

7 February 2017

Financial Crime Section

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

By email: antimoneylaundering@ag.gov.au

Dear Colleagues,

Response to Attorney-General Department's (AGD's) consultation paper - Trust and company services providers (TCSPs): a model for regulation under Australia's anti-money laundering and counter-terrorism financing (AML/CTF) regime

1. The Financial Services Council (FSC) represents Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks, licensed trustee companies and public trustees. The Council has over 100 members who are responsible for investing more than \$2.7 trillion on behalf of 13 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 third largest pool of managed funds in the world. The FSC promotes best practice for the financial services industry by setting mandatory Standards for its members and providing Guidance Notes to assist in operational efficiency.
2. FSC became the industry body representing licensed trustee company (**LTC**) members in 2012, when the then members of the predecessor trustee association, namely the Trustee Corporations Association of Australia (**TCA**) joined FSC, with TCA ceasing to exist shortly thereafter.
3. We refer to the AGD's consultation paper November 2016 *Trust and company service providers: a model for regulation under Australia's anti-money laundering and counter-terrorism financing regime* which seeks to obtain feedback about options for a model to regulate TCSPs. Thank you for the opportunity to provide a submission on this matter.
4. The consultation paper addresses implementing recommendation 4.6, from the *Report of the statutory review of the Anti-Money Laundering and Counter-Terror Financing (AML/CTF) Act 2006 and the associated Rules and Regulations* that relate to TCSPs:

Recommendation 4.6: The Department and AUSTRAC, in consultation with industry, should:

- (a) develop options for regulating lawyers, conveyancers, accountants, high-value dealers, real estate agents and trust and company service providers under the Anti-Money Laundering and Counter-Terror Financing (AML/CTF) Act, and

- (b) conduct a cost-benefit analysis of the regulatory options for regulating lawyers, accountants, high-value dealers, real estate agents and trust and company service providers under the AML/CTF Act.
5. The responses set out in this submission focus on 'traditional trustee services' provided by LTCs. These services typically include:
- a) A manager, appointed by the law or a Court/Tribunal, of the financial affairs of a person who is unable to manage their own affairs;
 - b) An executor or administrator of deceased estates;
 - c) A trustee for trusts created by a will, an inter vivos deed, an order of Tribunal/Court or a direction of a statutory office-bearer; or
 - d) An attorney under an enduring power of attorney, or an agent under another agency arrangement, for a person lacking capacity.
6. TCSPs or the designated services provided by TCSPs to be defined in any proposed amendments to the AML/CTF regulatory model may have a broader impact than 'traditional trustee services'. Other trustee roles commonly undertaken by FSC members include:
- (e) a Responsible Entity or Trustee of a Managed Investment Scheme;
 - (f) a Trustee of a Superannuation and /or Pension fund;
 - (g) a Security Trustee holding security interests in assets on behalf of others, including acting as Debenture or Securitisation Trustee; or
 - (h) A Trustee for a charitable Trust.
7. In many cases, these Trustee roles are undertaken as a business and as a service to third parties (as a Corporate Trustee).
8. Many of the Trustee roles referred to above give rise to existing AML/CTF obligations, however in some cases exemptions are in place for aspects of these obligations to recognise the lower risk of services associated with these roles (such as those associated with Superannuation and Pension funds).
9. FSC highlights the proposed AUSTRAC Rules – Exemption for LTCs that recognises the lower Money Laundering/Terrorism Financing (**ML/TF**) risk associated with services provided by LTCs and is intended to provide an exemption to LTCs when provided services in the capacity of:
- (a) a manager appointed by the law or a Court or Tribunal to manage the financial affairs of a person without that capacity;
 - (b) an executor or administrator of a deceased estate;
 - (c) a trustee of a trust established by:
 - i. a will;
 - ii. an order of a court or tribunal; or
 - iii. a direction of a statutory office holder;
 - (d) an attorney under an enduring power of attorney; or
 - (e) an agent of a person lacking capacity under an agency arrangement.

