

**Transnational Crime Branch
Criminal Justice Policy and Programmes Division
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600
antimoneylaundering@ag.gov.au**

**SUBMISSION IN RESPONSE TO
Consultation paper:**

Trust and company service providers: a model for regulation under Australia's anti-money laundering and counter-terrorism financing regime

November 2016

**ON BEHALF OF
Committee of Business Incorporators Australia Inc.(CBIA)**

Contact:

David Charles Balog, Solicitor
D.C. Balog & Associates Solicitors
Museum Towers, Level 8, Suite 129
267 Castlereagh Street, Sydney NSW 2000
Tel: 0282685700
Email: david@dcb-law.com

Contents

1. Purpose.....	4
2. The Committee of Business Incorporators Australia Inc. (CBAI)	4
3. Background Information	6
4. Response to questions raised in the discussion paper.....	10
1. What services provided by TCSPs pose a ML/TF risk?.....	10
2. Do any of the services provided by TCSPs, and identified by the FATF as requiring regulation, pose a demonstrated low ML/TF risk in the Australian context?	12
3. What are the benefits of requiring TCSPs to comply with AML/CTF obligations when performing services that may pose an ML/TF risk?	13
4. To what extent are the FATF's CDD obligations already reflected in existing regulation (including self-regulation) for Australian TCSPs?	13
5. To what extent do existing mechanisms that allow for regulatory oversight of TCSPs mitigate any ML/TF risks that may be posed by the services TCSPs provide?	14
6. What lessons can be learned from the experience of regulating TCSPs under AML/CTF regimes in other jurisdictions?.....	15
7. What services provided by TCSPs should be regulated under the AML/CTF regime?.....	15
8. Do any of the services provided by TCSPs as defined by the FATF pose a low ML/TF risk in the Australian context? If so, what evidence is there of this?	16
9. What should be done if there is an overlap of regulation of DNFBPs?.....	16
10. What impact would the costs associated with complying with the AML/CTF regime have on TCSPs?.....	16
11. What additional administrative structures will legal practitioners need to put in place to comply with the requirements of the AML/CTF regime?	17
12. How would regulating TCSPs for AML/CTF purposes impact on the delivery of services to clients?	17
13. How would AML/CTF obligations impact on the client confidentiality obligations of TCSPs.	20
5. Recommendations.....	20

1.	One-off company formation transactions.....	20
2.	Company formation and compliance transactions where the lodging agents are merely acting on behalf of other professionals such as accountants and lawyers.....	21
3.	The timing of verification of identity	22
4.	The definition of TCP	22
5.	Shoring up current deficiencies	22
6.	Strategies to Mitigate Money Laundering Risk for those providing one or more of the Services.....	23
6.	Conclusion	24
	ATTACHMENT A	26
	ATTACHMENT B	268

1. Purpose

This submission has been prepared on behalf of Committee of Business Incorporators Australia Inc. (CBIA) in response to the consultation paper for the TCSP sector in Australia released by the Attorney-General's Department for comment.

2. The Committee of Business Incorporators Australia Inc. (CBIA)

The Committee of Business Incorporators Australia Inc. (CBIA) is an organisation in Australia which membership is currently made up of businesses throughout Australia that are ASIC Lodging Agents and facilitate company incorporations, establishment of trusts, self-managed superannuation funds and ancillary ASIC compliance and select company secretarial work (the "Services").

The current membership includes

The founding members:

Corporate Express (NSW) www.corporateexpress.com.au

Castle Corporate Pty Ltd (Vic) www.castlecorp.com.au

David Garry & Associates (SA) www.davidgarry.com.au

Patricia Holdings Pty. Limited (NSW) www.patricia.com.au

C.C.A.S.A. (WA) www.ccasa.com.au

Rapid Companies (Qld) www.rapidcompanies.com.au

Other members of CBIA Inc are -

Australian Company Incorporation Pty Ltd www.acis.net.au

GKM Associates Pty Ltd www.gkm.com.au

Corporate Network Limited	www.incorporations.com.au
A1 Company Services	www.a1companyservices.com.au
Reckon Docs	www.reckon.com.au
Patricia Holdings (QLD) Pty Ltd	www.patriciaholdings.com.au
Company Creations	www.companycreations.com.au
Corporate Services International Pty Ltd	www.csi-aus.net.au
Shelf Company Services Pty Limited	www.shelfcompany.com.au
PantherCorps	www.panthercorp.com.au
Incorporation Specialists Pty Ltd	www.incspec.com.au
Corporate Representatives Pty Ltd	www.corpreps.com.au
Smartcorp	www.smartcorp.com.au

The objects of CBIA are:

- To represent and advance the company formation and company compliance industry within Australia.
- To provide industry representation with all levels of government and their agencies in respect of programs, policies, acts and regulations that impact upon the industry.
- To affiliate with other bodies and take such action as may be considered appropriate to ensure that the industry is adequately represented at all levels of government and the community.
- To develop uniform practices within the industry to comply with all legislation governing the industry.
- To adopt a role providing or promoting knowledge and administrative infrastructure to the industry.

