

SUBMISSION

Submission to the
Attorney-General's
Department — Reforming
Australia's anti-money
laundering and counter-
terrorism financing
regime

14 June 2024

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Attorney-General's Department
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Via email: economiccrime@ag.gov.au

14 June 2024

Dear Sir/Madam

Reforming Australia's anti-money laundering and counter-terrorism financing regime

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this supplementary submission in response to your consultation on *Reforming Australia's anti-money laundering and counter-terrorism financing regime*.

ABOUT ASFA

ASFA, the voice of super, has been operating since 1962 and is the peak policy, research and advocacy body for Australia's superannuation industry. ASFA represents the APRA regulated superannuation industry with over 100 organisations as members from corporate, industry, retail and public sector funds, and service providers.

We develop policy positions through collaboration with our diverse membership base and use our deep technical expertise and research capabilities to assist in advancing outcomes for Australians.

ASFA's strategic objectives include to develop public policy position and advocate for member outcomes and operational effectiveness.

GENERAL COMMENTS

ASFA member organisations support in-principle the proposed reforms to ensure compliance with the Financial Action Task Force's (FATF) global standards on combating Money Laundering (ML) and Terrorism Financing (TF) and in particular welcome the modernisation and simplification of the AML/CTF regime.

In particular, we are keen to see increased operational efficiency in the reporting of suspicious matters and greater clarity with respect to the tipping-off provisions.

1. Outcomes based approach to drafting / risk-based approach to AML/CTF programs

Members recognise that these proposed reforms ultimately will deliver regulatory benefits and efficiencies through applying an outcomes-based approach to the drafting of legislation and the AML/CTF Rules.

They welcome the proposed approach that the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Act) does not prescribe details of risk mitigation measures but instead embeds and emphasises the application of a risk-based approach to the development and design of AML/CTF programs, avoiding unnecessary prescription. Members consider that this will empower a Reporting Entity (RE) to manage, mitigate and respond in a manner that best reflects the unique nature of the risks faced by it and its customers.

Member organisations have observed that it will be important to ensure that an appropriate balance is struck between what is specified in the legislation, the AML/CTF Rules and the guidance.

2. Relative lack of detail

Given the initial consultation was conducted twelve months ago, there was an expectation there may be more detail in the consultation papers with respect to the proposals to simplify and modernise the AML/CTF regime.

This lack of detail makes it difficult for our member organisations to consider the likely impacts of the proposed changes, including the resourcing and transition time required to implement and maintain the updated regime. This has impeded their ability to provide meaningful feedback.

3. Timeframe for consultation, finalisation, and implementation

Member organisations have indicated that it is imperative that the expected timetable for consultation, finalisation and implementation of the new regime is communicated to stakeholders as soon as possible, to remove uncertainty.

The timeframe for these reforms, including proposed transition periods, are a matter of significant concern to members. There has been a suggestion that the Government is targeting to have legislation in place and operational in the first half of 2026, prior to the commencement of the FATF Mutual Evaluation of Australia scheduled for later that year.

In particular, the scheduling of a third consultation with more detail, to enable REs to perform an accurate, comprehensive, and considered assessment of the proposed reforms, will be critical. Implementation of the reforms will necessitate reviewing and uplifting the financial crime frameworks encompassing significant changes to AML/CTF programs, ML/TF risk assessments, and IT systems, and governance arrangements, as well as reviewing and revising supporting policies, procedures, systems, and controls.

In addition, there is also the impact on third party service providers, such as administrators, who perform various AML/CTF functions on behalf of superannuation fund REs, who also will need to make significant changes. In this context it is important to note that administrators commonly provide services to a large number of REs.

Members have expressed concern that the impacts of the reforms, including the resourcing and time required to change IT systems, supporting documentation and training, may be underestimated. They have recommended that stakeholders be consulted on appropriate transition periods, including any proposed Policy Principles period.

Recommendation

1. That stakeholders be consulted on appropriate time periods for consultation, finalisation and implementation of the reforms.

4. Need for provision of guidance

To enable REs to understand the nature and extent of changes to AML/CTF programs, members have recommended that, to ensure certainty, AUSTRAC publish supporting guidance that, among other things, indicates where changes have been made, including references to the legal/regulatory framework.

Recommendation

2. That AML/CTF program guidance, among other things, indicates where changes have been made.

5. Governance and the AML Compliance Officer (AMLCO)

Member organisations support the rationalisation of the Part A and Part B AML/CTF Programs and the proposed recalibration of the governance and oversight arrangements.

