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Dear Sir/Madam

**SMSF ASSOCIATION SUBMISSION: PUBLIC CONSULTATION ON NEW AML/CTF RULES**

The SMSF Association welcomes the opportunity to provide this submission to the *Consultation on the new AML/CTF Rules*.

The SMSF Association is supportive of the outcomes-based approach to drafting the new rules. We believe this approach provides flexibility for existing and future reporting entities to leverage current policies and processes, where appropriate, and ensure the obligations are scalable to the nature, scale and complexity of the respective entity.

As currently drafted, we believe the rules provide sufficient flexibility for small businesses, sole traders and sole practitioners. We also support the objective to adapt requirements for the rules, where possible, to cater for their specific circumstances and to avoid, for example, requiring a sole trader to report to themselves.

However, we note that given the AML/CTF Rules are not yet drafted in full, it is not possible to identify friction points with other legislative obligations or how the obligations may apply in practice, including for future reporting entities under Tranche 2.

Further, as discussed with AUSTRAC, the SMSF Association and the Financial Advice Association Australia will in addition provide AUSTRAC with specific examples of tasks that may, from time to time, be conducted in the course of providing an item 54 designated service that pose a low ML/TF risk but may unintentionally be captured by a Tranche 2 designated service. These examples will be provided in the coming weeks for further discussion.

Finally, as previously stated in previous submissions, successful implementation of the new AML/CTF regime will be dependent on AUSTRAC taking a proactive role and we look forward to continuing to



work with AUSTRAC to support newly regulated sectors understand and comply with their obligations.

Our detailed responses to the consultation paper are contained in the Attachment.

If you have any questions about our submission, please do not hesitate to contact Tracey Scotchbrook, Head of Policy and Advocacy via email [traceyscotchbrook@smsfassociation.com](mailto:traceyscotchbrook@smsfassociation.com)

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

### General

1. Do any aspects of the Exposure Draft Rules create unnecessary friction with existing approaches to risk mitigation in your business or sector? If so, what are they? Are there alternative approaches that could achieve the same regulatory outcomes?

The SMSF Association is supportive of the outcomes-based approach to drafting the new rules. We believe this approach provides flexibility for existing and future reporting entities to leverage current policies and processes, where appropriate, and ensure the obligations are scalable to the nature, scale and complexity of the respective entity.

However, while not a direct result of the draft AML/CTF Rules, the reliance provisions can result in item 54 reporting entities undertaking additional obligations beyond their legal requirements of the AML/CTF Act and draft AML/CTF rules. This occurs where a financial product provider, who is also a reporting entity, incorporates the reliance agreement into its product distribution agreement it has with item 54 reporting entities.

While this in of itself is not an issue, the challenge is that the terms of the reliance agreement often require the item 54 reporting entity to undertake obligations for the financial product provider they are exempt from, such as ongoing CDD, or they are prevented from distributing or arranging that financial product/s for their clients.

This is a cost and resource burden for item 54 reporting entities that they have had to absorb over many years to continue servicing their clients.

The SMSF Association recommends this issue is addressed, with possible options such as:

- amendments to the AML/CTF Rules to ensure item 54 reporting entities can only perform obligations required under section 26T of the AML/CTF Act
- allowing item 54 providers to charge a reasonable fee for undertaking obligations on behalf of another reporting entity that are outside its legal obligations, or
- another appropriate mechanism, such as enforceable guidance.

With the implementation of Tranche 2, we anticipate that a broader group of future reporting entities (such as conveyancers, lawyers and real estate agents) will also utilise the reliance provisions. It is therefore important that the issues of responsibility are adequately addressed to prevent it becoming a future point of friction between existing and/or Tranche 2 reporting entities.

2. Are any rules not sufficiently flexible to be scalable to specific circumstances of small businesses, sole traders or sole practitioners? Are there alternative approaches that could achieve the same regulatory outcomes?

As currently drafted, we believe the rules provide sufficient flexibility for small businesses, sole traders and sole practitioners. We also support the objective to adapt requirements for the rules,



where possible, to cater for their specific circumstances and to avoid, for example, requiring a sole trader to report to themselves.

One approach to achieve this could be to add a note to the relevant obligation/s that states this objective. For example, a note like the following could be added at the beginning of *Division 2 – AML/CTF policies*:

*Note: The distinction between governing body, senior manager and AML/CTF compliance officer may be redundant for small businesses or sole traders, meaning the obligations of these different roles may be discharged by a single person. In such cases, the AML/CTF policies of the reporting entity must focus on who and how the intended outcome of the respective obligation will be achieved.*

This approach would make it clear from the outset the focus is on achieving the intended outcome for that obligation for the reporting entity, regardless of the size or structure of the reporting entity.

