



**Australian Government**  
**Attorney-General's Department**

**November 2016**

## **Consultation paper**

**Trust and company service providers: a model for  
regulation under Australia's anti-money laundering and  
counter-terrorism financing regime**

**Contents**

- 1. Introduction ..... 3
  - 1.1 What is the purpose of the consultation paper? ..... 3
  - 1.2 How can you have your say? ..... 4
  - 1.3 What are the next steps? ..... 5
- 2. Why regulate TCSPs?..... 6
  - 2.1 What are the benefits of regulating TCSPs?..... 6
  - 2.2 What are the money laundering and terrorism financing vulnerabilities? ..... 7
  - 2.3 What are the international AML/CTF standards for TCSPs? ..... 8
- 3. What existing laws regulate TCSPs?..... 10
- 4. What are the obligations under the AML/CTF regime?..... 11
  - 4.1 Existing AML/CTF obligations ..... 11
  - 4.2 What is AUSTRAC’s role? ..... 12
  - 4.3 What approaches are adopted in other countries? ..... 12
- 5. How would AML/CTF obligations impact on TCSP?..... 14
  - 5.1 What services provided by TCSPs would be regulated? ..... 14
  - 5.2 Regulatory impact ..... 14
  - 5.3 Regulatory mitigation ..... 14
  - 5.4 Legal professional privilege ..... 15
  - 5.5 Client confidentiality ..... 16
- 6. Model for regulation ..... 17
  - 6.1 Enrolment and scope of services..... 17
  - 6.2 Customer due diligence (CDD) ..... 18
  - 6.3 Ongoing customer due diligence..... 19
  - 6.4 Reporting obligations ..... 20
  - 6.5 Internal controls– AML/CTF programs ..... 21
  - 6.6 Record-keeping ..... 22
  - 6.7 Monitoring and supervision ..... 22
- ANNEXURE A: EXPLANATION OF OBLIGATIONS UNDER THE ANTI-MONEY LAUNDERING AND COUNTER-TERRORISM FINANCING REGIME ..... 23

# 1. Introduction

## 1.1 What is the purpose of the consultation paper?

The purpose of this consultation paper is to obtain feedback about options for regulating trust and company service providers (TCSPs) under Australia's anti-money laundering and counter-terrorism financing (AML/CTF) regime.

Money laundering (ML) and terrorism financing (TF) are serious financial crimes that pose a threat to Australia's economic and financial stability and national security.

ML is the processing of criminal profits to disguise their illegal origins. Successful money laundering arrangements allow criminals to enjoy the benefits of the profits of their crimes without drawing attention to themselves, and reinvest the profits in future criminal activity or in legitimate business.

TF involves the raising of funds to supply terrorists with the resources they need to carry out their activities. Terrorists and terrorist organisations require only relatively small amounts of money to undertake terrorist attacks on Australian soil or to support terrorist activities overseas.

To combat these serious threats, Australia has implemented an AML/CTF regime that comprises the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) and the associated Rules and Regulations. This regulatory regime requires businesses to comply with a number of obligations when they provide specific services that pose money laundering and terrorism financing (ML/TF) risks. These obligations are designed to mitigate these risks and include customer due diligence (CDD), reporting, record-keeping, and compliance programs.

Businesses currently regulated under the AML/CTF regime are supervised by the Australian Transaction Reports and Analysis Centre (AUSTRAC) for compliance with these obligations by AUSTRAC. AUSTRAC is Australia's AML/CTF regulator and financial intelligence unit (FIU). The information these businesses collect and report to AUSTRAC about the movement of funds and assets as part of their AML/CTF obligations forms the basis of valuable financial intelligence that bolsters the ability of law enforcement agencies to detect, deter and prevent crime.