- To do all things that are incidental or conducive to the attainment of these objects.

CBIA believes there are many businesses in Australia who only provide one or more of the Services (“Lodging Agents”). These Lodging Agents are CBIA’s potential members.

The CBIA website is located at <http://www.cbia.org.au/>

CBIA requests that this submission be taken into account in response to the Consultation Paper dated November 2016 “Trust and company service providers: a model for regulation under Australia’s anti-money laundering and counter-terrorism financing regime.”

3. Background Information

The total number of companies registered in Australia in 2015 was 242,620 and in 2016 was 244,795 (see <http://asic.gov.au/regulatory-resources/find-a-document/statistics/company-registration-statistics/>)

To lodge ASIC forms (including forms for formation of companies), a person can choose to:

- Lodge directly with ASIC
- Use the services of a casual lodging party
- Use the services of an ASIC registered agent to facilitate lodgement.

It has been ASIC’s policy to appoint agents for the purpose of facilitating lodgement of ASIC compliance forms and to reduce manual over-the-counter lodgements by systematic closure of their business centres, the appointment of more agents and the development of an electronic lodgement process (ECR). ASIC is currently developing a single on-line portal for business and company formations available to the public in general. A roll out date for this service is anticipated to be sometime this year.

An ASIC registered agent acts as an intermediary between ASIC and Australian companies, to help companies meet their lodgement obligations under the Corporations Act 2001 (Cth).

An ASIC registered agent does not operate on ASIC's behalf but instead facilitates the provision of lodgement information on behalf of companies who need to lodge information with ASIC.

Most ASIC registered agents lodge information on behalf of companies electronically with ASIC, either using ASIC's Online Agent Portal (web based system) or ASIC's EDGE system (which requires third party software to lodge).

The vast majority of ASIC forms (including forms for the formation of new companies) are lodged by ASIC registered agents.

The only forms that can be used are the forms which ASIC creates:

- Those forms are created by ASIC in a format which requires completion of the information required by the legislation for those forms to be processed by ASIC;
- The completion of these forms is not authored by a CBIA member or the Lodgement Agent. It is merely a facilitation role comprising the entry of information provided by a third party on a form after which it is lodged. This information is usually provided indirectly by the lawyer or accountant who is the client of the CBIA member or Lodgement Agent.

CBIA members facilitate the provision of the following Services be it one or more of:

- company incorporations;
- establishment of trusts;
- establishment of self-managed superannuation funds;
- ancillary ASIC compliance by the completion of forms created by the regulator with information nominated by the regulator;
- select company secretarial work namely only the completion of forms, not the authorship, created by the regulator with information required by the regulator in accordance with the then prevailing legislation. Such information is provided to the CBIA member by the third party.

CBIA members:

- do not provide legal advice;

- do not provide accounting advice;
- do not advice on the structures to be incorporated;
- do not sell companies or trusts but rather assist in the filling out and lodging of forms and the creation of ancillary company or trust minutes, registers and pro-forma(ie, created and vetted by third party lawyers) family, unit and self-managed super fund (SMSF) trusts deeds and company constitutions;
- do not advise, direct or have input on either the structure to be created or the owners and or beneficiary of such structure as they merely complete an ASIC form on direction provided from their client be it an accountant, lawyer and or independent third party;
- do not provide financial advice;
- do not provide a financial product;
- do not engage in any financial transaction;
- do not act in the role of a company secretary, the tasks and skills of which are set out in 1220.0 - ANZSCO - Australian and New Zealand Standard Classification of Occupations, First Edition, Revision 1 and which is annexed as Attachment B;
- do not establish bank accounts;
- in the main do not apply for TFNs or ABNs of companies, trusts and not-for-profit organisations;
- do not engage in any flow or movement of funds from any structure created;
- do not engage in providing advice or engage in the financial affairs of any structure or entity.
- do not profess qualification as lawyers, accountants or financial advice or product providers and do not provide such advice;
- do not provide financial services advice and as such are not and should not be required to hold a licence;

- do not act or arrange for another person to act as a director, secretary of a company, as a partner of a partnership, or in any similar position. They merely enter the information that is provided to them on the requisite form or document which has been pre-arranged or advised by the third party client;
- do not act or arrange for another person to act as a trustee of a trust or similar arrangement. They merely enter the information that is provided to them on the requisite form which has been pre-arranged or advised by the third party client;
- do not act or arrange for another person to act as a shareholder or a nominee shareholder. They merely enter the information that is provided to them on the requisite form or document which has been pre-arranged or advised by the third party client;
- in the main, do not provide their address as the registered address, business office, correspondence address or other related service for the company partnership, or any other legal arrangement.

