23 December 2019

Committee Secretary

Senate Legal and Constitutional Affairs Committee

PO Box 6100

Parliament House

Canberra ACT 2600

By email only:

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Dear Secretary

Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill 2019 (the Bill)

The Financial Services Council welcomes the opportunity to make a submission to the Bill.

About the Financial Services Council (FSC)

The FSC is a leading peak body which sets mandatory Standards and develops policy for more than 100 member companies in Australia's largest industry sector, financial services. Our Full Members represent Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks and licensed trustee companies. Our Supporting Members represent the professional services firms such as ICT, consulting, accounting, legal, recruitment, actuarial and research houses. The financial services industry is responsible for investing $3 trillion on behalf of more than 15.6 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange and is the fourth largest pool of managed funds in the world.

Earlier Submissions

We previously have made submissions on the Bill: a submission dated 26 October 2018 and a submission dated 6 March 2019. Each of these submissions were made to the Transnational Crime Policy Branch, National Security and Law Enforcement Policy Division. A copy of each submission is **attached** for your reference. We confirm the comments made in those submissions.

Submission

The Anti-Money Laundering and Counter-Terrorism Financing (**AML/CTF**) regime serves an important function and financial services providers have an important role to play in reducing terrorism financing and money laundering which is a key enabler of transnational, serious and organised crime.

This submission is limited to specific matters raised by our Members in relation to the Bill, as follows:

1. need for a definition of the term "opening an account" for Section 32;
2. retention of the "reliance" provisions under the pre-existing section 38 enabling reporting entities to rely on third party customer identification which the Bill proposes to replace (effectively removing the existing safe harbour);
3. make a number of comments in relation to the proposed amendments to Section 53 under the Bill for reports about cross-border movements of monetary instruments. We seek clarity as to whether the proposed changes are intended to impact reporting obligations of reporting entities that are financial institutions; and
4. suggested expansion of the application of new tipping off exemptions in the relation to section 123(7) to be amended under the Bill

As well as the above matters in relation to specific provisions of the Bill, we wish to raise with the Committee a broader policy matter for its consideration. This proposal seeks to address critical pressure points underlying AML-CTF compliance being business cost and expense as well as consumer benefit. It is suggested that policy level consideration be given to:

1. a "central repository" of customer due diligence (**CDD**) be maintained which reporting entities could rely upon; and /or
2. a CDD in effect be treated as a "financial passport" within Australia and once customer identification had been effected, other reporting entities could rely on the satisfactorily completed CDD,

if it were reasonable in the circumstances to do so.

Kind regards,

Vincent So

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David McGlynn

Senior Legal Counsel

Carrying out applicable customer identification procedure – opening an account

We note that the amended section 32 under the Bill does not materially change the current obligations to carry out an Applicable Customer Identification Procedure (**ACIP**) prior to the provision of a designated service. However, it is suggested that the term "opening an account" needs to be specifically defined in the AML/CTF Act to ensure consistency of approach by all reporting entities. Also, in this regard, the FSC notes that AUSTRAC intends to issue Rules under section 33 to stipulate special circumstances where a designated service can be provided prior to ACIP being completed. Similarly, it is suggested that such Rule changes need to be made carefully to ensure consistency of approach overall, including with Section 32.

Reliance on customer identification and verification procedures

Also, we note that the Bill proposes the insertion of new sections 37A and 37B and the replacement of section 38 of the AML/CTF Act. According to the Explanatory Memorandum (**EM**) for the Bill, these changes will expand the circumstances in which reporting entities may rely on the applicable customer identification procedures undertaken by a third party. This includes the exchange of personal information including transactional information. Relevant measures in the Bill address some of the deficiencies identified by the Financial Action Task Force (**FATF**). These particular measures address a recommendation from the Statutory Review Report to ensure that Australia is consistent with the FATF Standards.[1]

According to the EM:

> *Expanding the circumstances for reliance will facilitate more efficient information sharing between reporting entities and other bodies to ensure the proper identification of customers. This supports cooperation and collaboration to detect, deter and disrupt money laundering, terrorism financing, and other serious crimes.*[2]

In the context of sections 37A and 37B, safeguards on this "reliance" provision include:

(a) all reporting entities are subject to the *Privacy Act* 1988 and subsequently must abide by the *Australian Privacy Principles;*
(b) the requirement that an agreement or arrangement exists between entities before reliance can occur, (with the agreement or arrangement satisfying requirements specified in the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)* **(AML/CTF Rules)**);
(c) the relying reporting entity must also regularly assess the agreement or arrangement and terminate it if, after carrying out an assessment under section 37B, the entity does not have reasonable grounds to believe that each of the relevant requirements prescribed by the AML/CTF Rules is being met.

