SUBMISSION

Submission to the Attorney-General's Department – *Modernising Australia's Anti-Money Laundering and Counter-Terrorism Financing regime*

16 June 2023

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via the Consultation Hub

16 June 2023

Dear Sir / Madam,

Modernising Australia's Anti-Money Laundering and Counter-Terrorism Financing regime

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this feedback in response to your consultation on the *Modernising Australia's Anti-Money Laundering and Counter-Terrorism Financing regime Consultation Paper* (Consultation Paper).

ABOUT ASFA

ASFA is a non-profit, non-partisan national organisation whose mission is to continuously improve the superannuation system, so all Australians can enjoy a comfortable and dignified retirement. We focus on the issues that affect the entire Australian superannuation system and its $3.5 trillion in retirement savings. Our membership is across all parts of the industry, including corporate, public sector, industry and retail superannuation funds, and associated service providers, representing over 90 per cent of the 17 million Australians with superannuation.

GENERAL COMMENTS

ASFA's superannuation fund member organisations generally are supportive of the proposed modernisation and simplification of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) regime as contained in the Consultation Paper.

This includes extending the AML/CTF regime to include the regulation of designated non-financial businesses and professions (DNFBPs), namely lawyers, accountants, real estate agents, trust and company service providers and high-value dealers. The regulation of DNFBPs will ensure that Australia is compliant with the global money laundering and terrorism financing standards set by the Financial Action Task Force, while producing regulatory efficiencies and reducing the burden on those entities currently subjected to AML/CTF oversight.

ASFA member organisations also strongly support the simplification and modernisation of the regime through removing complexity and ensuring that the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Act) and the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)* (Rules) are drafted in plain and accessible language. This will benefit Reporting Entities (REs) by developing a legal framework that provides not only clarity but certainty as well, through explicitly prescribing obligations, particularly as it applies to all aspects of AML/CTF programs and Money Laundering (ML)/Terrorism Financing (TF) risk assessments.

This initial consultation represents an opportunity for improvements to be made to the AML/CTF regime and we look forward to engaging with the second consultation paper, when released, which we understand will include detailed proposals for consideration.

In the context of the current Consultation Paper we make the following general observations and recommendations with respect to the current AML/CTF regime.

1. Need for distinction between where customer suspected perpetrator and where fraud victim

At a fundamental level there is a need for the regime to make a distinction between two different types of financial crime:

1. where a Reporting Entity (RE) forms a suspicion that a customer may be involved in money-laundering (ML) and/or terrorism financing (TF) – where the customer is the 'suspicious person' being reported (AML/CTF); and
2. where an RE has formed the view that a customer may be the victim of an actual/attempted fraud or theft perpetrated by a third party – where it is a third party who is the 'suspicious person' and not the customer (Fraud/Theft).

This would provide a clearer recognition of the different nature and contexts of these two different types of financial crime.

Creating a distinction between AML/CTF and Fraud/Theft could lead to real practical benefits, in that it would allow for the creation of different:

- Suspicious Matter Reporting - tailored to the circumstances of the different types of crimes; and
- Tipping-off obligations – the regimes governing tipping-off and the sharing of information (both public-private and private-private) could differ depending on whether it was ML/TF or Fraud/Theft.

For superannuation funds, and other providers of financial services, the majority of their resources and efforts are targeted at preventing, and mitigating the risk of, Fraud/Theft.

The significant growth in the volume and sophistication of cyber-attacks has seen a corresponding increase in the risk of theft of customer data, making customers more susceptible to ID frauds and scams, in addition to the direct loss of monies. This threat is exacerbated by the emergence and exploitation by transnational and serious organised crime groups of new methodologies deploying artificial intelligence (AI).

1.1. Suspicious Matter Reporting

1.1.1. 'One Size Fits All' Suspicious Matter Reports (SMRs)

The absence of a distinction between AML/CTF and Fraud/Theft makes it difficult and confusing for REs to complete what currently is a 'one size fits all' Suspicious Matter Report (SMR).

Creating a distinction between AML/CTF and Fraud/Theft would allow the SMR form(s) to be tailored to capture different information depending on the type of report that is being made.

1.1.2. Current lack of certainty as to what should be reported

Some REs have identified that there can be a lack of certainty as to what should and should not be reported when it comes to Fraud/Theft and observed that they find the SMR form can prove challenging to complete.