10. A key question in assessing the broader impact of any change to AML/CTF regulations for TCSPs will be clarification of who the customers of TCSPs are considered to be. Would this be the parties approaching the TCSP to establish the trust, the settlor/s of the trust, the appointor/s or the beneficiaries?
11. The primary purpose of the AML/CTF Act is to minimise the potential for products and services to be used for ML/TF purposes. The AML/CTF Act is principles-based and sets out requirements (obligations) that a Reporting Entity must comply with, whilst allowing it to implement risk-based systems and controls, depending on the nature, size and complexity of its business and the type of ML/TF risks that it might reasonably face.
12. It is with the above risk-based mindset that responses to the discussion items noted in the consultation paper are provided in Annexure 1 of this response. These responses are based on our initial consideration of the Department's Recommendation 4.6, and prior to the upcoming industry round table forum and Departmental cost benefit analysis.
13. FSC recognises that while TCSPs and other professional service providers may have some AML/CTF obligations under the AML/CTF Act, there is opportunity for strengthening and streamlining the regulatory AML/CTF regime.
14. We welcome the Attorney-General Department's invitation to obtain public feedback on the issues contained in the consultation paper and to participate in roundtable discussions with industry representatives and other interested stakeholders after the closing date for submissions, to discuss the consultation paper.
15. We also welcome the Attorney-General Department's offer to participate in the conduct of a cost-benefit analysis to allow the Government to assess the benefits of regulating these sectors relative to regulatory costs and make informed decisions about any future regulation.
16. Our initial responses to the consultation paper discussion items are provided in Annexure 1.

Yours Faithfully



Paul Callaghan
General Counsel

Discussion Question	Discussion Question	Response
1	What services provided by TCSPs pose a ML/TF risk?	<p>Services provided by TCSPs may pose a ML/TF risk where they:</p> <ul style="list-style-type: none"> • obscure ultimate ownership through complex layers and legal entity structures • evade tax and exploit known tax shelters • evade regulatory controls, including Australia's AML/CTF regime • provide a veneer of legitimacy to criminal activity • create distance between criminal entities and their illicit income or wealth by using complex business and corporate structures • avoid detection and confiscation of assets, and • hinder law enforcement investigations. <p>ML/TF risk associated with TCSPs is primarily where the companies or trusts established by these TCSPs obscure ultimate beneficial ownership, through complex structures, making it possible for individuals to disguise the true nature of ultimate beneficial owners.</p> <p>It may be challenging to identify which of the services provided by TCSPs as defined by FATF primarily introduce ML/TF risk, as there are legitimate activities associated with each of these services.</p>
2	Do any of the services provided by TCSPs, and identified by the FATF as requiring regulation, pose a demonstrated low ML/TF risk in the Australian context?	<p>Many of the services provided by TCSPs as defined by FATF, may be associated with low ML/TF risk in the Australian context, particularly where the circumstances associated with providing these services introduce low levels of ML/TF risk.</p> <p>FSC notes the roles that its members typically undertake as TCSPs that may be considered low ML/TF risk in relation to many traditional trustee services. This was recognised by AUSTRAC in the proposed AUSTRAC Rules – Exemption for LTCs, particularly in the capacity of:</p> <ul style="list-style-type: none"> • A manager, appointed by the law or a Court/Tribunal, of the financial affairs of a person who is unable to manage their own affairs <i>Appointments under the law or a Court/Tribunal are made by a government body where persons do not have the capacity to manage their own affairs, and are therefore considered to be low ML/TF risk</i> • An executor or administrator of deceased estates <i>An executor or administrator of a deceased estate is appointed on the death of a person and is unlikely to be used for ML/TF purposes</i> • An attorney under an enduring power of attorney, or an agent under another agency arrangement, for a person lacking capacity. <i>Similar to court / tribunal appointments, persons lacking capacity are unlikely to be associated with ML/TF activities.</i>

Discussion Question	Discussion Question	Response
		<p>In addition, it is considered unlikely that a licensed trustee company (LTC) or a public trustee (PT) would be engaged for services associated with ML/TF activities as LTC/PTs will generally only act as TCSP where the LTC/PT has the ultimate role of trustee. This set up is not attractive for ML/TF because the control rests with an independent, regulated entity (the LTC/PT). There is also the added disincentive that the LTC/PT is remunerated for the trustee role, adding a cost to these roles, whereas under other structures this fee may not be payable. Furthermore, LTC/PT will also not generally provide the protection of legal professional privilege, so structures set up for ML/TF purposes would be more vulnerable to being detected or uncovered.</p> <p>Similarly, the following Trustee roles are considered to be lower ML/TF risk:</p> <ul style="list-style-type: none"> • a Trustee of a Superannuation and /or Pension fund <i>while super / pension funds may be used for ML/TF purposes, AUSTRAC has historically viewed these products as being at the lower end of the ML/TF spectrum</i> • a Security Trustee holding security interests in assets on behalf of others, including acting as Debenture or Securitisation Trustee <i>Security Trustees generally only step in to exercise their trustee roles where there has been a failure of the operation of the trust and protect interests of parties. As a result, in undertaking this role there would be limited scope for ML/TF risk</i> • A Trustee for a charitable Trust. <i>While charitable trusts may be associated with some ML/TF risk, charities regulated by the Australian Charities and Not for Profits Commission (ACNC) are subject to regulatory oversight.</i> <p>In further support of our view, we note the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (the Rules), specifically draws attention to four elements when assessing ML/CT risk:</p> <ul style="list-style-type: none"> • Customers – including customer types, their beneficial owners, any politically exposed persons (PEP) and other customer risk attributes • Products – financial products and the designated services provided • Channels – methods by which designated services are delivered • Jurisdiction – the foreign jurisdiction that we deal with. <p>When considered from a Trust services perspective, various key factors within each element below also demonstrate FSC’s view.</p> <p>Customer Risk</p>

