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Dear Sir / Madam

Draft AML/CTF Rules resulting from the Review of the Act

1. Background to Financial Services Committee submission

- 1.1 The Business Law Section of the Law Council of Australia (**BLS**) is a Section of the broader Law Council of Australia (**LCA**) with a primary focus on various aspects of the laws of Australia as they affect specific business sectors.
- 1.2 This submission as to the *Draft AML/CTF Rules resulting from the Review of the Act (Draft Rules)* is prepared by the Financial Services Committee of the BLS (**BLS FSC**), which has offered comment on previously proposed amendments to the *Anti-Money Laundering and Counter-Terrorism Financing Act (Act)*, and was actively involved in the consultation process for the review of the Act.
- 1.3 The BLS FSC notes that the broader LCA has also made various submissions as to the reform process for the review of the Act. The broader LCA's focus is on questions about the proposed extension of the AML/CTF regime to designated non-financial businesses and profession and the proposed Phase 1 amendments to the objects of the AML/CTF Act and the powers and functions of the AUSTRAC CEO.
- 1.4 The BLS FSC, on the other hand, is composed of practitioners that regularly advise the regulated community of reporting entities under the Act. This submission is intended to offer the experience of the BLS FSC in suggesting technical amendments designed to enhance the ability of the Draft Rules to achieve their intended aims without unanticipated results.
- 1.5 This submission will follow recommendations in the order in which they are set out in the document released for consultation.

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2. BLS FSC Submission

2.1 Definition of 'certified copy'

- (a) The BLS FSC welcomes (and has argued in favour of) additional flexibility for certification requirements, given that under some previous versions of this definition, certification outside Australia has been difficult.
- (b) However, the BLS FSC considers that the proposed amendment may provide too much flexibility without a proper basis for expecting that money-laundering and terrorism-financing risk (**ML/TF risk**) will be appropriately managed.
- (c) In higher risk countries, it may be that a person, who (for example) has worked for 2 years in a licensed bank, may not be as reliable as their Australian counterpart and not sufficiently reliable for an Australian reporting entity to rely on a certification which they provide. As the Australian reporting entity may not be present in the relevant country, the customer would have an opportunity to select a reputable or a disreputable person in the available classes to perform certification, therefore diminishing the Australian reporting entity's ability to assess the reliability of the certification it is provided with.
- (d) We suggest as an alternative that the proposed new paragraph be amended by including a risk-based element as follows:

(6) a person in a foreign country who the [Australian entity] that proposes to rely on the certification has determined in accordance with its risk-based systems and controls is, in relation to that foreign country

(a) is the equivalent of a person specified in paragraphs (1)-(5) of the definition of 'certified copy', and

(b) appropriate to rely on for the purposes of providing certification;

- (e) In our experience, Australian reporting entities prefer to (for example) identify a legal practitioner or other suitably qualified person in the relevant region of the foreign country whose probity is known. Relying on the judgement of the new customer in choosing the certifier of their identity documents would create greater risks than such a process.

2.2 Definition of primary non-photographic identification document

- (a) The BLS FSC considers that the proposed amendment creates flexibility in an important definition in a way which is not appropriately risk-based and could have unexpected implications.
- (b) In particular, if the definition of primary non-photographic identification document is changed to an inclusive definition, there would be no express requirement for a

risk-based consideration, or for the document to be assessed as independent or reliable, and the certified translation specified mentioned in subparagraphs (2) and (3), would (it appears) become optional. While the documentation may be meaningfully assessed and accepted by staff of the Australian reporting entity literate in the relevant language, it cannot be assumed that all staff, independent reviewers, regulators and other users or reviewers of these records will necessarily have the same capacity. As a primary non-photographic identification document may be used in the 'safe harbour' identification process, the BLS FSC considers that the definition should not be made so uncertain.

- (c) Similarly to our suggestion in paragraph 2.1 above, we suggest that the change in the introductory paragraph be reversed (i.e. remove 'includes'), and a new sub paragraph (6) being added as follows -

(6) a document which the Australian entity wishing to rely on the document has determined in accordance with its risk-based systems and controls is issued by an independent and reliable source and is (for the purposes of verification) appropriately similar to the documents identified in paragraphs (1)-(5) of the definition of 'primary non-photographic identification document', having regard to the characteristics of the person to whom the document relates, and (if the document is written in a language that is not understood by the person who will carry out the verification), is accompanied by an English translation prepared by a translator that the Australian entity has determined is appropriate in accordance with its risk-based systems and controls.

