



SUBMISSION

Submission to the Senate Legal and Constitutional Affairs Committee — Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024

14 October 2024

The Association of Superannuation
Funds of Australia Limited
Level 11, 77 Castlereagh Street
Sydney NSW 2000

PO Box 1485
Sydney NSW 2001

T +61 2 9264 9300
1800 812 798 (outside Sydney)

F 1300 926 484

W www.superannuation.asn.au

ABN 29 002 786 290 CAN 002 786 290

File: 2024/40

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Via email: legcon.sen@aph.gov.au

14 October 2024

Dear Ms Dunstone,

Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this submission on the *Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024* (Bill).

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 seeks to ensure that member outcomes are appropriate, optimised and there are no unintended consequences flowing from policy decisions that affect superannuation.

GENERAL COMMENTS

ASFA's member organisations support the proposed reforms to simplify and modernise Australia's *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* to achieve compliance with the global Anti Money Laundering / Counter Terrorism Financing (AML/CTF) standards set by the Financial Action Task Force (FATF).

There are, however, some provisions of the Bill that have raised concerns for our members, in particular that the regulatory impacts on existing reporting entities, such as superannuation fund trustees, may have been underestimated.

SPECIFIC COMMENTS

Our member organisations have provided the following feedback on the Bill.

1. Scale of changes to the operations of reporting entities

The proposed reforms will require substantial uplift and enhancement not only to AML/CTF programs and Money Laundering and Terrorism Financing (ML/TF) risk assessments but also will necessitate significant changes to IT systems and the realignment of governance arrangements.

2. Urgent need for opportunity for reporting entities to be able to consider the AML/CTF Rules

In order to be able to fully assess the effects of the changes reporting entities will need an opportunity to consider the proposed AML/CTF Rules, which will provide further detail about the expectations and requirements with respect to the implementation of the revised obligations.

By way of example, with respect to initial customer due diligence, members have identified that paragraph 28(2)(e) of Division 2 of the Bill, on page 43, provides a specific obligation to run Politically Exposed Persons (PEP) and sanction checks on 'any person acting on behalf of the customer'.

This would include anyone operating under a power of attorney to transact on behalf of a member.

This is not a requirement of the current AML/CTF Act and Rules. The Bill states that the AML/CTF Rules may provide for certain exemptions from initial customer due diligence and that they may set out circumstances in which a reporting entity is taken to have complied with any of the requirements under subsection 28(2).

This demonstrates the need for reporting entities to be able to consider the AML/CTF Rules in order to be able to fully assess the effects of the changes that will need to be made as a consequence of the Bill.

The scheduled commencement date for the reforms with respect to existing reporting entities is 31 March 2026. Member organisations are concerned that, by the time the AML/CTF Rules are finalised, the timeframe to fully assess the operational impacts and implement the necessary changes will not be sufficient.

Given this, it is imperative that AUSTRAC release draft AML/CTF rules for stakeholder consultation as soon as practicable.

Recommendation

1. That AUSTRAC release draft AML/CTF rules for stakeholder consultation as soon as practicable

3. Need for a longer transitional period and/or a 'Policy Principles' period

Member organisations have indicated that, given the scale of changes that will need to be made to their operations, together with the fact that stakeholders have not yet had an opportunity to consider the AML/CTF rules, consideration should be given either to:

- extending the commencement date as set out in the Bill, having regard to when the Bill is passed and the AML/CTF rules are likely to be released; or
- providing certainty to reporting entities that AUSTRAC will utilise a 'Policy Principles' period to assist with the transition to the new regime.

3.1. Extension of commencement date

One option recommended by member organisations is that the primary provisions of the Bill should come into force 18-months after the making of the AML/CTF Rules

This would link the commencement of the obligations to the finalisation of the Rules, would assist with managing any unforeseen delays and ensure that sufficient time is provided to reporting entities to be able to make and test the necessary changes across their systems, policies, procedures and processes.

3.2. Adoption of a Policies Principles Period

By way of precedent, in 2021 the Minister approved a 'Policy Principles' period to facilitate the introduction of reforms to correspondent banking arrangements.¹

The terms of this arrangement were such that the CEO of AUSTRAC would not take enforcement action during the 'Policy Principles' period - between 17 June 2021 and 16 June 2022 - unless the reporting entity had failed to take reasonable steps to comply.

Recommendation

2. That consideration be given to:

- extending the commencement date as set out in the Bill; and/or
- utilising a 'Policy Principles' period to assist with the transition to the new regime

4. Policies Procedures, Systems and Controls

Part 1A, Division 3, Paragraphs 26F-G of the Bill introduces enhanced obligations with respect to the requirement for a reporting entity to include, as part of its AML/CTF Program:

- a ML/TF risk assessment; and
- AML/CTF policies, procedures, systems, and controls, to be known as 'AML/CTF Policies'.