Discussion Question	Discussion Question	Response
		<p>From a Customer perspective, the customers receiving traditional trustee company services are predominantly individuals - either ‘direct’ clients, ie: persons requesting that a will or power of attorney be drawn up or a trust established, or ‘consequential’ clients, ie: beneficiaries of wills and trusts, who receive traditional services as a result of a direct client’s actions.</p> <p>Direct clients have a clear rationale for seeking those services, eg: having their will drawn up to ensure that their assets are distributed in the desired manner.</p> <p>Clients for traditional services generally are not corporations, which might have complex, non-transparent ownership structures and be unregulated and/or have no legitimate commercial rationale.</p> <p>Some customers receiving traditional services are trusts, often associated with high net worth individuals. These arrangements may be subject to enhanced due diligence, particularly if complex structures are involved.</p> <p><i>Further, and in relation to Customer Identification</i></p> <p>Typically the identity of the customer (beneficial owner) is established prior to set up.</p> <p>The methods by which the companies identify individuals or classes of persons named as beneficiaries in wills / trusts are well established and involve the provision of official documents such as birth certificates, passports, driver’s licences, Medicare statements, statutory declarations etc.</p> <p>Where companies or trusts are named as beneficiaries in wills / trusts being administered by LTCs, information is sought on the beneficial owners. There are legal imperatives to ensure that all beneficiaries are appropriately identified.</p> <p>Where LTCs manage the financial affairs of persons under Court or Tribunal orders (ie: for minors or intellectually disabled persons) the identity of those persons is clearly established during the Court / Tribunal proceedings.</p> <p>Where LTCs manage charitable trusts, initial contact is with the benefactor, who will provide identification and outline the nature of the trust that they want set up and the intended beneficiaries / classes of beneficiaries.</p> <p>Within the established parameters set out in the trust deed, potential recipients of grants are assessed on a regular / annual basis and, subject to the identification process noted above, make distributions to the chosen beneficiaries (who, for example, may be registered charities or individuals such as “promising young musicians in Victoria”).</p> <p>Enhanced due diligence might be undertaken by LTCs if the identification process determines that a client is a Politically Exposed Person.</p> <p>Channel Risk</p> <p>The delivery of traditional services to direct clients is normally handled through formal face-to-face meetings in the LTCs’ offices, with various documents required to be signed and witnessed.</p> <p>Jurisdiction Risk</p>

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		<p>Country risk in respect of traditional services is low as most traditional services are provided to clients in Australia. Whilst some beneficiaries of wills and trusts are overseas residents, LTCs follow the identification procedures outlined above before distributing funds.</p> <p>Enhanced due diligence may be undertaken when dealings involve clients in a country which, as a result of a structured review of ML/TF activity as documented through international sources such as Transparency International, are rated as higher risk jurisdictions.</p> <p>Product Risk</p> <p>Product risk relates to the level of risk attributable to the products and designated services that FSC members provide. The level of risk associated with multiple products provided under a single designated service may differ (for example, equities funds versus cash funds, both covered as part of the designated service related to issuing units in managed investment schemes). Typically there are restrictions on the movement of funds (for example superannuation benefit restrictions or restrictions on mortgage redraws) and restrictions on physical cash distributions.</p> <p>In addition, the products and services involve low transactions per customer, customers are Australia based and funds are not transferred overseas. A common trust example is a Charitable/Philanthropic trust which again demonstrates the low risk of ML/TF. For example:</p> <p>The identity of the testator or settlor providing the initial funds would be established by the LTCs before taking on the role of trustee.</p> <p>The distributions might be to particular charitable organisations (eg: the Red Cross or the Smith Family) and identification and beneficial owner requirements would again confirm the low risk status of the activity.</p>
3	<p>What are the benefits of requiring TCSPs to comply with AML/CTF obligations when performing services that may pose an ML/TF risk?</p>	<p>The benefits of regulating TCSPs deemed to be providing Designated Services under Australia’s AML/CTF regime include:</p> <ul style="list-style-type: none"> • closing operational, regulatory and intelligence gaps in that existing regulation aimed at mitigating ML/TF is extended across a more exhaustive range of services susceptible to ML/TF • increasing the education, knowledge and awareness of AML/CTF in the business community so that activities or transactions of a high risk, suspicious or nature not in-line with Australia’s AML/CTF regime are identified and brought to the attention of the regulator as appropriate • enhancing national security by reducing the likelihood of ML/TF funds reaching their intended source • dispersing the regulatory burden already imposed upon businesses with obligations under the Act, and • bring Australia closer in-line with FATF Recommendations and international progression.

