REFORMING AUSTRALIA'S ANTI-MONEY LAUNDERING AND COUNTER-TERRORISM FINANCING REGIME

SUBMISSION TO THE ATTORNEY-GENERAL'S DEPARTMENT

June 2024

INTRODUCTION

1. We thank the Attorney-General's Department (**AGD**) for the opportunity to comment on its proposals for reforming Australia's anti-money laundering and counter-terrorism (**AML/CTF**) financing regime.

2. As we expressed in our submission to the AGD's previous consultation, we support the AGD's work to help ensure Australia has a strong regime for disrupting money laundering and terrorism financing. We support the proposed expansion of the regime to 'Tranche 2' entities, and the AGD's objective to simplify and modernise the regime.

3. To assist the AGD in refining the details of the reforms, we have made some technical observations on proposals relating to Customer Due Diligence (**CDD**), AML/CTF programs, the tipping off offence, reporting requirements for international funds transfer instructions (**IFTIs**), and the exception for assisting an investigation of a serious offence.

4. It is important that any changes to the regime do not have unintended negative consequences for consumers, and do not limit reporting entities' flexibility in how they assess and manage risk.

5. We would welcome the opportunity to engage on draft legislation once the details of these proposals have been finalised. This will help allow us to understand the full impacts of the reforms and provide meaningful comment.

DETAILED POINTS

Customer Due Diligence obligations

6. Consultation Paper 5 proposes to replace the existing CDD framework and clearly outline the core obligations of CDD to assign a customer risk rating, conduct initial CDD, and conduct ongoing CDD. The customer risk rating would determine whether simplified, standard or enhanced initial and ongoing CDD would be required.

7. We support the proposed changes, which could help to clarify and simplify the regime. We note, though, that some aspects of the proposed changes could adversely affect bank customers' ability to open and use accounts, and/or place additional requirements upon them.

8. In particular, the requirement to allocate a customer's risk rating ***before*** the provision of a designated service would require banks to alter their approach to opening a customer account. Currently, when a bank has completed its applicable customer identification procedures on a customer, the bank will usually conduct a risk assessment on a customer

and allocate a risk rating as part of its 'Day 2' processes after an account has been opened (and a designated service has been provided). This allows customers to access banking services quickly without unnecessary friction, while also allowing banks to carry out an effective risk assessment.

9. Requiring this assessment to take place before the provision of a service would mean banks would need to delay the provision of services to new customers while not achieving any clear improvement in the mitigation of risk. This could have a negative impact for customers, particularly in circumstances where services need to be accessed quickly (including by customers experiencing vulnerability). It could also adversely impact payment flows to small and medium businesses, as payment services could sometimes be delayed.

10. Consultation Paper 5 also mentions that a high-risk rating will be mandated in certain circumstances, such as where a customer is connected with a country subject to sanctions. These mandates, if made too broadly, could have the effect of requiring banks to conduct enhanced CDD on customers where it is not commensurate to the ML/TF risk. This would place a burden on customers and banks. In general, in allocating a risk rating to a customer, a bank should have flexibility to assess risk on a case-by-case basis. Any category-based mandates should be confined to categories in which ***all*** customers in the category present a clear high risk.

11. As we noted in our submission to the AGD's consultation last year, we do not think that all members of the 'Tranche 2' professions proposed to be subject to the regime should, as a rule, be considered 'high risk' and subject to enhanced CDD. We think the current application of the regime, whereby each customer's risk can be assessed separately, is appropriate.

AML/CTF Programs

12. Consultation Paper 5 proposes streamlining the requirements in Part 7 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (**Act**) for reporting entities to have Part A and Part B AML/CTF programs into a requirement to prepare a single program. The single program would need to meet overarching obligations. As part of these changes, Consultation Paper 5 also proposes simplifying the concept of 'business group' and amending obligations for foreign branches and subsidiaries.

13. It is important that, if these changes are made, reporting entities retain the flexibility to determine what information is included in the combined program, and the appropriate level of detail.

14. We support the position expressed in the Consultation Paper 5 that a reporting entity's Board would not be required to approve the implementation of day-to-day, operational

measures. This appropriately acknowledges the role of the Board in providing oversight and strategic direction. We think that it is important that reporting entities have the capacity to determine which parts of the combined program must be approved by the Board and subject to independent review.

15. We do not agree with the proposal to include, as one of the overarching obligations, an express obligation to *'establish internal practices that **ensure** the business, its managers, employees and agents comply with AML/CTF obligations'* (emphasis added). The obligation to 'ensure' is onerous and carries the risk of being applied with a hindsight bias. We suggest this obligation could instead focus on establishing internal practices that are *designed to ensure* compliance. This would align with the current wording of rules 8.9.1(2) and 9.9.1(2) of the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)* (**Rules**), which require a program to include *'appropriate systems and controls of the reporting entity **designed to ensure** compliance with the reporting obligations of the reporting entity'*.