While the purpose of an SMR is, among other things, to provide actionable information as to how a potential crime was perpetrated and what techniques were used (including matters such as IP addresses, emails and mobile telephone numbers), confusion as to reporting Fraud/Theft has resulted in divergent outcomes, ranging from inclusion of fulsome information, to a focus on reporting information about the victim, to the risk that some REs may not submit an SMR with respect to some Frauds/Thefts.

We appreciate that AUSTRAC has updated their guidance on SMRs with respect to how to report when the customer is the victim, as opposed to the suspected person, however, some REs have expressed a concern that in some circumstances reporting the name of a Fraud/Theft victim to AUSTRAC may have the potential risk that the victim may be considered to be 'suspicious'.

This has led to inconsistency with respect to how REs deal with Fraud/Theft, including whether, and how, they are reported, and has contributed, in part, to a perception among some REs that a proportion of SMRs are of limited intelligence value.

1.1.3. Need for different reports for ML/TF and Fraud/Theft

If different forms/sub-forms were to be developed to cater for reporting instances of suspected ML/TF and Fraud/Theft, this would enable the reporting form(s) to be tailored to, for example, ensure that the information collected is relevant, utilise wording applicable to the circumstances, and exclude aspects of the report that are not relevant, depending on whether what is being reported is a suspicion about ML/TF or an actual or attempted Fraud/Theft.

This would enable AUSTRAC to design their SMR form(s) such that it is easier for the RE user to report the best/most relevant information for AUSTRAC, and other government agencies, to use as a source of intelligence for any investigations of ML/TF or Fraud/Theft that may take place.

The SMR form could, for example, ask as its first question whether the RE is reporting a suspicion about ML/TF or an actual, or attempted, Fraud/Theft and from that, depending on which response is selected, the form would then include/exclude particular questions.

1.2. Tipping-off provisions

Similarly, the tipping-off provisions primarily are targeted at ML/TF – where what is being reported is a suspicion of ML/TF and it is the customer who is the 'suspicious person' – and so avoiding 'tipping-off' the customer is appropriate in these circumstances.

By way of contrast, potentially 'tipping-off' a customer as to a suspicion about an attempted or actual fraudulent transaction, change to an account or theft of money or data generally is less of a concern.

If a separate Fraud/Theft regime were to be developed this would enable recognition of the fact that the customer has the status of being an actual/potential victim of a Fraud/Theft, as opposed to ML/TF where it is the customer who is the 'suspicious person'.

Different reporting of Fraud/Theft would facilitate sharing of information with respect to Fraud/Theft with third parties, without risking a breach of the tipping-off provisions with respect to ML/TF.

2. Need for 'whole of government' approach to combating Fraud/Theft and ML/TF

Given the increased threats posed to Australians by the perpetrators of both Fraud/Theft and ML/TF, it would be beneficial if there were to be a coordinated, consistent approach to combating this across all levels of government, but in particular across the various Federal Government agencies.

Further to this, REs have reported a lack of clarity as to whether they should report actual or attempted Fraud/Theft to government agencies other than AUSTRAC, such as the Australian Criminal Intelligence Commission (ACIC), the Australian Taxation Office (ATO), the Australian Competition and Consumer Commission (ACCC) and/or the Australian Securities and Investment Commission (ASIC).

If the distinction were recognised between reporting suspected ML/TF and Fraud/Theft, and a reporting regime developed to reflect this, Fraud/Theft reporting could be administered either by AUSTRAC or by another government organisation.

In any event there is a pressing need for timely, extensive and comprehensive information sharing between government entities (public-public and public-private) and, where appropriate, between different REs and their agents(private-private), to combat the risk of loss to members from Fraud/Theft.

Further, there are instances where different regulatory regimes may create an obligation which creates a tension with the ability of an RE to protect against Fraud/Theft. By way of example, under regulation 6.34A of the *Superannuation Industry (Supervision) Regulations 1994*, a superannuation trustee must complete a rollover from a fund no later than 3 business days after receiving a request containing all mandated information, with no explicit exception for where the trustee may have a suspicion about the bona fides of the person purporting to be the member.

3. Breach reporting

Some REs have observed that, as there are no mandatory breach reporting requirements within the AML/CTF legislation, it is unclear what are the expectations with respect to reporting a breach of the AML/CTF legislation to AUSTRAC.

4. Potential redrafting of the AML/CTF Rules

As the Rules are legalistic and technical in style, and so can prove difficult to interpret and apply in practice, REs have recommended that it may be worth considering amending how they are drafted to improve their clarity.