CBIA members and Lodging Agents who facilitate one or more of the Services should be excluded from the requirements or provided an automatic exemption.

CBIA members and Lodging Agents who facilitate one or more of the Services are not and should not be the gatekeeper in these circumstances. The gatekeeper must be primarily ASIC and the regulators to ensure legislation is in place to provide whatever information the Government requires to succeed in the endeavours set out in the consultation paper and then the lawyers and accountants who advise and structure the activities.

By way of example CBIA members and Lodging Agents who facilitate one or more of the Services are not involved in the financial affairs of the entity they facilitate to establish. They are not involved in the creation of the bank account. Verification of identity and beneficial ownership should take place on the creation of a bank account with the parties seeking to open such account.

Most CBIA members have invested heavily in software required by ASIC for them to make lodgements electronically.

The engagement by ASIC of competent registered agents who facilitate electronic lodgement of ASIC forms has lead to substantial cost savings for ASIC and ensured the integrity of the public data base (registry) managed by ASIC.

Some members operate solely on-line with no physical places of business for face to face customer contact.

Most transactions are low value transactions (the Lodging Agents currently charge a fee or between \$600 and \$850 for most company incorporations and \$469 out of this fee represents the lodgement fee paid to ASIC). Other ASIC compliance work is charged out at fees ranging from \$22 to \$220 depending on the type of work undertaken.

4. Response to questions raised in the discussion paper

The responses below apply specifically relate to CBIA members and Lodging Agents who facilitate one or more of the Services namely:

- company incorporations;
- establishment of trusts;
- establishment of self-managed superannuation funds;
- ancillary ASIC compliance by the completion of forms created by the regulator with information nominated by the regulator;
- select company secretarial work by the completion of forms created by the regulator with information nominated by the regulator;

1. What services provided by TCSPs pose a ML/TF risk?

No services provided by CBIA members or Lodging Agents pose a ML/TF risk.

The gatekeeper for all or any risk must be the centralised regulatory government organisation which:

- Registers the organisation;

- Registers particulars and changes in such organisation;
- Is required under legislation to receive specific information before it registers the organisation and/or change.
- Opens a bank account for the entity.

The gatekeeper to assume a robust system of checks and balances, the integrity of the data and dissemination of all material information must be the regulatory authority and the bank or financial institution.

Where such powers are not provided to the regulator by legislation then it is the duty of Parliament to so empower the regulator.

The current regulatory system for Lodging Agents (broadly and the extent to which it addresses ml/tf)

- Corporations Act 2001.
- ASIC - Electronic Lodgement Protocol, Registered Agent.
- Australian Taxation Office/ Tax File Numbers (TFN).
- Australian Business Register ABR.
- Office of State Revenue.
- Banking code - 100 points of identification.
- Lodgement of company formation documents through ASIC Edge programme requires a digital certificate where 100-point identity check has been carried out by Australia Post to verify the identity of the applicant.
- Cash Transactions Reporting Agency.

2. Do any of the services provided by TCSPs, and identified by the FATF as requiring regulation, pose a demonstrated low ML/TF risk in the Australian context?

All Services are no risk or extremely low risk.

CBIA members and Lodging Agents who facilitate one or more of the Services facilitate the process such as establishing companies and trusts with information provided by their clients which are in the main lawyers and accountants.

There is no financial transaction so there is no risk requiring regulation.

CBIA members and Lodging Agents who facilitate one or more of the Services do not author but only send certain information to ASIC for the purpose of registering a new company which they have been provided usually from a lawyer or accountant. This information then becomes public information on the ASIC register.

This information is provided on forms created by ASIC to marry with the requirements of the existing legislation and it is ASIC who is in control of being satisfied whether this information is sufficient to give effect to the next required action.

CBIA members and Lodging Agents who facilitate one or more of the Services

- do not open bank accounts for new companies;
- do not handle cash on behalf of a newly registered companies or new established trusts;
- do not act as directors, secretaries, nominee shareholders or trustees nor are involved in the arrangements of persons to act as such by any legal arrangement;
- do not provide advice, other than information relating to ASIC compliance;
- are not involved in the financial affairs of the entity.

3. What are the benefits of requiring TCSPs to comply with AML/CTF obligations when performing services that may pose an ML/TF risk?