Discussion Question	Discussion Question	Response
4	To what extent are the FATF's CDD obligations already reflected in existing regulation (including self-regulation) for Australian TCSPs?	<p>FATF's CDD obligations are:</p> <ul style="list-style-type: none"> a) Identifying the customer and verifying that customer's identity using reliable, independent source documents, data or information b) Identifying the beneficial owner, and taking reasonable measures to verify the identity of the beneficial owner, such that the financial institution is satisfied that it knows who the beneficial owner is. For legal persons and arrangements this should include financial institutions understanding the ownership and control structure of the customer c) Understanding and, as appropriate, obtaining information on the purpose and intended nature of the business relationship d) Conducting ongoing due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer, their business and risk profile, including, where necessary, the source of funds. <p>Australia's TCSP industry is well established and currently undertakes a number of processes, including CDD processes, which may become obligations under changes to Australia's AML/CTF regime.</p> <p>Customer Due Diligence</p> <p>Australian LTCs already establish the identity of direct clients and obtain details of their assets and their wishes in respect of those assets.</p> <p>The methods by which the companies identify individuals or classes of persons named as beneficiaries in wills / trusts are well established and involve the provision of official documents such as birth certificates, passports, driver's licences, Medicare statements, statutory declarations etc.</p> <p>Where companies or trusts are named as beneficiaries in wills / trusts being administered, information is sought on the beneficial owners. There are legal imperatives to ensure that all beneficiaries are appropriately identified.</p> <p>Where the financial affairs of persons under Court or Tribunal orders (ie: for minors or intellectually disabled persons) are managed, the identity of those persons is clearly established during the Court / Tribunal proceedings.</p> <p>Where charitable trusts are managed, initial contact is with the benefactor, who will provide identification and outline the nature of the trust that they want set up and the intended beneficiaries / classes of beneficiaries.</p> <p>Enhanced due diligence might also be undertaken if the identification process determines that a client is a PEP (Politically Exposed Person).</p>

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5	To what extent do existing mechanisms that allow for regulatory oversight of TCSPs mitigate any ML/TF risks that may be posed by the services TCSPs provide?	<p>Under the Corporations Legislation Amendment (Financial Services Modernisation) Act 2009 (FSM Act), which inserted Chapter 5D into the Corporations Act 2001, traditional trustee company services are deemed to be 'financial services'.</p> <p>Accordingly, they are subject to licensing and 'entity level' regulation by the Australian Securities and Investments Commission for that part of their business activities - the consumer protection provisions of the Corporations Act 2001, covering conduct, disclosure, advice and dispute resolution, apply to those activities.</p> <p>At the same time, the jurisdiction of the State and Territory Supreme Courts – the regional legislation, the rules of common law and equity, and the rules which apply generally to persons such as trustees, executors, administrators and guardians, continue to govern the functions and powers.</p> <p>Trustees of Managed Investments Schemes are required to hold an Australian Financial Services License, regulated by ASIC.</p> <p>Trustees of Suer and Pension funds are required to hold a Registrable Superannuation Entity license, regulated by APRA.</p> <p>As previously mentioned, Charities are regulated by the ACNC.</p>
6	What lessons can be learned from the experience of regulating TCSPs under AML/CTF regimes in other jurisdictions?	<p>Regulation of TCSPs internationally is still in its early days. Accordingly, the experience of European and North American TCSPs which have been uplifted into regulatory regimes is not well-known and there is little data available for research at this point in time.</p> <p>Lessons learned should be included as part of the roundtable discussions and subsequent cost-benefit analysis as the data becomes available.</p>
7	What services provided by TCSPs should be regulated under the AML/CTF regime?	<p>Any services where the TCSP must be reasonably satisfied that an individual customer is who they claim to be and for a non-individual customer (e.g. a business) the customer exists and their beneficial ownership and/or control details are known.</p> <p>However, as previously outlined, the level of regulation should be considered on a risk based approach. This may include:</p> <ul style="list-style-type: none"> • A standard level of due diligence, to be applied to all customers. <p>And a provision for the standard level being reduced in recognised lower risk scenarios, such as:</p> <ul style="list-style-type: none"> • Publicly listed companies subject to regulatory disclosure requirements • Financial institutions (domestic or foreign) subject to an AML/CFT regime consistent with the FATF Recommendations. <p>At the same time, an increased level of due diligence in respect of those customers that are determined to be of higher risk. This may be the result of a customer's business activity, ownership structure, anticipated or actual volume or types of transactions, including those transactions involving higher risk countries or defined by applicable law or regulation as posing a higher risk, such as:</p> <ul style="list-style-type: none"> • PEPs, and Sanctioned countries.