Drafting in a plain English style would enhance their readability and accessibility and would serve to improve compliance and consistency in reporting across REs and reduce compliance costs.

5. AUSTRAC regulatory priorities

REs have indicated that it would be useful if AUSTRAC were to publish its regulatory priorities, in a way similar to APRA, ASIC and the ATO, as it is useful for REs to know where AUSTRAC is focusing its attention and in what areas the REs should be prioritising their resources.

Further to this REs have suggested that it would be beneficial if they could be informed about AUSTRAC's intelligence priorities as this would assist REs to understand the current threat environment.

6. Reporting of cross-border movements

One specific matter that was raised by superannuation fund REs was with respect to the obligation to report cross-border movements following the introduction of reforms in June 2022.

If a superannuation fund sends a cheque to/receives a cheque from a member who is domiciled overseas that invokes a reporting obligation. REs have observed that, as this was not addressed in the 2016 Report of the Statutory Review of the AML/CTF Act, Rules and Regulations, it is unclear whether this requirement may have been an unintended consequence of the reforms.

While superannuation fund REs are able to apply for an exemption from this requirement, such as those granted to ADIs, we suggest that consideration could be given to the appropriateness of the scope of the obligation to report cross-border transactions.

7. Further consultation

ASFA would welcome the opportunity to participate in any roundtable discussions with respect to the financial services sector.

Given the risk posed to superannuation fund members by the continued increases in the scale and sophistication of financial crime, in particular Fraud/Theft, we would also appreciate any opportunity to meet directly with representatives from the Attorney-General's Department and AUSTRAC to discuss this further as well.

SPECIFIC COMMENTS WITH RESPECT TO THE CONSULTATION PAPER

8. AML/CTF Programs

8.1. Assessing Risk

REs support the proposals to provide clarity and certainty with respect to the importance of governance over the performance of a risk assessment and sign-off by the board.

The more explicit an RE's risk framework is with respect to the obligations to perform a risk assessment, including the underlying governance obligations, supported by appropriate rules and guidelines, the easier it is for the RE to comply. Given this, REs generally support the proposal in the Consultation Paper to amend the Act, to establish a clear, overarching, requirement that an RE must take appropriate steps to identify, assess and understand the ML/TF risks it faces prior to the implementation of an AML/CTF program.

REs, however, do not support the proposal to amend the Rules to provide specific detail on each risk assessment requirement, as they consider it important that they continue to be able to utilise their enterprise/organisation-wide risk framework and methodology to identify, manage and mitigate the risk of ML/TF and Fraud/Theft.

8.2. Designated Business Groups (DBG)

REs have identified the need for the scope of entities that are allowed to be part of a Designated Business Group (DBG) may need to be broadened.

The majority of superannuation funds outsource the provision of member administration services to separate administrators, that frequently are third-parties operating at arms' length, effectively as an agent of the RE. A significant number of activities that are performed with respect to AML/CTF are the responsibility of the administrator but typically the administrator is not part of the DBG.

Consideration could be given to agents of REs, such as administrators, being eligible to be classified as part of the DBG, especially when it comes to the operation of the tipping-off provisions, without the need to seek an exemption.

Given that the RE is the entity that ultimately is liable, it would be useful if greater clarity and guidance could be provided with respect to AUSTRAC's expectations concerning the oversight and governance of agents conducting certain AML/CTF functions on behalf of an RE, especially where the agent is engaged in serious and/or ongoing non-compliance.

9. Amending the tipping-off offence

A number of REs struggle with the tipping-off provisions as they can impede the sharing of information that could prevent financial crimes, especially in the context of Fraud/Theft.

9.1. Need to be able to share information – distinction between ML/TF and Fraud/Theft

While there is an appreciation of the need for the tipping-off provisions with respect to ML/TF to be as stringent as they are, there is less of a need when it comes to victims of Fraud/Theft. Having a different 'tipping-off' regime in place for Fraud/Theft would allow REs to share information and collaborate, not just with government agencies but with peer REs as well, which would prove extremely valuable to prevent future crimes, especially Fraud/Theft, from taking place.

Data compromises create considerable vulnerabilities for REs - if they are not able to share information there is an increased risk of further financial crime, especially ID fraud, being committed against the victims whose date was the subject of the compromise. There is a need for enhanced public-private and private-private collaboration, subject to certain protections being in place, where information is shared between government agencies and REs, as well as between REs themselves.

