



13 June 2024

Criminal Justice Division
Attorney General's Department
3-5 National Circuit
BARTON ACT 2600

Email: economiccrime@ag.gov.au

Dear Sir/Madam

SMSF ASSOCIATION SUBMISSION – REFORMING AUSTRALIA'S ANTI-MONEY LAUNDERING AND COUNTER-TERRORISM FINANCING REGIME

The SMSF Association welcomes the opportunity to provide this submission in response to the Government's proposed reforms to Australia's anti-money laundering and counter-terrorism financing (AML/CTF) regime, being led by the Attorney-General's Department (the department).

The SMSF Association strongly supports the need for Australia to have in place a robust AML/CTF regime to effectively deter, detect and disrupt money laundering and terrorism financing, and ensure that Australia meets the international standards set by the Financial Action Task Force (FATF). We also support the inclusion of relevant designated services provided by tranche two entities, and the proposed broader reforms to simplify, clarify and modernise Australia's AML/CTF regime.

We believe the proposed approach to implementing tranche two focusing on the proposed designated service, rather than regulating by sectors, will further support the effectiveness of the regime, ensuring individuals cannot avoid their legislative obligations. However, the resources required by tranche two entities to build, implement and monitor their AML/CTF programs should not be underestimated, especially for professional service providers (PSPs) who we believe will be predominantly small to medium businesses.

Currently many of these PSPs are facing significant challenges in their businesses, including skills shortages and operating in a challenging economic environment. Further, some sectors are already implementing other Government reforms, including new compliance programs, further stretching available human and financial resources.

To ensure the effective implementation of tranche two and avoid unnecessary regulatory burden and cost on new reporting entities, we recommend a whole-of-Government approach to consider all current and pending regulatory reforms impacting tranche two entities. A plan for implementation for all relevant reforms should then be developed to ensure that small to medium businesses can meet their statutory obligations and, importantly, support the successful implementation of these reforms.



It is also vital to consider as part of this approach, what reforms could be effectively leveraged or occur in parallel to ensure impacted businesses are not forced to implement new systems or processes, only to amend them when other new regimes commence. For example, Australia's Digital ID Framework could provide an effective mechanism to support some reporting entities comply with their customer due diligence (CDD) obligations. It could also minimise their risk of cyber-crime, by reducing the amount of personal information they collect and retain for their customers.

While we acknowledge there is a reference to considering Australia's Digital ID Framework in Paper 5, we are disappointed this has not been more thoroughly discussed in the consultation, especially seeing a key objective is to modernise the regime. We recommend before progressing the implementation of tranche two and the proposed reforms to the current regime, consultation should explore potential opportunities for Australia's Digital ID Framework for all reporting entities, both current and pending.

The SMSF Association also recommends that AUSTRAC and the department consider the establishment of industry specific working groups who could support the successful implementation of the AML/CTF regime for tranche two reporting entities. The working group could also provide post commencement help in the early detection of pressure points or challenges being faced by PSPs to ensure they are quickly and effectively addressed.

Our detailed responses are contained in the Attachment.

If you have any questions about our submission, please do not hesitate to contact us, and we thank you again for the opportunity to provide this submission.

Yours sincerely,

Peter Burgess
Chief Executive Officer

ABOUT THE SMSF ASSOCIATION

The SMSF Association is the peak body representing the self-managed superannuation fund (SMSF) sector which is comprised of over 1.1 million SMSF members and a diverse range of financial professionals. The SMSF Association continues to build integrity through professional and education standards for practitioners who service the SMSF sector. The SMSF Association consists of professional members, principally accountants, auditors, lawyers, financial advisers, tax professionals and actuaries. Additionally, the SMSF Association represents SMSF trustee members and provides them with access to independent education materials to assist them in the running of their SMSF.



ATTACHMENT

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

Paper 2: Further information for professional service providers

a. Are there any terms contained in the proposed designated services for PSPs that require a statutory definition to clarify their ordinary meaning?

We do not believe there are any terms that require a statutory definition to clarify their ordinary meaning in the proposed designated services.