Members have requested clarification with respect to the following, as it will apply to the role and functions of the AML Compliance Officer (AMLCO):

- the meaning of the terms *fit and proper person*; *independent* and *resourcing*, and how these factors will be assessed
- who is responsible for certifying that the AMLCO is a *fit and proper person* i.e. the Chair, a member of the board, or the CEO, and whether this must be performed by all REs within a business group
- the expectations with respect to the scope and frequency of fit and proper assessments
- the interaction with, and implications under, the Financial Accountability Regime (FAR) – guidance on the alignment of expectations here would be appreciated; and
- whether the AMLCO will be held personally liable under the AML/CTF regime in the event of serious and systemic non-compliance (for example section 174).

SPECIFIC COMMENTS ON PAPER 4

6. Reforms to IFTI Reports

Member organisations have indicated that they would appreciate clarification with respect to the proposed ‘Reforms to IFTI reports’.

Members appreciate that Paper 4 is intended to apply to Digital Currency Exchange Providers (DEPs), remittance service providers and financial institutions and that, as per the legislative definitions, this does not include superannuation funds. They have noted, however, that the proposed reforms to IFTI reports includes that ‘the reporting entity closest to the Australian customer should report IFTIs’.

Members have suggested that it is unclear whether ‘reporting entities’ in this context is limited to the ‘Paper 4’ reporting entities (as per above) or whether it includes all reporting entities, including superannuation funds.

They have indicated that there was historical guidance released by AUSTRAC that superannuation funds were exempt from the IFTI reporting requirements, on the basis that this was an ancillary service to their core obligations and designated services. Members have indicated that it will be important for them to understand whether/how the proposed IFTI reporting reforms will affect the superannuation industry.

SPECIFIC COMMENTS ON PAPER 5

7. Suspicious matters include Fraud, Theft & Scams as well as Money Laundering & Terrorism Financing

As a result of the social and economic harms they inflict on Australians and the economy, disrupting and combating fraud and scams is a major priority of government, as evidenced through a range of initiatives such as the creation of the National Anti-Scam Centre (NASC) and proposed legislative reforms, accompanied by a coherent and coordinated national strategy.

Member organisations have experienced considerable escalation in the threat environment, with new and emerging threats and increased levels of sophistry including, for example, the deployment of artificial intelligence by transnational and serious organised crime groups. The prevalence and evolving nature of these threats have exacerbated the challenges faced by members in preventing and detecting illicit activity.

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/Scam.

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 and techniques including the deployment of artificial intelligence (AI).

7.1. Reporting should recognise distinction between ML/TF & Fraud/Theft/Scams

At a fundamental level there is a need for the reporting of suspicious matters to make a distinction between different types of financial crime:

1. where an RE forms a suspicion that a customer may be involved in ML and/or 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/Scams).

This would provide a clearer recognition of the different types of financial crime. This would allow AUSTRAC, in conjunction with relevant parties and industry-stakeholders, to develop and tailor the Suspicious Matter Report (SMR) that specifies and captures appropriate information to create actionable intelligence.

7.1.1. Current ‘One Size Fits All’ SMRs

The absence of a distinction between AML/CTF and Fraud/Theft/Scams makes it difficult and confusing for REs to complete what currently is a ‘one size fits all’ SMR.

Creating a distinction between AML/CTF and Fraud/Theft/Scams would allow the SMR form to be tailored to capture different information depending on the type of report that is being made – ML/TF or Fraud/Theft/Scam.

7.1.2. 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/Scams and have observed that they find the SMR form can prove challenging to complete, especially with respect to Fraud/Theft/Scams.

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, email addresses and mobile telephone numbers), confusion with respect to reporting Fraud/Theft/Scams has resulted in divergent outcomes, ranging from inclusion of fulsome information to a focus on reporting information about the victim.

We appreciate that AUSTRAC updated their SMR guidance with respect to how to report when the customer is the victim, however, some REs have expressed concern that in some circumstances reporting the name of a Fraud/Theft/Scam victim to AUSTRAC potentially may pose a risk that the victim may be considered to be a ‘suspicious person’.

This has the potential to lead to inconsistencies with respect to how REs deal with the reporting of Fraud/Theft/Scams, including how they are reported, which may adversely affect their intelligence value.

7.1.3. Need for SMR to cater for AML/CTF and Fraud/Theft/Scams

The SMR could be tailored, for example, to 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/Scam.

This would enable AUSTRAC to design their SMR form 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/Scams 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 a Fraud/Theft/Scam and then, depending on which response is selected, the form would then include/exclude particular questions.

7.2. Tipping-off provisions should recognise distinction between ML/TF & Fraud/Theft/Scams

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’ regarding a suspicion about an attempted or actual fraud or theft, such as a change to an account, fraudulent transaction, or theft of money or data, generally is less of a concern.

Accordingly, if in approaching the tipping off obligations, Fraud/Theft/Scams were recognised this could:

- accommodate the status of the customer as the actual/potential victim of illicit activity, which is different to where they are suspected of ML/TF
- facilitate the sharing of information with respect to Fraud/Theft/Scams with third parties, without risking a breach of the tipping-off provisions with respect to ML/TF
- make it simpler for REs to conduct enhanced customer due diligence.