Discussion Question	Discussion Question	Response
8	Do any of the services provided by TCSPs as defined by the FATF pose a low ML/TF risk in the Australian context? If so, what evidence is there of this?	See response to Question 2 above.
9	What should be done if there is an overlap of regulation of DNFBPs?	<p>As part of this consultation processes, proposed AML/CTF requirements should be provided to TCSPs so overlap of regulation can be identified.</p> <p>Care should be taken where there is overlap that any existing exemptions or concessions be considered so as to not introduce AML/CTF obligations that have previously been exempted.</p> <p>As noted by AUSTRAC, The purpose of the AML/CTF regime should solely be ML/TF control and risk mitigation not regulatory burden.</p>
10	What impact would the costs associated with complying with the AML/CTF regime have on TCSPs?	<p>It is proposed TCSPs would be required to comply with aspects of the following AML/CTF regime model:</p> <ol style="list-style-type: none"> 1. Enrolment/register with AUSTRAC 2. Conduct Customer Due Diligence 3. Ongoing Customer Due Diligence Procedures 4. Reporting Obligations 5. Internal controls– AML/CTF programs 6. Record Keeping. <p>The costs of complying will depend on the eventual regulation and model imposed, but TCSPs may expect the costs to include:</p> <ul style="list-style-type: none"> • Operational costs associated with new processes, procedures and internal controls including KYC - Customer Identification (CDD) • Staff education and training costs • Governance costs of implementing new AML/CTF policy and framework • Regulatory and compliance costs of meeting obligations, monitoring and review • Financial cost of resourcing, engaging subject matter experts/advice and possible effect on profit margins • Regulatory and legal costs including fees, fines and/or legal proceedings.

Discussion Question	Discussion Question	Response
		<p>Where identified, costs should not be duplicated, for example CDD measures set out in the FATF Recommendation 5 do not imply that organisations have to repeatedly identify and verify the identity of each customer every time that a customer conducts a transaction. An institution is entitled to rely on the identification and verification steps that it has already undertaken unless it has doubts about the veracity of that information.</p> <p>In addition, reforms are underway to increase the circumstances in which regulated businesses can rely on CDD procedures carried out by third parties and/or different entities in a corporate group. If TCSPs, conveyancers, legal practitioners, real estate professionals and mortgages are all required under the AML/CTF regime to conduct CDD on a shared customer related to a particular transaction, a mechanism could be developed to permit reliance on the CDD performed by someone else in the transaction chain.</p>
11	<p>What additional administrative structures will legal practitioners need to put in place to comply with the requirements of the AML/CTF regime?</p>	<p>The administrative structure must have a level of minimum requirements and then additional TCSPs will determine the due diligence requirements appropriate to each customer.</p> <p>Having regard to the size of the TCSP and based on the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (Rules), from a best practice standpoint, TCSPs should generally put in place administrative structures which:</p> <ul style="list-style-type: none"> • Provide increased focus on a TCSP's operations (products, services, customers and geographic locations) that are more vulnerable to abuse by money launderers and other criminals • Provide for appropriate training to be given to all relevant staff • Implement risk-based customer due diligence policies, procedures and processes • Provide for adequate controls for higher risk customers, transactions and products/services, as necessary, such as transaction limits or management approvals • Provide for a regular review of the risk assessment and management processes, taking into account the environment within which the TSCP operates and the activity in its market place • Provide for an AML/CFT compliance function and review programme • Designate an individual or individuals at management level responsible for managing AML/CFT compliance • Inform senior management of compliance initiatives, identified compliance deficiencies, corrective action taken and suspicious activity reports filed • Provide for programme continuity despite changes in management or employee composition or structure • Incorporate AML/CFT compliance into job descriptions and performance evaluations of appropriate personnel • Focus on meeting where appropriate, all regulatory record keeping and reporting requirements, recommendations for AML/CFT compliance and provide for timely updates in response to changes in regulations • Ensure that adequate controls are in place before new products or services are offered

