

7 February 2017

Mr Chris Collett  
Assistant Secretary  
Transnational Crime Branch  
Criminal Justice Policy and Programmes Division  
Attorney-General's Department  
3-5 National Circuit  
BARTON ACT 2600

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Dear Mr Collett,

## **STATUTORY REVIEW OF ANTI-MONEY LAUNDERING AND COUNTER-TERRORISM FINANCING REGIME**

Thank you for the opportunity to comment on implementation of the Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) statutory review. The invitation to comment references discussion papers covering three topics. This submission focuses on the third topic, namely the development of regulatory models for lawyers, conveyancers, accountants, high-value dealers, real estate agents and trust and company service providers (so-called "tranche 2 entities").

The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) advocates for small business and family enterprise in relation to policies and laws that impact on small business, including the large proportion of tranche 2 entities that are micro-businesses and small businesses.<sup>1</sup> In preparing this submission we have discussed the proposed regulatory models with organisations representing tranche 2 entities including lawyers, real estate agents and chartered accountants.

### ***Proposed amendments represent a major change***

We broadly support measures to promote a robust Australian AML/CTF regime that is informed by international guidelines and responsive to new developments. As small businesses interacting with clients and other similar businesses in transactions often involving the transfer of client funds and assets, tranche 2 entities have a clear interest in protecting not only their own integrity, but also the integrity of others in their network and overall public confidence in the types of products and services they

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<sup>1</sup> For example, data provided by the Law Council of Australia indicates that more than 80% of private law firms in Australia have just one principal, with most of the remainder having only 2-4 principals.

offer. The high degree of self-regulation of these entities through professional and quasi-professional organisations reflects their understanding that integrity and trust are business-critical.

A strong AML/CTF regime has the potential to enhance existing business benefits to tranche 2 entities, this is incidental to its main objectives of preventing financial crime and maintaining national security. Small business should not be expected to carry the burden of creating and maintaining the regime. Any costs of implementation that can be absorbed by government, should be.

Nor should the relative simplicity of the proposed changes in drafting terms be allowed to obscure their significance and complexity in policy and in practice. The extension of obligations under the AML/CTF regime to tranche 2 entities represents a major shift in the distribution of the compliance and regulatory burden, from big businesses for whom financial transactions are at the core of their mission, to small businesses for whom the movement of money is incidental to providing other products and services.

Tranche 2 entities are already heavily regulated for the same reasons that they have been targeted in the current review. For micro- and small businesses, even a minor incremental increase in regulatory and compliance costs can impact their viability. For example, the obligation to implement and maintain an AML/CTF program could be a major imposition on a sole practitioner who already dedicates a significant proportion of his or her working week to complying with various regulatory and professional requirements.

In addition, the smooth operation of client-facing processes is critical for any small service business. Unless care is taken to implement new regulations in a manner that avoids introducing friction into these processes, client experience may be adversely affected, with potentially devastating consequences for the business.

We recommend the following considerations be incorporated into the implementation process:

### ***1. Determine whether a regulatory gap exists***

In essence, the proposed changes extend key AML/CTF obligations relating to enrolment, establishing and maintaining an AML/CTF program, Knowing Your Customer (KYC) and other customer due diligence, reporting and record keeping to new classes of service providers. There may be circumstances where these tranche 2 entities are already obliged to take actions that would substantively satisfy these obligations. Efforts should be made, for example through a transition and implementation process, to identify any such circumstances and explore whether and how substantive compliance can be formally recognised.

Where practices exist that are found to go some way towards satisfying AML/CTF requirements, consideration should be given to modifying them rather than

introducing an additional separate set of compliance practices – for example, adding an extra field or question to an existing client induction form might save a business from having to go to customers more than once for the same information.

Similarly, where entities in different jurisdictions are subject to different standards under other existing regulation (including self-regulation), efforts should be made to support harmonisation across jurisdictions to a standard that satisfies AML/CTF obligations before any additional layer of regulation is introduced.

To avoid unnecessary duplication, where a transaction involves more than one tranche 2 entity, consideration should be given to having the AML/CTF obligations run with the client/transaction rather than with individual entities. For example, a real estate transaction might trigger a requirement for collection of client data from one of several possible tranche 2 entities involved in the transaction, which could then be taken as fulfilling the obligations of all entities. This could be achieved through a trusted customer identification process/“passport” that enables seamless transition through a transaction of identification data after positive verification.

## ***2. Differentiate regulatory models***

Where a regulatory gap is found to exist, differentiated regulatory models should be developed that take into account the nuances of day-to-day practice for those businesses caught by the proposed amendments. To achieve this, government should seek out and work with professional and industry bodies to develop tools and model practices that can be adopted by individual businesses with the minimum of customisation, given that small businesses are time- and resource-poor. In doing so, it should take into account that such groups typically draw funding from member contributions. We welcome the steps already taken with the release of several separate discussion papers tailored to different types of tranche 2 entities, but more differentiation is needed.

## ***3. Regulate responsively***

As a general principle, small business regulation should wherever possible take the form of education and collaborative capacity building. A phased transition (determined through consultation with small business) should be allowed for business owners to adapt to the new requirements.

Regarding education, many existing relationships between tranche 2 entities and regulators (such as the Australian Tax Office) have a significant educational component, and many business owners are also engaged in mandated forms of continuing professional development. As business owners do not receive income for time spent engaging in educational activities, it will be important to make use of existing education channels and information networks, both to maximise reach and to minimise the time business owners and their employees must spend away from revenue generating activities.

Some existing regulatory or self-regulatory principles, for example legal professional privilege, may conflict with elements of proposed obligations for tranche 2 entities under the AML/CTF regime. Such principles are not sacrosanct but they are fundamental to practice in the relevant fields and may serve the broader public interest in ways that warrant their protection, even if they are not optimal from the perspective of AML/CTF regulation. In our view, any decision to introduce regulation that conflicts with such established principles should not be taken without a full appreciation of their rationale and detailed consultation concerning possible ramifications.

### **Conclusion**

Overall, the priority in implementation should be to limit any additional regulatory burden and to achieve simplicity and low transaction costs from the point of view of the individual business newly assuming AML/CTF obligations, even if this looks more complex when viewed from the perspective of the regulator. We note that the proposed reforms introduce explicit principles to guide administration of the AML/CTF Act, including that obligations under the Act should be proportionate to risks faced by reporting entities. The degree of risk will differ from one type of entity and from one individual business to another, so realising this principle will entail dedicating sufficient time and resources to researching the operating environment of each class of tranche 2 entity and making a nuanced assessment as to the nature and magnitude of any risks.

Given that Government policy is to reduce the regulatory burden for small business, before any new regulation is implemented there must be solid evidence that the problem to be solved requires intervention and that the proposed intervention is designed effectively to minimise unnecessary red tape. From a small business perspective, the proposed measures will undoubtedly increase the regulatory burden. At this stage it is not clear that the evidence justifies the breadth and potential impact of this imposition.

We hope these comments assist you and would be happy to discuss further. Please feel free to contact either myself or Dr Janet Hope, by telephone 02 6263 1565 or email [janet.hope@asbfeo.gov.au](mailto:janet.hope@asbfeo.gov.au).

Yours sincerely,



**Kate Carnell AO**

Australian Small Business and Family Enterprise Ombudsman