There are no benefits for required compliance of CBIA members and Lodging Agents in the provision of their services.

The gatekeeper ASIC must police and ensure the integrity of the information provided.

CBIA members and Lodging Agents who facilitate one or more of the Services are too distant, not party or privy to the very information necessary to afford the requisite benefit or protection as they merely provide an ancillary facilitation support service to the advice of a lawyer, accountant or a client.

The only required compliance that should be effected is where the legislature deems it prudent or necessary to amend the legislation ensuring that ASIC as a gatekeeper has systems in place to confirm the veracity of the form when completed and on confirmation give effect to the purpose of the form.

4. To what extent are the FATF's CDD obligations already reflected in existing regulation (including self-regulation) for Australian TCSPs?

FATF's CCD obligations deal with both:

- financial transactions and
- transparency of beneficial and legal ownership of legal persons and legal arrangements.

CBIA members and Lodging Agents providing one or more of the Services are not involved in financial transactions.

They comply with all current legislative requirements in relation to legal ownership and beneficial ownership when dealing with the regulator.

The legislation and therefore ASIC does not require:

- the production of identification when registering a new company directly with ASIC;

- the provision or the recording of ultimate beneficial owner. Even if such records were kept it would still be out of the control and knowledge of CBIA members and Lodging Agents as to what financial dealings such an entity entered into.

The legislation and therefore ASIC does:

- ensure that the formation of new companies becomes public record and is available for the public to interrogate

The following requirements also exist:

- Requirement for 100 point check to open a bank account though it is reiterated that the Services the subject of this submission do not include this;
- ATO requirements in relation to obtaining a TFN or an ABN or GST registration in respect of all trading companies or trusts;
- State revenue department requirements in relation to stamping trusts;
- ATO requirements in relation to the registration of SMSF's.

5. To what extent do existing mechanisms that allow for regulatory oversight of TCSPs mitigate any ML/TF risks that may be posed by the services TCSPs provide?

The existing provide an excellent level which can be improved upon in the manner later provided:

- Banking Code-Requirement for 100 point check to open a bank account though it is reiterated that the Services the subject of this submission do not include this;
- ATO requirements in relation to obtaining a TFN or an ABN or GST registration in respect of all trading companies or trusts;
- State revenue department requirements in relation to stamping trusts.
- Corporations Act 2001.

- ASIC - Electronic Lodgement Protocol, Registered Agent.
- Australian Business Register ABR.
- Lodgement of company formation documents through ASIC Edge programme requires a digital certificate where 100 point identity check has been carried out by Australia Post to verify the identity of the applicant.
- Cash Transactions Reporting Agency.

6. What lessons can be learned from the experience of regulating TCSPs under AML/CTF regimes in other jurisdictions?

ASIC should be the entity responsible to provide the necessary assurance and should be so empowered through legislation to be the gatekeeper.

To onerously burden CBIA members and Lodging Agents who facilitate one or more of the Services which include one-off transactions, transactions where the Services are merely performing an administrative function of lodging ASIC forms for formation of new companies with no on-going business relationship with the clients, is inappropriate.

The obligations must be the responsibility of ASIC, or the lawyers or accountants who provide the advice and make the arrangements.

In relation to the Services CBIA members and Lodging Agents engaging in one more of the Services should be exempt as not only the service provided presents a low risk but where they are carrying out a service for an accountant or lawyer they do not have the access to the information provided, as the accountant or lawyer has the requisite access.

7. What services provided by TCSPs should be regulated under the AML/CTF regime?

In relation to the Services the subject of this response the Regulator must be left with the burden of ensuring the legislation and the forms required to give effect to the legislation comply and it is not CBIA members or Lodging Agents to be so regulated.

By way of example ASIC as the gatekeeper and regulator should be legislated to require information with the advice as to registered office and the beneficial ownership of shares.

8. Do any of the services provided by TCSPs as defined by the FATF pose a low ML/TF risk in the Australian context? If so, what evidence is there of this?

In relation to the Services provided by CBIA members and Lodging Agents these pose a non-existent or low risk.

- The risk is created by the current legislation and those that provide legal and accounting advice namely:
 - With the legislature, in the information required under legislation to be disclosed to ASIC or any other regulator for formation of a trust or a company;
 - With ASIC, in the creation of forms for the completion with information in accordance with the then legislation;
 - With ASIC in its policing of interrogation of those forms and in effecting the formation;
 - With those that provide legal advice, accounting advice and financial advice.

9. What should be done if there is an overlap of regulation of DNFBPs?

There should be no overlap as the CBIA members and Lodging Agents facilitating the Services should be excluded. Any regime implemented should only affect ASIC, banks and the lawyers, accountants and financial advisers advising on and establishing structures.