- (d) As certified translators may not in all circumstances be available, flexibility is maintained by allowing the relevant reporting entity to make a risk-based determination of the nature of the translation that is required in the relevant circumstances.

2.3 Definition of primary photographic identification document

- (a) For substantially the same reasons as those set out in paragraph 2.2 above, the BLS FSC suggests that the changes to the introductory paragraph be reversed, and a new subparagraph (6) included as follows -

(6) a document which the Australian entity wishing to rely on the document has determined in accordance with its risk-based systems and controls is issued by an independent and reliable source and is (for the purposes of verification) appropriately similar to the documents identified in paragraphs (1)-(5) of the definition of 'primary photographic identification document', having regard to the characteristics of the person to whom the document relates, and (if the document is written in a language that is not understood by the person who will carry out the verification), is accompanied

by an English translation prepared by a translator that the Australian entity has determined is appropriate in accordance with its risk-based systems and controls.

2.4 Definition of secondary identification document

- (a) For substantially the same reasons as those set out in paragraph 2.2 above, the BLS FSC suggests that the changes to the introductory paragraph be reversed. In relation to secondary identification documents, for the Rules should facilitate a risk-based consideration of the specific circumstances of the customer (including the reasons, if any, that other forms of documentation are not reasonably available), and a more generalised risk-based assessment of what documents may be appropriate on the circumstances.
- (b) The BLS FSC submits that the changes to the introductory paragraph should be reversed, and a new subparagraph (5) included as follows -

(5) a document which the Australian entity wishing to rely on the document has determined in accordance with its risk-based systems and controls is (for the purposes of verification) an appropriately reliable and independent form of evidence of the existence and identity of a person, having regard to the characteristics of the person to whom the document relates, and (if the document is written in a language that is not understood by the person who will carry out the verification) is accompanied by an English translation prepared by a translator that the Australian entity has determined is appropriate in accordance with its risk-based systems and controls.

2.5 Paragraph 4.12.2(d) - subsidiaries of foreign listed public companies

- (a) The BLS FSC supports the proposed amendment.

2.6 Paragraph 4.15 - Customers unable to provide satisfactory evidence

- (a) The BLS FSC has some concerns about the proposed methodology, notwithstanding that risk-based systems and controls are specifically mentioned in draft paragraph 4.15.2. The BLS FSC is aware that reporting entities have for many years had difficulty in conducting appropriate verification of individuals of the kind described in the introductory paragraph. The BLS FSC assumes that the reference in 4.15.2 to risk-based systems and controls is designed to ensure that the procedure will be relied on only where there are objectively appropriate reasons for the Australian reporting entity to determine that the relevant individuals cannot be identified through more conventional means. However, this reference does not in the Committee's view necessarily sufficiently reflect the intent of recommendation 5.6 of the Statutory Review that self-attestation should be allowed only as a last resort.
- (b) The BLS FSC's concerns about the general approach would be ameliorated if there were some express reference to such a general purpose and interpretation.

- (c) In relation to draft paragraph 4.15.2, the Committee queries the requirement for low 'baseline' ML/TF risk. Simply because a person is (for example) born in remote outback Australia, without access to conventional forms of identification documents, does not mean, in the view of the Committee, that it is appropriate that they be denied the use of low-medium ML/TF risk designated services such as person-to-person remittance.
- (d) In relation to draft paragraph 4.15.4(2), the Committee suggests that an alternative version of this might be considered for circumstances where the most appropriate 'trusted referee' may also suffer from a lack of formal identification documents. A tribal chief of a remote community may be more appropriate to verify identity than a council worker, but may not hold reliable documentation. This might be resolved by allowing for an appropriate risk-based determination that a person who is not able to be formally identified is nevertheless the appropriate reliable and independent source for a particular community.

2.7 **AML/CTF Program: 8.1.5(5) and 9.1.5(5) - 'identify, mitigate and manage'**

- (a) The BLS FSC supports the proposed amendment.

2.8 **AML/CTF Program: 8.5.2 - 8.5.3 and 9.5.2 - 9.5.3 - role and duties of the AML/CTF officer: general principles**

- (a) In general, the BLS FSC supports the inclusion of additional guidance on the concept of an AML/CTF Officer.