However, we do note that some of the proposed terms, for example 'carrying on a business', are already defined in statute, or are established concepts, such as in tax.

We believe where a proposed term is already defined in statute or is an established concept, that its definition or meaning in the AML/CTF regime be aligned to ensure consistency and clarity, as has been proposed for the definitions for 'director' and 'company secretary' to align with the definitions in the *Corporations Act 2001*.

Consideration should also be given to how proposed defined terms may be similar or overlap with existing statutory defined terms relevant to PSPs. For example, the proposed definition of 'legal entity' includes an express trust, which will capture a range of services PSPs provide to SMSFs, including services relating to the underlying assets of the SMSF such as commercial property.

As of 30 June 2022, around 11% of SMSFs held non-residential real property investments¹ which includes *business real property*. This term is defined in section 66(5) of the *Superannuation Industry (Supervision) Act 1993* in relation to an entity to mean:

- (a) any freehold or leasehold interest of the entity in real property; or*
 - (b) any interest of the entity in Crown land, other than a leasehold interest, being an interest that is capable of assignment or transfer; or*
 - (c) if another class of interest in relation to real property is prescribed by the regulations for the purposes of this paragraph—any interest belonging to that class that is held by the entity;*
- where the real property is used wholly and exclusively in one or more businesses (whether carried on by the entity or not), but does not include any interest held in the capacity of beneficiary of a trust estate.*

This statutory definition differs from the proposed definition of 'real property', which is proposed to exclude the leasing of commercial property. While on face value the differing of defined terms may

¹ Australian Taxation Office, *SMSF Statistical Overview* (Self Managed Superannuation Funds, Data and Resources, 2021-22) Table 28: <https://data.gov.au/data/dataset/self-managed-superannuation-funds>



not create any specific unintended consequences, it is important to consider such nuances as they could lead to confusion how different services may or may not be captured under the intersecting regulatory regimes.

b. Should proposed designated service 3 be confined in a way to exclude services provided by sectors beyond PSPs?

We believe that it should be the risk of the potential designated service that drives the decision to include or exclude services provided by sectors beyond PSPs.

However, if the intention is to not capture a specific service because of the low risk and function of the activity, for example company voluntary liquidations or business restructurings, consideration could be given to excluding such services provided existing regulatory protections are in place. For example, to be excluded from the regime the service must be provided by an ASIC registered liquidator.

c. Is the current list of prescribed disbursements in proposed designated service 3 appropriate?

The current list of prescribed disbursements is proposed to include payments by:

any other person who carries out business within Australia that relates solely to the services provided by the reporting entity if the total value of the transaction or series of related transactions is below \$1,000

The proposed \$1000 threshold is unreasonably low, especially given it is defined to include the total value of a series of related transactions.

Setting such a low threshold will likely result in 1000s of transactions being captured, creating unnecessary regulatory burden and cost that outweighs the associated risks, especially given the reportable entity will still need to comply with suspicious matter reporting.

The SMSF Association recommends the threshold for such prescribed payments should be lifted to \$10,000, which would also ensure consistency with other relevant AML/CTF reporting thresholds.

d. Are there any additional payments that should be included in the list of prescribed disbursements under proposed designated service 3 due to proven or demonstrable low risk?

It is common practice for a registered tax agent to receive and hold client tax refunds paid from the Australian Tax Office (ATO) on trust, before passing them on to the client. Under proposed designated service 3, this activity will be captured as a designated service.

We believe receiving money on behalf of a client from a Commonwealth agency for an individual tax return that has been subject to assessment before being paid, is a low risk activity. Further, a registered tax agent who holds client tax refunds on trust, must comply with the *Tax Agents Services Act 2009* Code of Conduct which requires client monies to be kept separate from the registered tax



agent's money or other property, and for tax refunds to be passed on to the client within 14 days of receipt.

The Tax Practitioners Board, responsible for the regulation of registered tax practitioners, has issued [TPB Information Sheet TPB\(I\) 15/2012 Code of Professional Conduct – Holding money or other property on trust](#), which provides guidance for registered tax agents on how to comply with their obligations. Failure to comply with these obligations can result in a range of sanctions from a written caution to termination of tax agent's registration.