10. What impact would the costs associated with complying with the AML/CTF regime have on TCSPs?

The return for the work undertaken is small as is the profit for CBIA members and Lodging Agents facilitating the Services in the provision of the Services.

The costs associated with complying with the suggested regime, including increased staff, increased establishment costs, increased policing costs, increased record retention costs, will lead to increased pricing, and consequently cause the closure of Lodging Agents providing those Services.

11. What additional administrative structures will legal practitioners need to put in place to comply with the requirements of the AML/CTF regime?

CBIA members are not lawyers, do not provide legal advice and do not represent themselves as lawyers.

One of the CBIA members reports that only 98% of its instructions come from lawyers and accountants and experience is similar to other CBIA members.

It will be matter for the lawyers to respond to.

12. How would regulating TCSPs for AML/CTF purposes impact on the delivery of services to clients?

Competitive disadvantage:

There will be a competitive disadvantage to the Lodging Agents. Clients who lodge their documents for company formation will need to comply with AML/CTF Act requirements (such as customer identification verification) whereas clients who lodge directly with ASIC will not have to comply with the same AML/CTF Act requirements. This may discourage clients to do lodgements through the Lodging Agents as there will be delays to AML/CTF Act requirements to identify and verify the clients.

The competitive disadvantage with ASIC will result in encouraging customers to avoid the AML/CTF Act requirements by dealing direct with ASIC instead of going through the ASIC Lodging Agents. If that happens, regulation of the Lodging Agents is unlikely to be effective in the prevention of money laundering and terrorism financing activities.

It would create a cumbersome environment, slow down the delivery of the service and introduce another layer of regulatory compliance which would not deliver the objectives of the consultation paper but create a situation or compliance requirement presenting such difficulties as to discourage or defeat attempts to resolve or deal with it.

Verification of identify of clients by lodging agents:

There must be a simple definition of 'your client'. In the last proposed second tranche of AML/CTF regulations it was stated that clients included promoters, proposed officeholders and members of companies being formed and the beneficiaries of trusts being established. If it is proposed that this definition be carried forward then identification and verification requirements imposed upon Lodging Agents will cause substantial delays. Lodging Agents do not in the main have face to face contact with any of defined clients as nearly 100% of the Services are ordered on-line. Further, Lodging Agents will not be able to perform electronic identification verification on all such defined clients due to limited reliable sources of electronic database currently available in Australia.

This will also affect the business efficiency of the Lodging Agents, increase their cost base and place more burdens on them who are usually small to medium sized enterprises. This is also inconsistent with the Federal Government's goal to remove excessive regulation to Australian businesses in order to improve Australia's productivity. It is also against the general trend to promote e-commerce businesses.

Most of the Lodging Agents' transactions for company formation and trust establishment are one-off transactions with no on-going relationship with the entities they are instructed to create. It would be impossible for Lodging Agents to monitor the activity of the entity's business when there is in fact no on-going relationship. The point we make is that 'our client' in the main are instructing professionals like lawyers, accountants and financial advisors and it is they who deal direct with the beneficial owners of those entities we are instructed to create.

Most transactions would be low value transactions (the Lodging Agents currently charge a fee of between \$600 and \$850 for company formations and \$469 out of this fee represents the lodgement fee paid to ASIC). High value transactions may reflect the complexity of the transactions and therefore such transactions may have higher anti-money laundering or counter-terrorism finance risks. These types are

transactions are not carried out by TCSPs in Australia and they are in other countries.

Company formation activities:

Most company formation activities and other lodgement services are purely administrative in nature (there is generally no provision of advice by the Lodging Agents) and would comprise of the following:

- Lodging Agent collects relevant information required by ASIC
- Completing relevant ASIC form
- Lodge forms with ASIC electronically
- ASIC provides an ACN and certificate if a company or a validation if other company forms are lodged eg changes of address or officeholders
- Provide relevant documents to clients, including constitution (if any), minutes, ACN, certificate of incorporation, consents (directors), blank transfer forms, share certificates, seal, register.

Most new companies are original subscription companies but there are also some incorporated shelf-companies being sold (these would involve lodging change of directors/officers/shareholders forms with ASIC).

Company Secretarial activities:

Company secretarial activities are purely administrative and facilitatory in nature (there is no provision of advice by CBIA members and Lodging Agents in the facilitation of the Services and they do not undertake the tasks set out in Attachment B).

The facilitation is simply:

CBIA members and Lodging Agents facilitating the Services are provided with relevant information and required by ASIC for completion of the form;

- CBIA members and Lodging Agents facilitating the Services replicates the information provided in the format required by ASIC by completing relevant ASIC forms.

