML Directive also contains a number of statements relating to proportionality and cost-benefit analysis at recitals 22 and 47 which are absent from the Bill under consideration. These recitals are reproduced below:

(22) It should be recognised that the risk of money laundering and terrorist financing is not the same in every case. In line with a risk-based approach, the principle should be introduced into Community legislation that simplified customer due diligence is allowed in appropriate cases.

(47) In exercising its implementing powers in accordance with this Directive, the Commission should respect the following principles: the need for high levels of transparency and consultation with institutions and persons covered by this Directive and with the European Parliament and the Council; the need to ensure that competent authorities will be able to ensure compliance with the rules consistently; the balance of costs and benefits to institutions and persons covered by this Directive on a long-term basis in any implementing measures; the need to respect the necessary flexibility in the application of the implementing measures in accordance with a risk-sensitive approach; the need to ensure coherence with other Community legislation in this area; the need to protect the Community, its Member States and their citizens from the consequences of money laundering and terrorist financing.

3.16 AMTA understands that a series of amendments in relation to AML and the implementation of recommendation 40 of the FATF (relating to the provision of information about the sender of a payment) have been agreed between the European Council, the European Parliament and the European Commission.⁹ These amendments also reflect further application of the proportionality principles (see amendments 6, 7, 30, 32, 33) and specifically recognise the instances where the application of regulation should be excluded in regard to transfers of funds carried out by means of a mobile telephone under certain conditions (see amendment 35). AMTA recommends that these same principles should apply to Australia's efforts to adopt the same international requirements being considered by the EU.

Impact on third party services and games

3.17 Another concern for Mobile Operators relates to premium mobile content services provided as part of a post-paid mobile handset service. Mobile Operators may use payment arrangements for premium services where the operator generally pays the third party for the content or information (such as wall paper or ring tones) provided to the customer prior to the customer paying the operator for that content or information.

3.18 Under the Bill, a loan might be considered to be made under subparagraph (c) of the definition of loan at the time the Mobile Operator makes the payment to the third party because in doing so the operator might be considered to be extending credit to the customer. Further, the exclusion of credit provided in the supply of goods and services from the definition of loan does not assist the operator in these circumstances because they (as the credit provider) did not provide the good or service to which the credit relates.

3.19 In AMTA's view, the risk of money laundering and terrorist financing activity being conducted by a customer when accessing premium content with a mobile handset is negligible. Further, if the Bill applies to the relevant payment arrangements, the implementation and compliance costs on affected Mobile Operators will clearly outweigh any money laundering or terrorism financing risk.

3.20 Accordingly, these types of payment arrangements should be excluded from the application of the Bill. The exclusion could provide that the definition of a loan



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⁹ See attachment

does not apply to the provision of credit by telecommunications companies in the supply of goods or services provided by a third party. Alternatively, a monetary threshold of \$10,000 should apply to the definition.

- 3.21 Finally, given the broad definition of “gambling services” games run by Mobile Operators in connection with a product (known as trade promotions) or that are accessible using a mobile product (for example, games accessed via mobile phones) may involve the provision of a “designated service”.
- 3.22 In general, the value of any “winnings” or “prize” in connection with these games is very low and the customer is unable to have any affect the amount of money won. Accordingly, it is unlikely that these games are of a kind that would be used to launder money or finance a terrorist organisation. Because of the negligible risks posed by low value games AMTA recommends that a \$1,000 monetary threshold be applied to the definition of gambling services.

Consultation Process

- 3.23 From the perspective of the consultation and stakeholder engagement process adopted in relation to the Bill, AMTA also notes that mobile operators have not been provided adequate opportunity to comment on the AML/CTF Bill 2006 and draft AML/CTF Rules, as it had been understood that the current Bill would not impact services other than financial services, and that the impact on other services would be considered in the second tranche (if at all).

AMTA Recommendations

- 3.24 AMTA proposes that the Bill should be generally amended to ensure it does not apply to companies who primarily operate in the telecommunications sector. This would address the majority of AMTA’s concerns. If it is intended that telecommunications services are to be covered by the AML/CTF regime (which AMTA is not suggesting should be done) then consideration can be given to including other institutions/people as part of the second tranche. AMTA would welcome the opportunity to provide detailed comment to AGDs as part of a comprehensive consultation process on the second tranche.
- 3.25 AMTA also recommendations that particular consideration should be given to amending:
- (a) Item 18 of Table 1 – Financial services in clause 6 of the Bill be amended to only apply where the issuer of the debit card is an ADI, a bank, a

building society, a credit union or a person specified in the AML/CTF Rules;

- (b) the definition of “debit card” in the Bill be amended to exclude mobile telecommunication services;
- (c) the definition of a “remittance arrangement” be amended to introduce a \$1000 threshold to effectively exclude relevant mobile telecommunication services from the provisions;
- (d) the definition of “loan” be amended so that it does not apply to the provision of credit by telecommunications companies in the supply of goods or services provided by a third party. Alternatively, a monetary threshold of \$10,000 apply to the definition; and
- (e) the definition of “gambling services” be amended to apply a \$1,000 monetary threshold.

4. Conclusions

- 4.1 AMTA is committed to working constructively with its stakeholders to achieve a sound balance of policy outcomes on all mobile telecommunication issues. Industry, both individually and through AMTA, is currently proactively engaged in a number of national security related issues, and is keen to extend its constructive involvement on this issue, to ensure a workable, balanced outcome.
- 4.2 AMTA urges AGD to amend the proposed Bill to ensure it applies only to financial institutions at this stage. Non-financial sector issues should be addressed in the second tranche of reforms, after appropriate consultation with those relevant stakeholders, including the mobiles industry. To the extent possible the Bill should minimise duplication of existing telecommunications regulation and maintain consistency with other jurisdictions also seeking to fulfil their obligations in relation to AML and CTF.
- 4.3 AMTA appreciates the opportunity that the AGD has given AMTA to provide feedback on the current Bill and looks forward to working co-operatively with the AGD to further discuss the concerns raised in this paper and to actively participate in the consultation process associated with the second tranche.