An additional layer of security was also introduced in 2023, referred to as [client agent linking](#), aimed at protecting registered tax agents and their clients from identity-related theft or fraud. This requires business owners to set up myGovID, a secure way to prove who they are online, link it to their ABN and then log into the ATO online services to nominate their registered tax agent. The registered tax agent must also accept the nomination.

Given the existing regulation and additional identity security measures recently introduced for registered tax agents and their clients, we do not believe client tax refunds paid from the ATO on trust, before passing them on to the client should be captured under proposed designated service 3.

We recommend these payments are added to the definition of 'prescribed disbursements', which could be defined as:

a refund payment from the Australian Taxation Office for an individual client's tax return paid into a registered tax agent's trust account, provided it is paid to the client within 14 days

Including the requirement to be paid within 14 days aligns with the existing statutory obligations for such payments and adds an additional statutory mechanism to be held accountable under the AML/CTF regime.

e. With reference to proposed designated service 3, how often do you provide services relating to digital assets, and how does this differ from the services provided by dedicated digital asset service providers?

Digital assets represent less than 1% of total assets invested for all SMSFs and have declined as an investment asset class in recent years². While it is currently not a mainstream service for many PSPs within the accounting profession, where the crypto currency itself falls within the definition of a 'financial product', the related service will likely already be captured under the AML/CTF regime.

f. What additional information, guidance and materials would you require from AUSTRAC to help you comply with your new AML/CTF obligations?

The early release of clear and practical guidance, written in business language will be critical to support tranche two entrants successfully transition into the regime. This should include, where possible, the use of case studies and real life examples, noting we believe some of the examples

² [SMSF Quarterly Report March 2024](#)



provided in the consultation papers were somewhat simplistic or too often geared towards larger corporations.

Within the accounting profession most new entrants will be small to medium businesses. These businesses are currently experiencing significant skills shortages, limiting client capacity for many practices, at a time when many small businesses are relying on their expert advice and support to navigate the current challenging economic environment.

Further, this sector is already implementing other government reforms, such as in the tax profession where new compliance and client onboarding obligations are currently coming into force, with more reform to follow, further limiting their capacity to digest and comply with new regulatory obligations.

The SMSF Association would welcome the opportunity to work collaboratively with the department and AUSTRAC to develop sector specific guidance, templates and other resources. We can also play a key role in communicating the changes and available support through our many communication channels with our members.

We also recommend the department establishment of an industry working group, which could further support both the successful implementation of tranche two and provide post commencement help in the early detection of pressure points or challenges being faced by PSPs to ensure they are quickly and effectively addressed.

[g. Do you have feedback on any of the proposals relating to legal professional privilege?](#)

We are generally supportive of the proposals relating to legal professional privilege.

[h. What timeframe would you require to complete a risk rating for all pre-commencement customers \(customers who you are in a business relationship with when the reforms commence\)?](#)

We recommend a timeframe of two years from the commencement of the tranche two regime. This timeframe strikes an appropriate balance to enable new reporting entities to understand, develop and implement their new AML/CTF programs, and ensures pre-commencement customers transition into the regime within an appropriate period.

It will also be integral to provide an appropriate transition period for new reporting entities to comply with their obligations for new customers under the AML/CTF regime, noting our earlier comments regarding capacity and resourcing for many small to medium businesses.



Other comments

Australia's Digital ID Framework and Privacy Act Reform

We are concerned that the Paper and proposals have not given due consideration to other important reforms being progressed, including in parallel, with the reform of Australia's AML/CTF regime, or accounted for increased areas of risk, such as cyber-crime, including identity theft.

In response to the growing risk of cyber-crime, the Australian Government's economy wide Digital ID system will provide Australians with a voluntary, secure and inclusive way of verifying an individual's identity online. A key objective of this system is to reduce the unnecessary collection, and if required storage, of identity information compared to the traditional method of providing physical copies of their identity documents. This also reduces the risk of data breaches, which have already impacted millions of Australians.