Combating financial crime these days necessitates a more global approach, where the sharing of information can significantly improve financial crime outcomes. Given this, when designing an AML/CTF and Fraud/Theft framework, it is imperative that the right balance is struck between sharing information on the one hand and protecting privacy and ensuring the security/integrity of data on the other, through putting in place appropriate safeguards.

9.2. Need to be able to share information – with government and other, private, third parties

Financial services REs are unable to share information with government agencies, such as regulators, or with the Australian Financial Complaints Authority (AFCA), the external dispute resolution body, which can create a challenge when the customer who is the subject of an SMR has made a complaint that has gone before AFCA.

Similarly, when some REs come across evidence of a Fraud/Theft they may share the information with a private third party, such as a credit bureau, which may breach the tipping-off provisions.

In addition, an employee of an RE may have done something inappropriate, such as performing a transaction that has aroused suspicion or committing an internal fraud, that has made them the subject of an SMR. When that employee subsequently changes employment the original employer is unable to advise the new employer of the circumstances/behaviour that gave rise to them making an SMR with respect to the employee.

9.3. Enhanced Customer Due Diligence (ECDD)

There is an issue with respect to the interaction of the tipping-off provisions with the Enhanced Customer Due Diligence (ECDD) obligations.

REs have expressed concern that, where a suspicion may have been formed about a customer, engaging with them to seek more information, such as asking them to re-identify themselves, or to verify their identity, or to provide evidence of a source of funds/wealth, may well serve to 'tip-off' the customer – as a matter of practical effect - that a suspicion has been formed.

We note that AUSTRAC guidance indicates that the tipping-off offence is not intended to prevent REs from conducting ECDD after it has formed a suspicion, and that asking the customer for more information is not considered to be 'tipping-off' under the law. The guidance, however, goes on to say that the RE should be discreet, that an RE is not required to perform ECDD if doing so would breach the tipping-off offence and that if carrying out certain ECDD measures would likely tip off the customer the RE should apply other ECDD measures.

This can create a dilemma for an RE to determine whether, and how, to perform ECDD without risking 'tipping-off' the customer in practice and, depending on the circumstances, possibly committing a breach of the AML/CTF tipping-off provisions as well.

9.4. UK / Canadian outcomes focussed regimes

Given the above, member organisations have indicated that there would be merit in the Attorney-General's Department exploring the UK and Canadian models and that they would be likely to support a move towards that type of model.

9.5. Superannuation fund mergers

Another matter which is causing a bit of concern among REs within the superannuation industry is the application of the tipping-off provisions during mergers between superannuation funds.

During the due diligence phase of a merger the REs are expected to perform an AML/CTF risk assessment and need to seek an exemption to share information relating to SMRs in order to better understand the ML/TF risk profile. Ideally the AML/CTF regime could recognise the limited circumstances of such merger as an exception to the tipping-off provisions, precluding the need to seek an exemption.

10. Revised obligations during COVID-19 pandemic

The ability to utilise digital ID for ID validation and verification during the COVID-19 pandemic was greatly appreciated by REs and was widely deployed.

In particular the use of 'selfies', utilising an image of the customer together with their photographic ID, proved to be an especially effective and efficient method for verifying a customer's ID during the pandemic and REs are keen to see this practice continue. Given the efficiency and effectiveness of digital ID, that provides a superior customer experience to which they have become accustomed and now expect, and that ideas about accepted ID practices around the world are changing, REs are keen to see their ability to utilise digital IDs being extended or even made permanent.

Further to this, REs would be keen for some further opportunity within the 'safe harbour' provisions in the Rules for REs to be able to assess and manage the risk internally and to be able to innovate with respect to developing and utilising different methods of ID validation and verification while still being considered to be operating within the 'safe harbour'.

In addition, REs have raised that it may be worth reviewing the requirements with respect to record retention in light of privacy considerations, current best practice and the increasing rate of cyber incidents compromising data security.

11. Part 2: Tranche-two entities

Most of ASFA's member REs have indicated that there is merit in the extension of the regime to tranche-two entities and support this taking place, as this shares the responsibilities for AML/CTF across a broader spectrum of entities and makes the regime more effective and efficient overall.

Should you have any queries with respect to this submission, please do not hesitate to contact me on (03) 9225 4021 or via fgalbraith@superannuation.asn.au.

Yours sincerely

Fiona Galbraith
Director, Policy