Discussion Question	Discussion Question	Response
		<ul style="list-style-type: none"> • Enable the timely identification of reportable transactions and ensure accurate filing of required reports • Provide for adequate supervision of employees that handle transactions, complete reports, grant exemptions, monitor for suspicious activity, or engage in any other activity that forms part of the institution's AML/CFT programme • For groups, to the extent possible, there should be a common control framework • Senior management will need to have a means of independently validating the development and operation of the risk assessment and management processes and related internal controls, and obtaining appropriate comfort that the adopted risk-based methodology reflects the risk profile of the TCSP. This independent testing and reporting should be conducted by, for example, the internal audit department, external auditors, specialist consultants or other qualified parties who are not involved in the implementation or operation of the TCSP's AML/CFT compliance programme. The testing should be risk-based (focussing attention on higher risk customers, products and services) and include comprehensive procedures and testing that cover all activities. It should also evaluate the adequacy of the TCSP's overall AML/CFT programme and the quality of its operational risk management programme.
12	How would regulating TCSPs for AML/CTF purposes impact on the delivery of services to clients?	<p>The impact on <i>clients</i> will be dependent on the size of the TCSP and the resources available to take on additional roles and responsibilities without taking time away from client interaction.</p> <p>The flow down effects of the impact of increased costs (question/answer 10) to TCSPs may also be felt by clients.</p>
13	How would AML/CTF obligations impact on the client confidentiality obligations of TCSPs?	<p>The AML/CTF Act imposes on reporting entities a number of reporting obligations (Parts 3 and 4), in particular a suspicious matter report (SMR).</p> <p>The Privacy Act 1988 (Privacy Act) exempts from the non-disclosure prohibition where the disclosure is required or authorised by or under an Australian law or a court/tribunal order. As a result, the Privacy Act does not hinder the implementation of the AML/CTF Act.</p> <p>Where TCSPs are also legal professionals, additional client confidentiality considerations will need to be considered.</p>

Discussion Question	Discussion Question	Response
6.1	What professional activities undertaken by TCSPs should be regulated under the AML/CTF Act?	See response to Question 4 above.
6.1	<p>Should TCSPs be required to enrol with AUSTRAC?</p> <p>- Alternatively, are existing obligations for these professionals to be enrolled/licensed with other regulators sufficient?</p> <p>- If these existing obligations are sufficient, how would any AML/CTF regulator for these sectors identify the regulated population?</p>	<p>The benefit of TCSPs enrolling with AUSTRAC would be that all reporting entities are regulated by the same body.</p> <p>The AML/CTF Act adopts an activity-based approach to regulation. Where an entity provides a service listed under section 6 of the AML/CTF Act, the entity becomes a regulated business ('reporting entity') for the purposes of the AML/CTF Act and is subject to applicable AML/CTF obligations, including enrolment with AUSTRAC.</p> <p>This is because for example, there is no conclusive evidence that these non-regulated DNFBPs are rejecting customers due to suspected ML/TF activities. They also do not have obligations to report suspicious matters to AUSTRAC, and do not do so in practice.</p> <p>For those TCSPs that are not providing a designated service and not require to enrol with AUSTRAC, Regulation could also be performed on a risk based basis. This may be performed by (a) a supervisor or (b) by an appropriate self-regulatory body (SRB), provided that such an SRB can ensure that its members comply with their obligations to combat money laundering and terrorist financing. Once the TCSP begins offering a Designated Service they could then be moved to the AUSTRAC enrolment model.</p>
6.1	<p>Are there services provided by TCSPs that should be exempted from AML/CTF obligations?</p> <p>- If yes, on what grounds?</p>	<p>The FSC has written to AUSTRAC previously in regards to exemptions under the Act. We provide Annexure 2 – AUSTRAC ref SAFE#4922582</p> <p>In summary, the FSC applied on behalf of LTCs for an exemption under section 247 of the AML/CTF Act in relation to certain obligations. AUSTRAC replied 20 June 2016 with its In-Principle Decision to draft Rules granting an exemption from designated services described in items 33, 34, 46, 51 and 53 in Table 1 of subsection 6 (2), and items 1 and 2 in Table 2 of subsection 6(3) of the AML/CTF Act, from the following provisions of the AML/CTF Act:</p> <ul style="list-style-type: none"> a) Divisions 2 to 7 of Part 2 b) Divisions 2 to 5 of Part 3 c) Parts 3A, 5, 6 and 7 d) Part 10; and <p>The draft Rules to only apply in circumstances where the Trustee acts in the capacity of:</p>