Importantly a key objective of the reforms is to also simplify and modernise the existing regime.

Except for a single reference in Paper 5, there is no discussion on how myGovID or Director ID could be leveraged for CDD purposes by PSPs.

Similarly, Paper 2 refers to targeted engagement to implement the Government's response to the Privacy Act Review, including in relation to the small business exemption. However, there is no further discussion how these pending reforms will interact with the existing or proposed reforms to the AML/CTF regime, especially in respect of record keeping.

We strongly recommend that further consideration is given to how Australia's Digital ID Framework can be utilised for CDD purposes and how any pending reforms from the Privacy Act Review, may impact reporting entities, before progressing with the implementation of tranche two and the proposed reforms to modernise the AML/CTF regime.

Broader Government Reforms

As previously stated, many PSPs will be small businesses who have limited resources and are already implementing other Government reforms.

We recommend that the department work with other respective departments and Commonwealth Agencies to understand the current regulatory agenda impacting tranche two reporting entities.

A whole-of Government approach should then be developed to pragmatically implement regulatory reform impacting these entities, to avoid imposing excessive regulatory burden and costs, especially given the current economic challenges.

Reporting Entities servicing the same Customer

Paper 2 fails to discuss how tranche two PSPs that engage with a customer of another reporting entity will be treated, for example the obligation to report all cash transactions of \$10,000AUD or more. Many professional accountants and/or registered tax agents will have access to their client's bank statements. However, requiring them to report such transactions would merely duplicate the reporting of the customer's relevant financial institution, creating unnecessary regulatory burden



and cost. Value could be added though where the PSP gathered supporting documentation for the transaction, which could complement the reporting by the financial institution.

Defined Terms

The paper refers to ‘financial advisors’ as professional service providers.

‘Financial adviser’ is a defined term in section 923C of the *Corporations Act 2001*, and as such, we recommend using this term to ensure consistency across regulatory frameworks.

Paper 5: Broader reforms to simplify, clarify and modernise the regime

a. Under the outlined proposal, a business group head would ensure that the AML/CTF program applies to all branches and subsidiaries. Responsibility for some obligations (such as certain CDD requirements) could also be delegated to an entity within the group where appropriate. For example, a franchisor could take responsibility for overseeing the implementation of transaction monitoring in line with a group-wide risk assessment. Would this proposal assist in alleviating some of the initial costs for smaller entities?

We generally support the proposal to introduce a simplified ‘business group’ concept, which would automatically include all related entities, including non-reporting entities. This approach should provide more flexibility and allow an enterprise approach for reporting entities to complying with its AML/CTF obligations.

b. The streamlined AML/CTF program requirement outlined in this paper provides that the board or equivalent senior management of a reporting entity should ensure the entity’s AML/CTF program is effectively identifying and mitigating risk. To what extent would this streamlined approach to oversight allow for a more flexible approach to changes in circumstance?

The SMSF Association supports the principal that a reporting entity establish internal practices to ensure it complies with its AML/CTF obligations. Specifically requiring a reporting entity to ensure it has delegated this responsibility to an individual should help drive ongoing compliance, and a compliance culture.

However, we believe the individual accountable should not only have appropriate seniority, and therefore influence, but also the necessary knowledge and skills to carry out this responsibility.

c. Many modern business groups use structures that differ from the traditional parent subsidiary company arrangement. What forms and structures of groups should be captured by the group-wide AML/CTF program framework?

We believe that business groups will continue to evolve how they are structured, responding to the risks and regulated environment in which they operate. It is therefore important not to focus on



current practices, but rather focus on designing a regulatory framework that is flexible enough to cater for this evolution.

The proposed simplified 'business group' concept that will extend to all related entities, including non-AML/CTF reporting entities where appropriate, should provide build this flexibility into the AML/CTF regime.

[d. To what extent do the proposed core obligations clarify the AML/CTF CDD framework?](#)

We believe the proposed core obligations provide greater clarity and explicitly outline the obligations for relevant reporting entities.