Under existing section 38, there are 'deeming' provisions which provide the relying entity with a safe harbour and enable circumstances where an ACIP carried out by a licensed financial advisor is considered to meet the AML/CTF Program requirements of the relying entity, even if the ACIP is not entirely in line with the requirements of the relying entity's AML/CTF Program.

[1] EM at paragraphs 4 and 40.
[2] Ibid at paragraph 41.

This safe harbour created by the section 38 deeming provisions has supported processes in place across the financial advice industry, where product issuers are able to rely on customer identification procedures carried out by financial advisers (typically in accordance with the FSC standard customer identification forms). We have set out in detail in our submission of 6 March 2019, detailed reasons as to why the existing provision should be retained.

By way of contrast, the EM refers to deficiencies in the existing provision. For example, at paragraphs 37 and 38, it is said that

> *Feedback from reporting entities has indicated that existing section 38 of the Act is of limited utility because it does not enable reliance in Australia or overseas on an ACIP or other customer identification procedure undertaken by other related parties (such as other members of a 'designated business group' within the meaning of this Act, or a 'related body corporate' within the meaning of the Corporations Act 2001).*

> *The new section 38 takes a broad approach to the third parties that may be relied upon. The key limitation on who can be relied upon is drawn from the FATF Standards. FATF Recommendation 17 requires that the third party is subject to appropriate AML/CTF regulation and supervision, and that where reliance on foreign entities is permitted, the money laundering and terrorism financing risks of the country are considered. New Chapter 7 of the AML/CTF Rules address these third party requirements.*

The EM goes on to state that the new provision is neutral as to the types of entities which may be relied upon and will enable continued reliance on licensed financial advisors and other members of a designated business group. It also is said that this provision will allow reporting entities to rely on other domestic and offshore members of their global corporate or designated business group without the need to enter into a 'CDD arrangement' as part of section 37A.

> *In particular, this expansion will benefit multinational corporations (such as major financial institutions and fund managers) that can harness the opportunities of being part of a trusted network of members that have operations in Australia and all throughout the world.* [3]

The benefit of this approach it is said is that reporting entities may rely on other entities when they have reasonable grounds to believe it is appropriate to rely on the ACIP or other customer identification procedure set out in the AML/CTF Rules having regard to the money laundering and terrorism financing risks the relying reporting entity faces.

> *As such, this requires reporting entities to apply the risk-based approach to determine whether the ACIP or other customer identification procedure is sufficient given the money laundering and terrorism financing risks associated with the customer type or service.*[4]

[3] EM at paragraphs 38 and 39.
[4] EM at paragraph 40

We appreciate the intention of the proposed provisions and the desire to satisfy FATF Standards. The difficulty however is that in this process, the legislative safe harbour appears to have been removed. For instance, and noting that there is an initial consideration as to whether it is appropriate to rely on the other party, having regard to the risks associated with the customer type or service, in terms of section 32, reporting entities ultimately remain liable for failure by the "relied on party" to carry out the ACIP or other customer identification procedure.

Putting to one side, whether it is appropriate to rely on the other party having regard to the risks associated with the customer type or service, the intention is that a reporting entity will remain ultimately responsible or liable under section 32 for failure by the relied on party to carry out the ACIP or other customer identification procedure. This is in contrast to reliance under new section 37A which, according to the EM, affords *reporting entities a safe harbour from liability where there exists isolated breaches of compliance with the ACIP (or other customer identification procedure) requirements.*[5]

For CDD agreements under s37, arguably there is little benefit for reporting entities utilising this provision, because as currently indicated in the EM, safe harbour is only provided for isolated breaches by the 'relied on' entity.

For the proposed s38, there is no safe harbour at all (even though a relying reporting entity is required to determine whether it is appropriate to rely on the procedure carried out by the other reporting entity). Removal of safe harbour is considered unnecessary as s38 already requires the relying entity to consider whether is appropriate to rely, and in circumstances where the entity carrying out the procedure is found to be non-compliant, by implication the relying entity should cease to rely on them.

Impact: if liability is going to be attributable to the relying entity, then it is likely that the amount of duplication across the industry will increase significantly. Customers may be asked to complete a customer identification procedure by the adviser and then again by a product issuer (or multiple product issuers if they hold multiple products across different product issuers). This is at odds with the intention of the amendment, which was to reduce inefficiency and costs to industry and customers.

Recommendation 1: The safe harbour provided for in the current wording of section 38 be retained so that the relying entity is not liable for isolated breaches of the customer identification procedure carried out by the 'relied-on' entity.

[5] EM at paragraph 41.

Bearer Negotiable Instruments

We note that if the Bill is passed in its current form, cross-border movements into or out of Australia of cash and bearer negotiable instruments (of which cheques are an example) of $10,000 or more will need to be reported under section 53. There are comments in the EM at pages 71 and 72 which suggest that there may well be no change in existing requirements for reporting entities. For example, in Attachment B – Indicative Costings and Assumptions), it is stated that;

there is no existing or future impost on reporting entities for CBM reporting. CBM reporting impacts travellers, flight and ship crews, and Immigration and Border Protection and the AFP.