- CBIA members and Lodging Agents facilitating the Services lodges the forms with ASIC electronically.

13. How would AML/CTF obligations impact on the client confidentiality obligations of TCSPs?

The obligations would require an interrogation for information not available to CBIA members and Lodging Agents facilitating the Services, such information which the gatekeeper, ASIC and or the Bank, should require of its own or at the lawyer or accountant stage and not through the Lodging Agents providing the Services.

5. Recommendations

1. One-off company formation transactions

There should be total exemption from the AML/CTF Act given to one-off company formation transactions where there is no on-going relationship with the entity created or established and below a certain threshold amount. What constitutes an “ongoing business relationship” needs to be defined. For example, what is the element of duration?

Is there an on-going business relationship for the purposes of the AML/CTF Act if the service provider merely lodges ASIC forms for an entity when advised of changes or when it fills in the names and addresses in pro-forma deeds?

In our view a Lodging Agent who performs administrative tasks (for example, company secretarial services which are not skills or tasks as set out in Attachment B) is not involved in the business of that entity and does not have an on-going business relationship with it.

2. Company formation and compliance transactions where the lodging agents are merely acting on behalf of other professionals such as accountants and lawyers

A total exemption from the AML/CTF Act should be given to CBIA members and Lodging Agents facilitating the Services for company formation and compliance transactions where the Lodging Agents are merely acting on behalf of other professionals such as accountants, lawyers and financial advisors.

A significant portion of the Lodging Agents' company formation and compliance work comes from professional businesses such as lawyers and accountants. The Lodging Agents' fees are invoiced to the lawyers and accountants giving the instructions. In such arrangements, there is an on-going business relationship between the Lodging Agents and the instructing accountants/lawyers and certainly not with the entities involved in such instructions.

We assume that lawyers and accountants will become reporting entities for the purposes of the AML/CTF Act in the proposed reforms and will be obliged to conduct client identification and verification of identity procedures on their clients, who by the very nature of their relationship will see face to face. There is no direct contact between the Lodging Agents and those clients. In fact, the instructing lawyers and accountants are the Lodging Agents' clients. Also, it would also be impossible for the Lodging Agents to monitor the business activity of the instructing lawyers or accountants' clients.

Where the Lodging Agents are acting under the instructions of lawyers or accountants who are also reporting entities for the purposes of the AML/CTF Act, the Lodging Agents:

- are to be totally exempted from the client due diligence requirements of the AML/CTF Act in regards to the clients of the instructing lawyers/accountants and are only required to identify and verify the instructing lawyers/accountants; OR
- to be allowed to rely on the client identification and verification performed by the instructing lawyers/accountants in relation to the clients of the instructing lawyers/accountants.

3. The timing of verification of identity

The AML/CTF Act requires a reporting entity to identify and verify new clients **before** a designated service is provided. Due to the e-commerce nature of the business of the Lodging Agents, it may not be possible for them to identify and verify all clients without delaying the company/trusts/other legal entity formation and compliance services. For example, if verification is to be based on documentation, the Lodging Agents may face delays in obtaining the relevant documentation. If electronic verification is used, the reliable and independent electronic data available in Australia is currently limited. The Lodging Agents would not be able to perform electronic verification on all clients. For example, Lodging Agents are currently not able to use credit reports for electronic verification due to restrictions in the Privacy Act. We see little benefit in obtaining verification after company formation in the sense of the objectives of the AML/CTF regime and the costs and time involved in chasing such information is prohibitive to the business model of TCSPs.

4. The definition of TCSP

The term “Trust and Company Service Provider” is far too broad and must be given definition in accordance with the objectives of Australia’s anti-money laundering and counter-terrorism (AML/CTF) regime.

This definition should ensure that the first defence to secure the gateway to money laundering and terrorism financing is to empower the gatekeeper ASIC by legislation to require nominated information that the legislature deems necessary to meet the objectives of Australia’s anti-money laundering and counter-terrorism (AML/CTF) regime.

All legislation must employ a comprehensive and clear definition of “Trust and Company Service Provider” to ensure it only encompasses those activities the subject of the objectives of Australia’s anti-money laundering and counter-terrorism (AML/CTF) regime.

5. Shoring up current deficiencies

There are numerous deficiencies at the gatekeeper level including:

1. ASIC does not have the requirement to produce identification when registering a new company directly with ASIC either by post or proposed on-line formations.
2. ASIC has closed its service centres, therefore cannot identify directors and beneficial owners when lodging company formation documents.
3. ASIC does not record details of ultimate beneficial owner. Even if such records were kept it would still be out of the control of TCSPs as to what financial dealings such an entity entered into.
4. ATO application for TFNs, ABNs and GST registration do require identification.
5. There needs to be protocols in relation to reporting suspicious transactions provided there are sufficient guidelines in relation to definition of 'suspicious' and the industry is protected by exemptions in the privacy legislation.