The reporting entity is required to develop and maintain AML/CTF Policies to achieve the following outcomes:

- to manage and mitigate the ML/TF risks that the reporting entity may reasonably face in providing its designated services (ML/TF Risk Management & Mitigation Policies)
- to ensure the reporting entity complies with the AML/CTF Act, rules, and regulations (ML/TF Internal Compliance Management Policies).

The Bill provides that the ML/TF Risk Management & Mitigation Policies must cover a range of areas outlining how the reporting entity will go about complying with its obligations.

Member organisations have raised that the inclusion of procedures in an AML/CTF program may be problematic.

Members have identified that the Explanatory Memorandum, at item 95 on page 38, states that

"[...] AML/CTF policies will largely include the matters that are currently dealt with in Part A and Part B of an AML/CTF program."²

This seems to indicate that the changes being proposed in the draft amendment bill would have a minimal impact on the way AML/CTF Programs are structured and the level of detail included.

By way of contrast, the inclusion of AML/CTF policies, procedures, systems, and controls in the definition of 'AML/CTF Policies' could be considered to expand significantly the scope of AML/CTF Policies.

¹ [Anti-Money Laundering and Counter-Terrorism Financing \(Correspondent Banking\) Policy Principles 2021](#)

² https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r7243_ems_d299fdc8-59a6-47a7-b36f-3adf0782996e/upload_pdf/JC014035.pdf;fileType=application%2Fpdf

Given this, members have indicated that the intent of the legislation with respect to the scope of AML/CTF Policies need to be clarified, including the expectations of the regulator AUSTRAC with respect to policies, processes and procedures.

Members have observed that currently AML/CTF programs are at the enterprise/Designated Business Group (DBG) level. The further in depth that AML/CTF Policies are required to be the more operational in nature they will become.

Currently procedures in the relevant areas of the business align to the reporting entity's AML/CTF Program and are managed by the business owners that perform the related activities. There is a distinction between policies and procedures:

- a policy sets out the overall approach and guidelines that a reporting entity must follow to comply with its regulatory obligations
- by way of contrast, procedures have a narrower focus and can incorporate processes, down to detailing step-by-step instructions with respect to specific actions to take in different circumstances.

By way of example, Enhanced Customer Due Diligence (ECDD) would be covered as follows:

- the AML/CTF Program is strategic - the design of the AML/CTF Program outlines policies with respect to:
 - when ECDD is required
 - what needs to be included/considered when undertaking ECDD – this can include high level procedures/steps such as reviewing transaction history, re-verifying identification etc
- the operational procedures – implementation of the AML/CTF Program – these
 - outline how the policies are implemented
 - are more operational in focus
 - this can include going down to the level of individual, step by step, processes
 - are developed and maintained by the business unit undertaking the relevant activities
 - are subject to continuous improvement
 - are subject to assurance reviews to ensure they are aligned with the AML/CTF Program.

Member organisations are concerned that, if operational processes become part of the AML/CTF Program, this would necessitate significant time and effort to maintain them with little added value/benefit.

Accordingly, members would value a clear indication of the intent underlying this change and would appreciate supporting guide from AUSTRAC with respect to its expectations as to how reporting entities are to address procedures being considered to be part of AML/CTF Policies.

Members are also concerned that an instance of non-compliance with a documented procedure, which could be a minor, technical, breach with respect to a purely operational process, could amount to a contravention of proposed subsection 26G(1) or (2), which are civil penalty provisions, and hence potentially subject to a penalty. A failure to adhere strictly to a process should not constitute a contravention of the AML/CTF Act and potentially attract a penalty.

Further to this, members have observed that every procedure implemented by a reporting entity will need to be approved by a senior manager. Underlying processes are dynamic and subject to continuous improvement – requiring every change to be approved by a senior manager will create inefficiencies and increase the regulatory burden.

Given this, we recommend that the definition of what constitutes ‘AML/CTF Policies’ in section 5 of the Bill be clarified. By way of example, consideration could be given to including higher level procedures but excluding lower-level processes.

Another possibility may be that consideration is given to allowing approval of the reporting entity’s AML/CTF Policies by the Senior Manager to be delegated.

For FAR-regulated reporting entities, management of the entity’s AML function is a prescribed responsibility. In other words, delegation will not absolve the senior manager from accountability for the compliance/suitability of the entity’s AML/CTF Policies.

Recommendation

3. That the definition of what constitutes ‘AML/CTF Policies’ be clarified

If you have any queries or comments in relation to the content of our submission, please contact Fiona Galbraith, Director Policy, on

Yours sincerely

James Koval
Head of Policy and Advocacy