This suggests to us that the reporting requirement for cross-border movement of monetary instruments including physical currency and BNIs does not (and will not, if the proposed amendment becomes effective) apply to reporting entities.

We would appreciate confirmation that our understanding around the application of this obligation is correct (i.e. it is not applicable to reporting entities).

Further to this, we do have the following additional comments:

1. Although the expression “bearer negotiable instruments” is defined, there may be some lack of full appreciation of the law relating to negotiable instruments within the business community. We think it would be useful if the EM provided some examples of what is meant or included in the concept; for example, a cheque, regardless of whether it is payable to order or bearer and regardless of whether it is crossed with the words “account payee only”. Perhaps an example could be provided also of a bank cheque.

2. We also note that the Bill proposes reports concerning receipts of monetary instruments moved into Australia. The Committee would understand that our members would appreciate an early indication of the type of information that Reporting Entities would need to provide to AUSTRAC and the format of the “approved form”.

Tipping Off Offence

The FSC is supportive of the two new tipping off exemptions for advisers and global corporate groups under Section 123(7) and (7AA) which will substantially reduce the burden associated with preventing inadvertent breaches of the prohibition and will enable greater identification, mitigation and management of AML/CTF risk across global organisations.

However, it is suggested that, as a matter of completeness, the scope of these exemptions should be expanded beyond reporting entities but strictly within the confines of corporate groups of which the relevant reporting entity/ies are member(s). That is, it is suggested that these amendments extend the exception in subsection 123(7) to include a related body corporate in a corporate group that is not a reporting entity or body corporate regulated by AML/CTF laws in a foreign country but is:

1. a "service company" that provides services and/or staff to those bodies to enable them to meet their AML/CTF obligations. For example, a related body corporate that engages operations staff to conduct AML/CTF obligations, form suspicions on behalf of the reporting entity and submit Suspicious Matter Reports to AUSTRAC or relevant Financial Intelligence Units overseas; and
2. a "holding company" that has board and senior management oversight and responsibilities on behalf of the related body corporate that is a reporting entity.

This amendment would ensure that all companies directly involved in the relevant activities in complying with the AML/CTF obligations would benefit from the above exception.

Also, as Subsection 123(7)(f) requires that the disclosure to the related body corporate is done "for the purpose of informing the related body corporate about the risks involved in dealing with the relevant person." The disclosure needs to be broader to also allow for disclosures to be made "including for reporting, investigation and escalation purposes" and suggest that wording to this effect be added at the end of Subsection 123(7)(f).

Section 123(5) has an exception from the tipping off prohibition in respect of sharing information with a legal practitioner for the purpose of obtaining legal advice, but only in respect of Suspicious Matter Reports under Section 41(2) of the AML/CTF Act but not in relation to Section 49 notices. It is suggested that 123(5) be amended to read as follows:

Omit "Subsection (2)", substitute "Subsection (1) and Section 49"

General observations concerning reliance on pre-existing CDD

Putting to one side the observations we have made concerning relevant provisions in the Bill, there is a separate issue which we wish to raise with the Committee of a broader policy matter. It seems to us that this is a matter which will necessitate changes to the law and detailed discussions with AUSTRAC. In this regard, we are mindful that it is necessary for Australia to comply with its FATF and other international obligations.

As we have indicated in our earlier comments, it is not clear that the Bill assists in consumer usability or business efficiency. Indeed, because of the removal of the safe harbour and the retention of ultimate liability for the product provider in the majority of instances, it is doubtful whether the measures proposed to be introduced by the Bill would be adopted by many businesses. This is to be contrasted with the existing protection afforded where CDD is undertaken in the first instance by a financial advisor and the product issuer relies on that CDD process.

The critical pressure points here are business cost and expense and consumer benefit. Apart from the limited circumstances set out in the current legislation, a consumer acquiring products subject to CDD must be identified. This is potentially time-consuming and inefficient for the consumer. From a business perspective, there is an added layer of cost and complexity each time a CDD process is undertaken.

Accordingly, we suggest that at a policy level consideration be given to either or both the following options or similar approaches:

1. a “central repository” of CDD be maintained which reporting entities could rely upon if it were reasonable in the circumstances;
2. a CDD in effect be treated as a “financial passport” within Australia and once customer identification had been effected, other reporting entities could rely on the satisfactorily completed CDD; again, if it were reasonable in all the circumstances.

We appreciate that further investigation and discussion would be required to go forward with this proposal. As we have said, we also are mindful that it is necessary for Australia to satisfy its international obligations in this context. However, we would welcome any observations the Committee has concerning this suggestion. In addition, we are happy to advance the matter further by way of preliminary discussion with AUSTRAC.