2.9 **AML/CTF Program: 8.5.4 and 9.5.4 - detailed elements of role and duties of the AML/CTF officer**

- (a) The BLS FSC does not support the inclusion of these additional matters in the AML/CTF Rules, or their documentation in the AML/CTF Program of any reporting entity.
- (b) In the submission of the BLS FSC, the proposed aspects of the role in subparagraphs (1)-(15) would be better expressed in general guidance released by AUSTRAC. There is, in our submission, little benefit in including a lengthy and optional ('may include') list of kinds of activities given the diversity of Australian reporting entities from ASX20 corporations to single-person part-time remittance businesses or on-track bookmakers.
- (c) In our submission, the proposal would have a similar effect to the obligations of the AML/CTF Officer to ensure that AUSTRAC is informed of certain matters under Chapter 64 (which the BLS FSC has separately suggested below is apt to distract the AML/CTF Officer from the matters which should be their focus, and where the desired result might be more efficiently achieved through other means, such as the checking of an annual return procedure by AUSTRAC. The inclusion of a list of such matters in any AML/CTF Program would be apt to focus the AML/CTF Officer on checklists and distract them from identifying, mitigating and managing the actual ML/TF risks arising day to day in the relevant business.

- (d) In particular, the BLS FSC notes that reporting entities vary widely in the size of their operations. For a nationally operating banking group, it is difficult to conceive of any way that the AML/CTF Officer could meaningfully 'ensure' that record keeping obligations are complied with, and the degree of focus on computer systems which would be needed to 'ensure'; this would quite limit the capacity to perform other more relevant duties. If the 'ensure' element is able to be satisfied by 'ensuring' that some other person is responsible, it does not seem a useful inclusion. Further, in the experience of Committee members in relation to the AFSL regime, the real or imagined risk of personal liability for the person taking on a role with such obligations associated with it can act as a real disincentive to being able to secure the most appropriate person in an organisation for that role.
- (e) In general, subparagraph (11) - providing leadership and promoting a culture of AML/CTF compliance would, in the submission of the BLS FSC, be an appropriate inclusion in the AML/CTF Program with draft paragraphs 8.5.3 / 9.5.3, but the remainder should not, in the submission of the BLS FSC, be included in the AML/CTF Rules (or not in a section mandating inclusion in the AML/CTF Program).

2.10 **AML/CTF Program - 8.6 and 9.6 - 'independence'**

- (a) The BLS FSC understands the risk that reviews may be of limited use if they are not truly 'independent'. However, particularly given the small community of professionals undertaking them, the BLS FSC suggests that there should be some basis for a person who had been involved in the development of a program, with the passage of time, to become independent again.
- (b) Even if an external advisor assists with the implementation of a program, it is likely that over a reasonable period (perhaps 6 years), the program would be varied and renewed in the course of reviews by other persons so that ultimately it becomes a different program than the one initially prepared. Draft paragraphs 8.6.4(2) and 9.6.4(2) should include a time period within which the relevant role has not been performed.
- (c) Further, the BLS FSC is concerned that some aspects of the proposed definition of 'independence' relating to the ability to make enquiries and access all relevant information sources go not to independence but to access. It is submitted that independence of the reviewer and that reviewer's access to information or the scope of the required review should be dealt with separately.
- (d) Finally, the committee notes that under the tipping off rule, as presently implemented, no independent person could access records of suspicious matter reports, and accordingly no external party might be regarded as 'independent'. A lack of access to legally professionally privileged documents should also not preclude a reviewer from the status of being independent (or the status of having appropriate access, if the concepts are split as we have suggested).

2.11 **8.7 and 9.7 - Feedback**

- (a) The BLS FSC supports reporting entities understanding developments in ML/TF Risk and remaining current with regulatory developments. However, we have concerns about the specific proposed implementation.