16. We would also welcome clarity on the scope of the related new proposed obligation for an AML/CTF Compliance Officer to be responsible for 'overseeing and coordinating the day-to-day operation and effectiveness of' a program.

17. On foreign branches and subsidiaries, Consultation Paper 5 notes that the amended regime will allow flexibility in how in a business group head meets general obligations under Australia's AML/CTF regime. We would welcome an opportunity to consider and provide input on the details of how this will be achieved. We think there should not be a requirement to apply Australian law in circumstances where there is no connection between a customer or transaction and Australia. In this circumstance, it is most appropriate to apply local laws.

18. We would also welcome further detail as to how the simplified business group concept would apply to non-operating holding company structures, and as to the identification, role and qualifications of the 'business head'.

Tipping off offence

19. Consultation Paper 5 proposes changes to the tipping off offence at s 123 of the Act. The proposed new offence would focus on preventing the disclosure of information that is likely to prejudice an investigation or potential investigation.

20. We support these changes in principle. The changes could help expand private-to-private information sharing, which we think is imperative to help fight financial crime and better protect the community. Expansion of private-to-private sharing would help ensure Australia's regime is consistent with international developments, for example recent new

AML/CTF laws in the European Union. As we noted in our previous submission, the increased intelligence value through private-private sharing can lead to better quality suspicious matter reports and more disruption opportunities, such as arrests, prosecutions and confiscation of criminal assets.

21. It is important that the proposed new tipping off offence be framed clearly and applied objectively. In this regard, we suggest that:

    - the proposed new offence's application to a 'potential' investigation should be qualified. Reporting entities are not well placed to determine whether an investigation could potentially be undertaken. We suggest the prohibition be limited to circumstances where a reporting entity is on notice that an investigation may be forthcoming, i.e. an 'anticipated' investigation.

    - The proposed new offence should include an objective standard for when a disclosure will be likely to prejudice an investigation (or anticipated investigation). To avoid any possible subjectivity and hindsight bias in the application of the offence, the prohibition could apply where it is 'reasonably foreseeable' to the reporting entity that the disclosure would likely prejudice an investigation or anticipated investigation.

22. As finally drafted, the offence should also not prohibit the disclosure of suspicious matter report information for certain legitimate purposes, such as the disclosure of information to a Court or opposing party for the purpose of defending legal action.

Reporting of IFTIs

23. Consultation Paper 4 proposes to amend IFTI reporting requirements, including by updating the trigger for IFTI reports to be the sending of value rather than the sending of an instruction, and by merging the reporting of different IFTI types (IFTI-Es and IFTI-DRAs) into a single report. The changes are affected by the paper's separate proposal to introduce the concept of 'value transfer service' to replace some of the Act's current definitions.

24. We support proposed changes in principle, though note the following matters for consideration:

    - The terms used to define reporting obligations should be consistent with international standards. In particular, the definition of 'financial institution' (and corresponding definitions of 'ordering institution' and 'beneficiary institution') should be aligned with the broader functional definitions used by SWIFT or FATF.

    - The reporting obligation should expressly exclude transfers to or from financial institutions acting on their own behalf.

- There should be a clear objective standard as to what amounts to 'initiating a transfer' or 'making the transferred value available'. Reporting entities need certainty as to which entity in a transfer chain has the IFTI reporting obligation. Participants in a value transfer chain may hold differing views about the meaning of these terms. This is particularly relevant in the context of digital assets, which Consultation Paper 4 proposes to bring into the regime.

25. Consultation Paper 4 does not set out the detail of new legislative provisions that would implement these changes. Given the complexity of IFTI reporting requirements and the significant scope of the proposed changes, we would welcome the opportunity to review and comment on draft legislation once it is available.

26. It is also important that reporting entities have adequate time to make the changes to systems and processes necessary to implement the changes. Entities would need to coordinate these changes with considerable changes required to implement the new ISO20022 standard for SWIFT messages.

27. We note that the Financial Action Task Force recently consulted on revision to its Recommendation 16 on payment transparency. This consultation is relevant to the content of and obligations relating to payment messages. We encourage the AGD to consider the outcomes of this consultation in the framing of IFTI reporting requirements.

Exception for assisting an investigation of a serious offence

28. Consultation Paper 5 proposes specifying in the Act that eligible law enforcement agencies can issue a 'keep open notice' directly to a reporting entity if a senior delegate within the agency reasonably believes maintaining the provision of a designated service would assist the investigation of a serious offence. Currently, Chapter 75 of the Rules requires an agency to have AUSTRAC approve and issue these notices.

29. We support the proposal to include safeguards to uphold the quality of the process and minimise regulatory impact, including the maintenance of AUSTRAC oversight. In addition to those outlined in Consultation Paper 5, we think that these safeguards should include process requirements for law enforcement agencies before they can issue a valid notice. These could include a requirement to evidence, as far as is appropriate, the basis for the requisite 'reasonable belief'.

ENDS