3. Are any rules not sufficiently flexible to be scalable to specific circumstances of large or multinational businesses? Are there alternative approaches that could achieve the same regulatory outcomes?

We believe the draft rules in the current exposure draft are flexible enough to cater for such business models.

## AML/CTF programs

4. What is a reasonable period of time for you to document updates made to your ML/TF risk assessment or AML/CTF policies?

Given the AML/CTF regime will regulate sole traders through to multinational businesses, it is difficult to say what a reasonable period of time would be for all reporting entities to document an update to its ML/TF risk assessment or AML/CTF policies. Also of relevance is that any updates would need to be approved by the senior manager, depending on the size and structure of the reporting entity, before being documented.

If a minimum period of time is to be prescribed in the rules, it must consider these factors given failure to document the AML/CTF program within the period specified in the rules would result in a civil penalty.

## Reporting Groups

5. What are the structures in your industry by which businesses exercise control over one another (e.g. corporate structures, partnerships, joint ventures, franchises, trust arrangements, decentralised operations and platform-based operations etc.)?

The professional services sector utilises a number of different structures, reflecting the fact it consists of sole traders/practitioners through to multinational firms. The types of structures include:



- sole trader unincorporated and incorporated, where there may also be employed staff or contractors
- partnerships from two to 100s of partners
- trust structures, where they may be multiple ownership layers depending on the size of the business and services offered
- companies
- franchises, e.g. H & R Block in tax, and
- joint ventures, including between different disciplines such as accounting, tax, mortgage broking and financial planning

How control is exercised will depend on the type of structure, ownership agreement and expertise within the business.

6. Where you or your sector use group structures that do not involve ownership or control, what are these structures? Are there any impediments to sharing customer and compliance information within such groups for AML/CTF purposes?

While we are not aware of any group structures that do not involve ownership or control, we are aware of impediments to sharing customer and compliance information within groups for AML/CTF purposes. For example, in the financial planning sector it is common for an individual and/or their business to be authorised under another entity's Australian Financial Services (AFS) licence.

Where the individual offers other professional services, such as accounting or tax, the AFS licensee may require the individual to establish a separate entity to manage risk including:

- ensuring the AFS licensee can control the policies and procedures for the services being provided, and
- disputes and claims – ensuring there is clear delineation between the services provided under each entity in the event of a client dispute or a professional indemnity insurance (PII) claim.

The AFS licensee may also restrict information sharing across entities outside its control as a further measure to manage its risk and manage the scope and cost of its PII.

Importantly, with the pending implementation of Tranche 2 it is important to ensure the current exemption for item 54 reporting entities is maintained. Relationships, including the above example, do not alter the fact that the primary responsibility for item 54 providers rests with the AFS licensee.

In contrast, where a similar business is self-licensed, the ability to share information within the business group will increase efficiency and the effectiveness of identifying client ML/TF risks.



## 7. Are there obvious lead entities in each of these structures? If so, what are their common characteristics?

Given the breadth of business models and structures, it is difficult to site common characteristics for all lead entities. However, there are concepts of control that could be considered to ensure there is alignment with how control is defined across different regulated sectors.

For example, section 50AA of the *Corporations Act 2001*<sup>1</sup> defines the meaning of control, which includes where the first entity controls a second entity if the first entity has the capacity to determine the outcome of decisions about the second entity's financial and operating policies.

'Controlling person' for an individual, company, trust and partnership is also defined in the glossary to the ATO Automatic exchange of information guidance – CRS and FATCA<sup>2</sup> guide.

Where possible, it is important to align common concepts to support regulated entities operate effectively and efficiently.

However, as previously stated how control is exercised will depend on the type of structure, ownership agreement and expertise within the business. While guidance from AUSTRAC may be helpful in identifying the characteristics, roles and responsibilities it expects from a lead entity, we believe that the reporting group itself is best place to determine who its lead entity should be.

The SMSF Association recommends that a reporting group is responsible for selecting and nominating its lead entity.

## 8. What is the best way to implement a nomination model for a lead entity for structures that do not involve ownership or control of one group member over another?

Where there is no clear ownership or control of one group member over another, it should be the responsibility of the reporting group to nominate its lead entity (reporting entity) as part of enrolling with AUSTRAC.

The lead entity, and all other relevant roles and responsibilities as required by the AML/CTF Act, should then be documented in the reporting group's AML/CTF program.

## 9. Within reporting groups, what are the circumstances in which a reporting entity members of a reporting group would want a non-reporting entity to discharge an AML/CTF obligation? Would this extend to discharging reporting obligations (threshold transaction reports, suspicious matter reports etc.)? What benefits would this provide to you?