Discussion Question	Discussion Question	Response
		<p>a) A manager, appointed by the law or a Court/Tribunal, of the financial affairs of a person who is unable to manage their own affairs; or</p> <p>b) An executor or administrator for deceased estates; or</p> <p>c) A trustee for trusts created by a will, an order of a Tribunal/Court or a direction of a statutory office-bearer, or</p> <p>d) An attorney under an enduring power of attorney, or an agent under another agency agreement, for a person lacking capability.</p> <p>Further, the decision (by AUSTRAC) was made to refuse the application for exemption for the aforementioned designated services, in circumstances where a trustee acts for inter vivos trusts.</p> <p>We understand that the relevant rules are in the process of being made by the AUSTRAC CEO.</p>
6.2	What CDD obligations should TCSPs have?	<p>It may be reasonable to expect TCSPs who are providing a designated service to meet the CDD obligations already under the AML/CTF Act. Existing CDD measures include:</p> <ul style="list-style-type: none"> • collecting and verifying customer identification information - for example, identity documents, data or other information which can be verified using a reliable and independent source • identifying and verifying the beneficial owner(s) of a customer • identifying whether a customer is a PEP (or an associate of a PEP) and taking steps to establish the source of funds used during the business relationship or transaction 3Z • ongoing CDD and transaction monitoring, and • obtaining information on the purpose and intended nature of the business relationship. <p>Further, once a regulated business has established who is a beneficial owner or owners of a client, the business must collect at least the following information in relation to each individual beneficial owner:</p> <ul style="list-style-type: none"> • full name, and • date of birth or full residential address. <p>Lastly, as with existing obligations, the business must take reasonable measures to verify the information it collects about the beneficial owner. Reasonable measures means it must take certain steps to verify the information and the steps taken must be appropriate given the level of ML/TF risk.</p>

Discussion Question	Discussion Question	Response
6.2	What CDD obligations do TCSPs have that duplicate CDD obligations under the AML/CTF regime?	See response to Question 4 above.
6.3	Should simplified CDD measures be available for some services provided by TCSPs? -If yes, in what circumstances?	At a minimum (as is currently required by the AML/CTF Act) businesses must be reasonably satisfied that: <ul style="list-style-type: none"> • an individual customer is who they claim to be, and • for a non-individual customer (e.g. a business), the customer exists and their beneficial ownership and/or control details are known. After attempting the minimum requirement, the business is in a position to assess whether further ECDD are required in circumstances of higher risk.
6.3	When should the obligation for TCSPs to conduct CDD on clients commence?	FSC do not have a differing view to the AML/CTF Act at this point in time which requires reporting entities to perform an applicable customer identification procedure before providing a designated service to a customer.
6.3	What opportunities are there for TCSPs to rely on CDD performed by other businesses involved in the same transaction?	See response to Question 10 above.
6.4	What ongoing due diligence obligations should apply to TCSPs?	The starting point is for a TCSP to assess the risks that a customer may pose taking into consideration any appropriate risk variables before making a final determination. TCSPs will determine the due diligence requirements appropriate to each customer. This may include: <ul style="list-style-type: none"> • A standard level of due diligence, to be applied to all customers • The standard level being reduced in recognised lower risk scenarios, such as: <ul style="list-style-type: none"> ○ Publicly listed companies subject to regulatory disclosure requirements ○ Financial institutions (domestic or foreign) subject to an AML/CFT regime consistent with the FATF Recommendations. An increased level of due diligence in respect of those customers that are determined to be of higher risk. This may be the result of a customer's business activity, ownership structure, anticipated or actual volume or types of transactions, including those transactions involving higher risk countries or defined by applicable law or regulation as posing a higher risk, such as: <ul style="list-style-type: none"> • PEPs, and Sanctioned countries.

Discussion Question	Discussion Question	Response
6.4	Are there existing ongoing due diligence obligations or industry standard practices for TCSPs that duplicate CDD obligations under the AML/CTF regime?	Yes. See question/answer 4 above.
6.4	Should all reporting obligations apply TCSPs?	<p>Potentially suspicious activity includes complex, unusual or large transactions, or unusual patterns of transactions, which have no apparent economic or visible lawful purpose. Considerations of what may amount to a suspicious transaction will differ between business units and designated services provided, however, examples of these include:</p> <ul style="list-style-type: none"> • Significant transactions (in terms of amount or volume) for a customer • Transactions that appears to be inconsistent with the expected use of the product or service provided • Transactions that appear to be unusual with consideration to the customers occupation or industry and/or the nature and purpose of the relationship with the customer • High account turnover inconsistent with the size of the balance • Transactions that do not appear to have a commercial purposes, and • Transactions outside the regular pattern of an account's activity. <p>The objective of the AML/CTF Act is to minimise the potential for products and services to be used for ML/TF purposes. As other Government Regulatory Bodies allow voluntary reporting of illegal or suspicious matters, it may be reasonable to encourage legal practitioners and conveyancers to report suspicious matters in order to obtain valuable ML/TF intelligence and information.</p>
6.4	If TCSPs have suspicious matter reporting obligations, should such reports be lodged with AUSTRAC or an industry body?	The benefit of TCSPs lodging Suspicious Matter Reports with AUSTRAC would be that all monitoring / assessment and intelligence is carried out by the same body.
6.4	To what extent do TCSPs conduct IFTIs?	<p>Consistent with Discussion Question 2 above, most traditional services are provided to clients in Australia.</p> <p>Whilst some beneficiaries of wills and trusts are overseas residents, LTCs follow the identification procedures outlined above before distributing funds.</p>