However, it is important to note that while the proposed reforms provide greater clarity, they are still extensive and will require the significant investment of time, human and financial resources by tranche two reporting entities, many of whom will be small to medium businesses.

This investment will not only be needed to develop and implement a compliant program, but also an ongoing investment to ensure they are meeting their ongoing CDD obligations, including upskilling and training relevant staff.

As previously mentioned, we believe efficiencies could be achieved by leveraging Australia's Digital ID Framework and this should be further explored and consulted on before finalising any proposals from this current consultation.

[e. What circumstances should support consideration of simplified due diligence measures?](#)

The SMSF Association supports the proposal to allow simplified due diligence measures for customers who pose low risk, which should support reducing unnecessary regulatory burden and costs for reporting entities.

Many PSPs, for example, have ongoing long-term relationships with their clients, meaning they have a thorough understanding of their financial, but often also personal, circumstances. This means they are well placed to assess the associated risk with the requested transaction or business relationship.

We therefore believe it is appropriate to permit the use of simplified CDD measures, including the ability for the reporting entity to use its discretion on what measures should be used, where the reporting entity has rated the associated risk for the requested service as low, and none of the triggers for enhanced CDD apply.

While we acknowledge the need for rule-making power to allow the AUSTRAC CEO to respond to a changing environment and risk, we would encourage AUSTRAC to implement steps to consult with the relevant sector first, to ensure any specific obligations introduced will be effective in addressing the identified risk and pragmatic to comply with.

f. What guidance should AUSTRAC produce to assist reporting entities to meet the expectations of an outcomes-focused approach to CDD?

Similar to our response to question h in Paper 2, the guidance should be clear and practical, written in business language and provide relevant examples and case studies where possible.

Again, we would welcome the opportunity to work with the department and AUSTRAC to develop sector specific guidance, including considering and incorporating what existing obligations could be leveraged to comply with proposed obligations.

g. When do you think should be considered the conclusion of a 'business relationship'?

Given the breadth of reporting entities and designated services under tranche one and tranche two, we believe a principles-based approach should be taken to define the conclusion of a 'business relationship'.

Factors that could be considered include the duration of the relationship, frequency of engagement and services agreed to be performed. While engagement documentation could also be considered, such as terms of engagement or contracts, it is common for many professionals to have ongoing relationships with their clients over many years but provide ad hoc services depending on the client's needs.

Guidance could then be developed, with the input of industry, to support reporting entities assess their customers for the purposes of pre-commencement purposes, relative to each client relationship.

h. What timeframe would be suitable for reporting entities to give a risk rating to all pre-commencement customers?

We recommend a timeframe of two years from the commencement of the revised AML/CTF regime. This timeframe strikes an appropriate balance to enable reporting entities to update and implement their revised AML/CTF programs, balancing available resources and other business commitments. It also ensures pre-commencement customers transition into the regime within an appropriate period.

i. Are there situations where SMR or section 49 related information may need to be disclosed for legitimate purposes but would still be prevented by the proposed framing of the offence?

j. Are there any unintended consequences that could arise due to the proposed changes to the tipping off offence?

We do not have any specific comments in response to these questions, however, provide general support for the proposed change in process to allow eligible law enforcement agencies to issue a 'keep open notice' directly to a reporting entity.



Other comments:

Independent Audit of AML/CTF Programs

The SMSF Association is supportive of the proposal to specify internal controls that must be included in an AML/CTF program, noting the proposals in Paper 5 broadly align with existing obligations including the need for independent audit of a reporting entity's program.

We believe it is important that reporting entities continue to have flexibility to comply with this obligation, determined by their risk profile and consider a minimum of every four years appropriate. While we are supportive of ensuring the auditor of the program meets minimum standards to ensure the independence and integrity of such audits, it is also important to ensure that these standards provide flexibility to ensure the respective auditor has the commensurate knowledge and skills relevant to the reporting entity and AML/CTF program they will audit.

We recommend that the department further consult on this proposal, noting a range of regulatory and professional obligations already apply to the audit profession.