Current examples of both the power and necessity of the legislature to legislate to empower ASIC as the gatekeeper to meet the objectives of Australia's anti-money laundering and counter-terrorism (AML/CTF) regime at both ends of the spectrum under current legislation:

- Section 1072H of the Corporations Act 2001 provides for notices relating to non-beneficial and beneficial ownership of shares.

If this information is inadequate to meet the objectives of Australia's anti-money laundering and counter-terrorism (AML/CTF) regime, then it is this legislation that should be changed as ASIC is gatekeeper.

- Section 254F Corporations Act 2001 which provides that "A company does not have the power to ...issue bearer shares."

6. Strategies to Mitigate Money Laundering Risk for those providing one or more of the Services.

The following strategies currently exist:

CBIA members employ the following strategies in their business namely:

- Training their staff;

- Competence in their knowledge of the Corporations Act 2001 as amended form time to time;
- Competence in their knowledge of obligations under the Electronic Lodgement Protocol.
- Knowledge of their obligations as a registered ASIC agent.
- Ensure thorough record keeping.
- Ensure keeping instructions.
- Ensure keeping signed consents to act as company directors, secretaries and shareholders.
- Ensure keeping payment records.
- Compliance with the CBIA's code of practice (see attachment A):

The following strategies would enhance the existing strategies:

- Ability to become a registered ASIC agent should be made stricter by the incorporation of:
 - Fit and proper person tests, continuing education.
 - Qualifications to become a registered ASIC agent.
 - Training course before becoming a registered ASIC agent.
- Mandatory joining of a self-regulatory organisation such as CBIA Inc.

6. Conclusion

Many companies are established as corporate nominees for Superannuation funds and for custodian of real property for Superannuation funds and are not transaction companies but custodial companies.

The legislature should empower ASIC to have the appropriate checks and balances.

The requirement to add further layers of proof of identity to the formation process for starting a business is counter-productive to the incentive of starting a legal entity as the preferred business model. It is adding another cost increasing the barrier to entry.

In the carriage of their business CBIA members and Lodging Agents facilitating the Services are not engaged in a financial transaction for the entity or in the business activities of the entities.

They are only involved in the external administrative affairs of completion of forms from information supplied for the most part by the majority of their clients being their customers namely lawyers and accountants. It is the lawyers and or accountants who

provide the necessary information required by legislation for the completion of the forms also required by the legislation.

They usually have no current or ongoing relationship with the entity owner and no 'relationship' with or in the business of the entity.

The decision process to register a legal entity is usually conducted under the advice of an accounting or legal firm and the process is outsourced to CBIA members in facilitating the Services. CBIA members and Lodgement Agents in facilitating the Services are not privy to the transactions nor are they linked to the beneficiary of the entity. The Lodging Agent is an efficient facilitator of the process. CBIA members and Lodging Agents in providing the Services are not the author of the process, but merely the facilitators completing the information provided to them.

Until the entity has been registered there is no financial transaction implemented. And once registered the Lodging Agent has no involvement in the financial affairs, dealings or transactions of the entity.

The point where a financial transaction is required to take place which requires the opening of a bank account with a Financial Institution is the point where the proof of identity and beneficial ownership is essential.

Most bank accounts are opened by the beneficiaries of the entity. CBIA members and Lodging Agents facilitating the Services do not and cannot open or operate the bank account and it is at that point the proof of identity and beneficial ownership of the entity is an issue.

CBIA members and Lodging Agents facilitating the Services are not involved in the underlying structure be it a corporate structure, trust or partnership.

CBIA members in providing the Services and Lodging Agents providing the Services should be excluded from the definition or at the very least exempted.

ATTACHMENT A
COMMITTEE OF BUSINESS INCORPORATORS AUSTRALIA INC

Committee of Business Incorporators Australia Inc ('CBIA Inc') is a professional self-regulating association of corporate registration and compliance consultants. Its members have agreed to be bound by a set of standards embodied in the following Code of Practice which incorporate regulatory, professional and ethical standards.

It is the aim of the members of CBIA Inc to enhance and raise the profile, professionalism and credibility of the business sector known as corporate registration and compliance consultants in the public, governmental and private arenas.

By adopting the Code of Practice the members acknowledge that it is an expectation of CBIA Inc that the Code will be adhered to and the failure to do so will result in any reported complaint or non-compliance being referred to the disciplinary procedures set out the Rules of the Association (Rule 12).