Discussion Question	Discussion Question	Response
6.4	Should legal practitioners and conveyancers be able to voluntarily report suspicious matters to the AML/CTF regulator that relate to a service that is not a designated service?	Removing the ethical considerations, the option to report suspicious matters should not be prohibited and there are carve outs in The Privacy Act to allow volunteer reporting, see discussion question 13 above.
6.5	Should TCSPs have an obligation to develop and maintain an AML/CTF program? If yes, what should the components of the AML/CTF program be?	TCSPs providing designated services should have at least a basic AML/CTF program in place in line with the following elements. <ol style="list-style-type: none"> 1. Enrolment/register with AUSTRAC 2. Conduct Customer Due Diligence 3. Ongoing Customer Due Diligence Procedures 4. Internal controls– AML/CTF programs 5. Reporting Obligations 6. Record Keeping.
6.5	Do TCSPs that operate internationally already have AML/CTF programs in place that comply with the FATF standards?	There is limited data on the international experience at this point in time other than the information and insights provided by the Attorney-General's Department in the consultation paper.
6.5	What are the implications of a risk-based approach for TCSPs?	A risk-based approach for TCSPs in line with AML/CTF Act requirements would provide TCSPs flexibility to adopt an appropriate AML/CTF Program based on the size and complexity of their business as well as the type of AML/CTF risk that might be reasonably faced.
6.5	How could professional bodies and/or the AML/CTF regulator assist TCSPs in developing AML/CTF systems	While AUSTRAC does not provide a template AML/CTF Program because it takes the view that each business should develop their own program based on their own needs, AUSTRAC has developed industry specific guidance on developing an AML/CTF program

Discussion Question	Discussion Question	Response
	and procedures suited to their professional practices?	<p>and these guides provide reporting entities with practical guidance on meeting their obligations. Industry guidance is currently available for:</p> <ul style="list-style-type: none"> • bookmakers • independent remitters • hotels and clubs. <p>The addition of professional services covered by TCPS may be of assistance.</p>
6.6	What records should TCSPs be required to keep?	<p>Relevant records may include the below and may be stored in electronic or paper form, provided that these records continue to be accessible throughout the applicable retention period:</p> <ul style="list-style-type: none"> • Records relating to their AML/CTF Program, including copies of each version of the Program (once approved) • Documents relating to the provision of a designated service • Records of an applicable customer identification procedure • Transaction records relating to a customer • Documents in relation to any suspicious matter reports; and • Documents relating to employee screening.
6.6	To what extent can record-keeping obligations for AML/CTF purposes leverage off other record-keeping obligations that TCSP have (for example, under taxation or corporations law, and laws governing the use of trust accounts)?	<p>Under the AML/CTF Rules a reporting entity may adopt simplified verification procedures for certain types of companies and trusts. While this has improved the efficiency of the verification process it also means in these circumstances there is less opportunity for leveraging record keeping for AML/CTF purposes.</p>
6.6	Should AUSTRAC monitor and supervise TCSPs for compliance with AML/CTF obligations?	<p>AUSTRAC as the regulating body is in the best position to monitor and supervise TCSPs. International experience may offer a number of different 'hands off' approaches where professional bodies could regulate or co-regulate which may be considered.</p>

Discussion Question	Discussion Question	Response
	<p>- Are there professional bodies or existing regulatory authorities that could regulate or co-regulate TCSPs?</p>	
6.6	<p>What regulatory approach should be adopted (for) TCSPs?</p>	<p>AUSTRACs current approach of consultation and industry feedback is best placed to illicit the information and issues necessary to develop the appropriate regulatory model.</p>
6.6	<p>What approach should be adopted for monitoring and supervising lawyers and accountants that provide trust and company services where the lawyers and accountants have AML/CTF obligations in relation to non-TCSP services they provide?</p>	<p>N/A</p>
6.6	<p>What advice and assistance should the AML/CTF regulator provide to support TCSPs to implement AML/CTF obligations?</p>	<p>As per the response to 6.5 Part 4, while AUSTRAC does not provide a template AML/CTF Program because it takes the view that each business should develop their own program based on their own needs, AUSTRAC may consider developing industry specific guidance for TCSPs for implementing their AML/CTF obligations.</p>