Recommendation

3. That Suspicious Matter Reporting and the Tipping-off provisions should recognise Fraud/Theft/Scams.

8. Need for new private to private and private to public partnerships and information sharing

Members recommend that the tipping off provisions enable the ability to share with multiple private and public partners information regarding suspicious activity about fraud, theft and scams, money-laundering and terrorism financing.

Member organisations have observed that the proposed reforms provide an opportunity to leverage the regime to develop new frameworks for private to private and private to public partnerships, to facilitate responses to these ever-increasing threats.

This could be achieved through the development of efficient information-sharing partnerships and processes, both private to private and private to public, either through non-government structures such as the Australian Financial Crimes Exchange (AFCX) and/or industry bodies, or through infrastructure operated under the auspices of the NASC.

Members have also recommended that a functional framework be established to enable private to private and private to public information sharing.

Recommendation

4. That a functional framework be established to enable private to private and private to public information sharing.

8.1. Further detail / information on tipping off needed

ASFA member organisations support the proposed reforms to the prohibitions on tipping off.

They have indicated, however, that further detail is required with respect to what constitutes intentional, reckless and /or negligent disclosure.

In addition, with respect to the 'reasonableness test', they have recommended there be a clear process and supporting guidance, utilising worked examples, to ensure that REs do not unwittingly facilitate a disclosure which could prejudice an investigation.

Recommendation

5. That with respect to the 'reasonableness test', there is a clear process and supporting guidance, utilising worked examples.

9. Customer Due Diligence

9.1. Preservation of current exemptions

Member organisations support the intention largely to preserve the current exemptions with respect to the performance of initial Customer Due Diligence (CDD) with minimal alterations, including incorporating them directly into the Act instead of the Rules.

Members have sought confirmation that the exemption applying to superannuation, with respect to the acceptance of a contribution, rollover or purchase price of a pension, will continue to apply.

Recommendation

6. That there is confirmation that the exemption applying to superannuation, with respect to the acceptance of a contribution, rollover or purchase price of a pension, will continue to apply.

9.2. Interaction with Privacy Act 1988

Members agree that the Attorney General's Department (Department) will need to consider the *Privacy Act 1988* (Privacy Act) and work with stakeholders to explore options to reduce the requirements for the retention of sensitive data, while maintaining the integrity of the AML/CTF regime.

Member organisations have indicated that the targeted engagement to implement the Government's response to the Privacy Act Review ideally should align with the uplifts to the AML/CTF Regime, with the outcomes shared with stakeholders so that changes can be considered concurrently.

Recommendation

7. That options to reduce the requirements for the retention of sensitive data are explored.

10. Matters specific to the superannuation industry

10.1. Potential efficiencies through SuperStream

Member organisations have suggested that, subject to a comprehensive cost/benefit analysis, it may be worth exploring whether there are opportunities for increased efficiencies by refining SuperStream, administered by the ATO, to enhance the distribution of information throughout the superannuation sector.

Potential improvements could include facilitating the exchange of relevant information between funds when a rollover occurs. This would enable the transferring superannuation fund to advise the receiving superannuation fund that potentially there may be a suspicion around the transaction and, accordingly, enhanced due diligence may be warranted.

Any such developments would need to be balanced carefully against the requirements of the Privacy Act and the costs to the ATO and industry.

10.2. Successor Fund Transfers and Outsourced Administration

Member organisations have indicated that they would appreciate consideration of, and greater guidance with respect to, the following circumstances:

- Successor Fund Transfers (SFT) – this is where trustees of two different funds agree to transfer some/all members and their benefits from one superannuation fund to another. As this is done without the members' consent it is subject to considerable regulatory requirements, including that the successor fund will provide the transferring members with 'equivalent rights' to those they had in the transferring fund, and prudential supervision by APRA. There are issues with respect to the tipping off provisions and their effect on the ability of the two parties to a SFT to be able to share data/information. Members would appreciate
 - a regulatory exemption from the tipping off provisions with respect to SFT, so they are not required to request an exemption to the tipping off provisions each time a superannuation fund engages in an SFT
 - guidance with respect to expectations around the sharing of data/information in the context of an SFT
- Outsourced administration – a number of superannuation providers outsource the administration of their funds to third party service providers (administrators). Members would appreciate clarification as to whether the proposed tipping-off provisions would enable the sharing of SMR information between the trustee of the superannuation fund and their administrator.

If you have any queries or comments in relation to the content of our submission, please contact Fiona Galbraith, Director Policy, on 0431 490 240 or by email fgalbraith@superannuation.asn.au.

Yours sincerely

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