



By e-mail: legcon.sen@aph.gov.au

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Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
Canberra ACT

General Counsel's Office
American Express
Australia Limited
175 Liverpool Street
Sydney NSW 2000 Australia
Tel: 9271 3346
Fax: 9271 2393

Dear Committee Secretary

Inquiry into the Exposure Draft of the Anti-Money Laundering and Counter-Terrorism (AML/CTF) Bill 2005 (Bill)

Thank you for the opportunity to participate in the Committee's enquiry into the Bill. We offer the following concise comments on the Bill for the Committee's consideration.

1. American Express in Australia

American Express is one of the largest global payments providers and is based in New York. It has carried on business in Australia for over 25 years and holds an Australian Financial Services Licence.

Some 12% of credit and charge cards on issue in Australia are American Express Cards which represent 15% of the value of all credit and charge card transactions.

American Express operates significant business in Australia in corporate travel management services and foreign exchange services for retail and corporate clients. It also issues and sells travellers cheques.

American Express has complied with the current Financial Transactions Reporting regime in Australia since its inception in 1988.

American Express does not own or operate a proprietary branch network and has no intention to do so in the future.

2. Global Experience

American Express carries on diversified financial services businesses in some 110 countries under policies of strict compliance with the laws of all jurisdictions in which it operates. It has experience of compliance with anti-money laundering laws in many countries, including the US Patriot Act and the various national laws based on the Directives of the EU.

3. Risk Based Approach

American Express strongly supports a risk based approach to money laundering prevention to allow financial institutions the flexibility to create programs that are tailored to the AML/CTF risks associated with particular products and services.

As governments and regulators are not industry experts the consequence of prescriptive guidelines is likely to be that AML/CTF typologies will not be allowed to develop over time.

International regulators have endorsed the risk based approach.

Institutions will be required to put extensive amounts of money into technology, training programs and processes to support money laundering prevention, therefore we espouse the risk based approach which ensures that these investments truly deter money laundering based on the particular business model.

American Express believes that traditional face-to-face inspection of ID documents such as passports and drivers' licences affords little or no safeguard against forged documents, use of false identities and criminal activity, including fraud and money laundering.

A risk based approach would entail the use of electronic verification (EV) plus a holistic client risk classification and transaction monitoring system to deter and detect unusual or suspicious activity. We believe this approach represents international best practice in this field.

4. Customer Identification

Institutions need the flexibility to implement customer identification processes that are reasonable and practical for their particular products and clients.

Electronic verification (EV) has been investigated and approved by regulatory authorities in both the US and UK and has the following advantages:

- **Prevention of identity theft and fraud.** Use of diverse data sources to effect an identity verification removes risk of a fictitious identity deployment, unlike reliance on traditional ID documents, which are increasingly susceptible to theft and sophisticated alteration or forgery.

- **Efficiency.** This can be demonstrated in terms of ease, speed, cost and certainty. EV obviates the need for customers to provide documents either by attending the premises of the provider in person or sending documents through the mail. It is almost instantaneous. It is much less labour intensive and therefore cheaper than requiring physical presentation of documents. Finally it reduces the possibility of human error.

The AML/CTF Rules should provide as far as possible for EV via existing databases such as Baycorp.

5. Competitive Neutrality

As an elementary matter of fair play, regulation should not create a competitive bias in favour of particular service providers.

A wide range of financial services are now delivered electronically (and with high levels of security) to clients. Consequently, a number of prominent financial service providers, including American Express, do not have physical branch networks through which to conduct face-to-face enquiries with clients. The law should not require a service provider to follow procedures which it cannot comply with except by incurring inordinate expenses which are not required of its competitors.

For this reason, American Express submits that it is critical the new AML/CTF regime established by the Bill does not prescribe a narrow, traditional identification process based on physical or face-to-face presentation or inspection of identity documents, especially as more efficient alternatives are available.

American Express' estimated direct implementation costs of compliance with a face-to-face regime are conservatively estimated at \$7.5 million. This does not include loss of revenues or opportunity costs.

6. Specific Comments on the Bill and the proposed AML/CTF Rules

▪ Immunity from Liability

A feature of the AML/CTF regimes of other countries, which is conspicuously absent in the Bill, is reasonable legal protection from civil liability for persons complying with the new regulatory regime. Here again as a matter of fair play, no one who complies with the Bill's requirements should be exposed to actions in contract or tort by a third party.

The Bill should also relieve persons complying in good faith with its provisions from liability for breach of the statutory duties imposed by privacy or anti-discrimination legislation. These various regimes (AML/CTF, privacy and anti-discrimination) may be in conflict with each other and the legislator should resolve such conflicts by appropriate amendments to the Bill.

- **Information Sharing (and Tipping off) – Groups of companies**

Financial Service providers, including American Express, frequently operate through a group of related companies, in which particular activities are concentrated in individual group members. A deficiency of the Bill is that, as currently drafted, the strict rules requiring particular AML/CTF related information to be kept confidential do not give any relief for intra-group information sharing.

To take a simple example, one group entity may provide a financial service to clients, a second may coordinate corporate functions such as legal or regulatory compliance, a third may provide customer servicing and a fourth data processing.

All four entities may have to be involved – and share information – in servicing any single client. The group entities may be located in different countries and the Bill should be amended to take reasonable account of corporate group structures and allow them to share information and function effectively.

- **Materially Mitigate**

The requirement to “*materially mitigate*” risk of products and services being misused is unrealistic and unattainable, as it is not possible to quantify levels of money laundering and terrorist activity with any level of precision, nor to predict future directions and developments of such activity.

The requirement should be changed to require providers to implement programs which “*effectively mitigate such risks as are reasonably apparent*” of the provider’s products and services being misused.

- **Minimum Customer Information – Individuals**

The scope of the minimum customer information required under the draft AML/CTF Rules is unnecessarily wide. For the purpose of issuing a relatively low risk product such as a credit card, it is of no business value to record: place of birth, nationality or country of residence. Verifying these particulars would be disproportionately costly and labour intensive and would yield no information of regulatory value for AML/CTF purposes. In addition, such information of necessity becomes a surrogate for identifying ethnicity, which in turn may lead to inappropriate assumptions being used as a basis for decision-making. The legitimate objectives of privacy and anti-discrimination laws may thus be undermined.

A connection with a foreign country is not of itself an index of suspicion, though certain transactions may be. But such transactions will only be ascertainable via a risk-based transactional monitoring system. Many Australians have connections with other countries because that is where they or their forbears came from, but for ATM/CTL purposes such connections should only be of significance in the context of actual transactions.

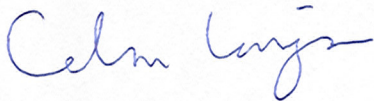
▪ **Minimum Customer Information – Legal Entities**

Some of the prescribed information in relation to legal entities is of little value and would be costly to obtain, for example – the particulars of all directors and the names of members with substantial holdings. As regards publicly listed companies, the name of their directors and officers are in any case public knowledge.

This submission is made at a time when the complete AML/CTF regime has not yet been revealed. We would welcome the opportunity to comment on the various additional draft rules and guidelines as and when these are published.

We appreciate any consideration the Committee may give to the matters raised in this submission and would like an opportunity to discuss this in person at any hearing the committee proposes to hold.

Yours faithfully



Colm Lorigan
Group Counsel