CBIA Inc is committed to satisfactorily resolve any reported complaint or noncompliance fairly and efficiently having regard to the Rules and the laws of natural justice.

CODE OF PRACTICE

CBIA Inc requires its members to subscribe to a set of practices, values and ideals which uphold and advance the professionalism, honour, dignity and effectiveness of Corporate Registration and Compliance Consultants ('Industry').

Upon admission to membership, all applicants agree to subscribe to the Rules of the Association and the spirit embodied in the following principles.

1. Corporate Governance

- To adhere to a high level of corporate governance in respect to data submitted to the Australian Securities Commission database;
- To maintain a level of record keeping that ensures there is an adequate audit trail to satisfy potential transactional review by authorised government authorities;
- To maintain and upgrade sufficient information technology services to competently fulfil all undertakings made to ASIC in the role of its authorised agent;
- To comply with all undertakings, laws, regulations, rules and codes that apply now or in the future to the activities and services undertaken by the Industry;
- To institute and abide by all uniform or best practice policies developed by the Association for its members in respect of the provision of services and/or compliance with all legislation governing the Industry.

2. Confidentiality

- To respect the confidentiality of information acquired in the course of providing services and in the development of business relationships;
- To not disclose any acquired confidential information to third parties without obtaining the proper authority from the owner of the confidential information unless

disclosure is otherwise required under a legal or statutory duty.

3. Knowledge & professional competency

- To keep abreast of all current relevant legislation, practices, codes and standards affecting the Industry;
- To maintain professional knowledge and skill at the level required to ensure the provision of competent professional service to clients and obligations to ASIC;
- To act diligently and in accordance with applicable standards when providing services to clients and other stakeholders;
- To perform only those services that the member is competent or authorised to perform;
- To provide all services with due care and ensure that products provided to clients contain the highest level of efficacy.

4. Ethics and Duty

- To act with honesty and integrity in all dealings with clients, other members, ASIC and other stakeholders;
- To take appropriate action if a member engages in behaviour that is in breach of the Rules, this Code or other policies adopted by the Association for its members;
- To seek advice from the Association when faced with any ethical dilemma that the member cannot resolve;
- To refrain from any conduct which, in the view of a reasonable person, may place the Association or the Industry in disrepute.

ATTACHMENT B

CBIA members and Lodging Agents do not act in the role of company secretary the skills and tasks in respect of which are set out in 1220.0 - ANZSCO - Australian and New Zealand Standard Classification of Occupations, First Edition, Revision 1.

UNIT GROUP 2212 AUDITORS, COMPANY SECRETARIES AND CORPORATE TREASURERS

AUDITORS, COMPANY SECRETARIES AND CORPORATE TREASURERS conduct audits of accounting systems, procedures and financial statements, manage corporate funding and financial risk, and administer and review corporate compliance activities.

Indicative Skill Level:

In Australia and New Zealand:

Most occupations in this unit group have a level of skill commensurate with a bachelor degree or higher qualification. In some instances relevant experience and/or on-the-job training may be required in addition to the formal qualification. In the case of Corporate Treasurers and Company Secretaries, at least five years of relevant experience may substitute for the formal qualification (ANZSCO Skill Level 1).

Registration or licensing may be required.

Tasks Include:

- arranging, giving notice of and attending meetings of directors and shareholders
- advising organisations' governing boards on matters concerning compliance with stock exchange listing rules, relevant legislation and corporation practice
- supervising organisations' share capital by preparing documents and share issues, and handling share transfers
- controlling treasury and treasury systems and establishing and reviewing risk management objectives and treasury policies
- identifying, managing and reporting on financial risks
- assisting with equity management, debt management, securities and taxation planning issues
- collecting, analysing and interpreting information on the financial standing, cost structures and trading effectiveness of organisations
- devising, re-organising and establishing budgetary cost control and other accounting systems such as computer-based systems
- conducting audits and investigations and preparing financial statements and reports for management, shareholders, and governing and statutory bodies
- evaluating the cost effectiveness and risks of operational processes, activities, policies and systems

- reporting to management on the existence and effectiveness of the system of internal controls
- establishing audit objectives, and designing and implementing audit methodologies, processes and audit report criteria

Occupations:

221211 Company Secretary
221212 Corporate Treasurer
221213 External Auditor
221214 Internal Auditor

221211 COMPANY SECRETARY

Plans, administers and reviews corporate compliance activities and effective practice concerning company board meetings and shareholdings, ensuring all business matters and transactions are managed and implemented as directed by the board.

Skill Level: 1