Circumstances in which a reporting group may want a non-reporting group to discharge an AML/CTF obligation may include completing initial and ongoing customer due diligence checks, monitoring

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<sup>1</sup> [https://www5.austlii.edu.au/au/legis/cth/num\\_act/ca2001172/s50aa.html](https://www5.austlii.edu.au/au/legis/cth/num_act/ca2001172/s50aa.html)

<sup>2</sup> <https://www.ato.gov.au/about-ato/international-tax-agreements/in-detail/international-arrangements/automatic-exchange-of-information-crs-and-fatca/8-glossary>



and lodging threshold transaction reports and monitoring for unusual transactions that may give rise to a suspicious matter reporting obligation.

Benefits, depending on the size, nature and complexity, of the reporting group may include increased effectiveness through specialised trained employees and improved efficiency in discharging obligations.

10. Are there circumstances where reporting groups formed automatically under law would want to combine with other reporting groups and/or reporting entities? Why?

We are not currently aware of any such circumstances.

## Customer Due Diligence

11. Are there practical implementation challenges you anticipate you may face in meeting the CDD obligations set out in the Exposure Draft Rules? If yes, what are they and do you have alternate suggestions as to how the same regulatory outcome can be achieved?

Section 25(2) of the AML/CTF Rules requires the reporting entity to collect and verify at least the date and place of birth for a customer when providing certain types of designated services. However, there may be instances where the individual will not have documentation to verify this information. Section 35C of the AML/CTF Act provides for alternative means of identification for customers who do not have or are unable to obtain standard identification, however it is unclear how this section may apply to draft section 25(2) of the rules.

Section 26 requires the reporting entity to collect specific KYC information about the customer, including any trading or registered name. Following reforms to the national Business Names Register, from 31 October 2025, the only names displayed on the ABN Lookup will be:

- an entity's legal name
- an entity's business name registered with ASIC.

This means a reporting entity will not be able to use the ABN Lookup to verify the trading name of the customer.

Where the customer is a trustee, section 27(5) requires the reporting entity to collect information about any settlor, appointer or guardian of the trust. However, in the case of self managed superannuation funds (SMSFs) and small APRA funds these are not commonly included in the trust deed because of the nature and purpose of the trust.

Given there are more than 600,000 SMSFs in Australia, we recommend that amendments are made to this section to ensure the provision can effectively operate in practice.



12. Are there any additional circumstances (e.g. particular types of transactions that require the urgent provision of a designated service) in which your sector may need to delay aspects of initial CDD to prevent disruption of the ordinary course of business?

We are not currently aware of any additional circumstances that may need a delay to aspects of initial CDD to prevent disruption of the ordinary course of business.

## Compliance Reports

13. Does the 12-month reporting period of January – December, with a report lodgement period of the following January – March present significant challenges to your business due to conflicts with other Commonwealth, State or Territory reporting or lodgement requirements? What are these challenges?

14. Is there a preferable reporting or lodgement period?

We do not believe a report lodgement report from January to March for the previous calendar year presents any significant challenges for current or future reporting entities.

## Value Transfer

We do not have any specific comments regarding this section.

## Keep open notices

18. Is the information required to be provided in a keep open notice sufficient for you to determine if the customer to whom the notice applies, is a customer of yours?

19. Are the explanations in the keep open notice and the keep open – extension notices easily understood by you?

We believe the proposed information is sufficient for a reporting entity to determine if to whom the notice applies is a customer and explanations for a keep open or extension notice.

## Additional Comments

### **Deemed compliance with ongoing customer due diligence—monitoring of transactions and behaviours**

Section 39 of the AML/CTF Rules includes an extensive list of transactions and behaviours that reporting entities must monitor for, including financing of terrorism, corruption and environmental crime. Many of these terms will be unfamiliar to existing and future regulated entities who may also be required to undertake this obligation as part of a reliance agreement under the AML/CTF Act.





The SMSF Association recommends that AUSTRAC develop guidance to support reporting entities, especially sole traders and small business, understand and discharge their obligations

### **AML/CTF Compliance Officers**

While we agree that the considerations outlined in section 23 of the Rules are consistent with other Commonwealth regulatory regime interpretations, it is common to include a timeframe for some considerations, for example whether the individual has been convicted of a serious offence in the past ten years.

We also recommend that AUSTRAC provide guidance on the steps a reporting entity should take to check if a person is an undischarged bankrupt or has executed a personal insolvency agreement under the law of a foreign country.

### **Enhanced customer due diligence**

Section 35 requires the reporting entity to undertake enhanced customer due diligence if the proposed designated service will involve unusually complex or large transactions.

We recommend AUSTRAC issue industry specific guidance about what it considers are complex or large transactions, as this will vary across regulated sectors.