- (b) Firstly, it would be very difficult to measure and detect whether the proposed obligation had been complied with. The provision would likely be interpreted having regard to ML/TF risk information that is relevant to the business of the relevant reporting entity, meaning that some communications may be seen as of limited relevance, and the provision complied with without any specific action being taken.
- (c) The BLS FSC is concerned that the concept is expressed too broadly. As drafted, the proposed language could contemplate virtually any statement of AUSTRAC, FATF, the Wolfsberg Group, or the FIUs of any foreign country, whether or not intended to draw attention to any relevant risk. Similarly to our comment at 2.9(c), if the AML/CTF Officer perceives their duty as being to parse any statement of such a diverse group of authorities, it would be apt to distract them from their focus on managing actual ML/TF risk affecting the reporting entity or DBG.
- (d) In the Committee's submission, the proposed paragraph 8.7.2 and 9.7.2, commencing with 'For the avoidance of doubt' heightens these risks. The requirement, if imposed, should in our submission be limited to specific information provided by AUSTRAC at a specific location on its website (perhaps only accessible once logged in through the portal), where AUSTRAC could curate specific information as to ML/TF risk which it had developed or had been developed by other relevant authorities and it views as required to maintain an effective AML/CTF Program.
- (e) In addition, there is a concern that the mandatory requirement to 'incorporate' the relevant ML/TF risk information could elevate such information to the status of legislative instruments without the usual process for scrutiny and passage of such instruments into law having been followed. Perhaps the phrase to "***incorporate information***", could be replaced with to "***have regard to information***" (as is used in Rule 8.7.1(2)) as a more appropriate form of words that would still retain the objective. For many reporting entities, amendment to the AML/CTF Program itself is a more formal and considered process than the preparation of guidance and there could be disproportionate costs if new elements must be frequently added and deleted as the varied sources which would need to be considered under the proposed Rule issued and varied information.

2.12 Chapter 30 - disclosure certificates - appropriate officer

- (a) This Committee had suggested the adoption of this model and in general supports the changes but submits that, as drafted, the provision lacks sufficient flexibility.
- (b) Certificates should, in the submission of the Committee, be able to be provided by a person who is not an officer of the customer, if the reporting entity determines that this is appropriate in accordance with its risk-based systems and controls.
- (c) To reprise two examples offered by this Committee in previous submissions: the officers of a school parents and citizens association might be appropriately confirmed by the principal of the school, who would not usually be an officer of the association. Similarly the beneficial owner of a trust might be appropriately confirmed by the trust's accountants or auditors, who would not usually be officers of the trust. A requirement for certificates to be provided by 'officers of the

customer' would in most cases lead to a person certifying information about themselves personally, which may not be the most reliable and independent source for confirmation.

2.13 Chapter 20 - disclosure certificates - content

- (a) The Committee repeats its earlier submissions that flexibility should be permitted for the content of certificates. It should be acceptable that a certificate contain **some** of the relevant information, as opposed to containing **all** of the relevant information.
- (b) For example, under the proposed amendment to paragraph 30.7, if a disclosure certificate contains a reliable certification as to the beneficial owner, why should it be necessary for its validity for it to contain a statement as to whether the company is registered as a private or public company, or some other kind of company by a relevant foreign registration body?
- (c) The BLS FSC submits that it is not unlikely that no single person would have the knowledge to be capable of certifying every single element required to be included in a valid certificate, in which case no valid certificate could be prepared or relied on.

2.14 Chapter 36 - corporate structure services

- (a) The Committee repeats its strong submission that the 'related body corporate' definition in the *Corporations Act* is not necessarily suitable in the context of this paragraph, including because common corporate structures involving stapled securities are regarded under the *Corporations Act* as separate corporate groups, even though they are under common ownership and control (and, for clarity, are managed as a single group). Groups which are under common ownership and control should be considered related, even where 'control' is taken to not exist under section 50AA(4) of the *Corporations Act* and ownership is taken not to exist under section 48(2) of that *Act*.
- (b) In relation to draft paragraph 36.4(5), we suggest deleting the words '**is a partnership**', and including instead '**are all members of the same partnership**'.
- (c) The Committee notes that structures may exist for legitimate purposes such that entity 'A' is a member of partnership 'B' which is a member of a partnership of partnerships 'C'. The exemption should, in our submission, extend to this kind of arrangement, in the case where the relevant designated service is provided in respect of the relevant partnership.
- (d) A concept of common management and control (or common enterprise) in relation to the relevant partnership would be a useful addition as the Draft Rules do not address the possibility that a legal person may be a member of more than one entirely unrelated partnership.

The BLS FSC would be pleased to be involved in any further consultation or development of the Draft Rules. In the first instance, please contact James Moore, the deputy chair of

the BLS FSC and co-ordinator of the AML sub-committee, on +61 2 9334 8686,
jmoore@hwle.com.au .

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Teresa Dyson', written in a cursive style.

Teresa Dyson, Chair
Business Law Section