TCSPs can take different forms, but generally assist in the creation, operation and management of corporate and trust structures. The services offered by TCSPs operate as a gateway to property and financial markets, financial institutions and other regulated professionals and can be misused by criminals to disguise beneficial ownership, conceal the origins and purposes of financial transactions, facilitate tax evasion and, ultimately, launder the proceeds of crime.<sup>1</sup> Operating through or behind a TCSP may provide a veneer of legitimacy to criminal activity and, where complex structures are established, creates distance between criminal entities and their illicit wealth.

Increasingly countries are regulating TCSPs for AML/CTF purposes to mitigate these risks and comply with the international standards for combating ML/TF and other serious crimes. These international standards are set by the Financial Action Task Force (FATF)<sup>2</sup> and require professionals such as TCSPs to be subject to AML/CTF regulation when they are involved in certain transactions for a client that pose ML/TF risks.<sup>3</sup>

---

<sup>1</sup> Financial Action Task Force, *Money laundering using trust and company service providers*, October 2010, <http://www.fatf-gafi.org/topics/methodsandtrends/documents/moneylaunderingusingtrustandcompanyserviceproviders.html>.

<sup>2</sup> The Financial Action Task Force is an inter-governmental policy-making body that promotes the effective implementation of measures for combating ML/TF and other related threats to the integrity of the international financial system.

<sup>3</sup> FATF Recommendation 22, criterion 22.1(b)

This consultation paper initiates discussion about a model for regulating TCSPs in Australia, implementing a key recommendation from the *Report of the statutory review of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 and the associated Rules and Regulations* that relate to TCSPs.<sup>4</sup>

The statutory review recommended that options be explored to shape a modern AML/CTF regime that positions Australia to address current and future challenges, as well as respond to the findings of the FATF's 2015 assessment of the effectiveness of Australia's AML/CTF regime. The FATF's report strongly criticised the non-regulation of TCSPs (and a number of other sectors) under the AML/CTF regime and made a number of recommendations to strengthen the regime and enhance compliance with the international standards.<sup>5</sup>

The report on the statutory review was tabled in Parliament in April 2016. The report identified a need to strengthen capabilities to mitigate ML/TF risks within the TCSPs sector. It also noted that regulating the sector under the AML/CTF regime would have a significant regulatory impact. In view of this impact, the report recommended consultation with industry to design an efficient regulatory model for the sector and for the costs and benefits of this model to be examined.

**Recommendation 4.6:** *The Attorney-General's 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 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.*<sup>6</sup>

This consultation paper represents the first step towards implementing the aspects of this recommendation that relate to TCSPs.

## 1.2 How can you have your say?

Public submissions are invited on the issues raised in this consultation paper. While questions are included at the end of each chapter to guide discussion, these are not intended to limit or constrain stakeholders in their responses.

Submissions can be sent to:

### Financial Crime Section

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

Submissions may also be submitted electronically to [antimoneylaundering@ag.gov.au](mailto:antimoneylaundering@ag.gov.au) or by facsimile to (02) 6141 2873. The closing date for submissions is **31 January 2017**.

---

<sup>4</sup> Attorney-General's Department, *Report on the Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 and Associated Rules and Regulations* (April 2016), Canberra. Available online at:

[www.ag.gov.au/consultations/pages/StatReviewAntiMoneyLaunderingCounterTerrorismFinActCth2006.aspx](http://www.ag.gov.au/consultations/pages/StatReviewAntiMoneyLaunderingCounterTerrorismFinActCth2006.aspx)

<sup>5</sup> Financial Action Task Force, *Anti-money laundering and counter-terrorist financing measures, Australia: Mutual Evaluation Report, April 2015*: <http://www.fatf-gafi.org/documents/documents/mer-australia-2015.html>.

<sup>6</sup> See footnote 4, above.

All submissions and the names of persons or organisations that make a submission will be treated as public, and may be published on the Department's website, unless the author clearly indicates to the contrary. A request made under the *Freedom of Information Act 1982* for access to a submission marked confidential will be determined in accordance with that Act.

### **1.3 What are the next steps?**

Roundtable discussions will be arranged with industry representatives and other interested stakeholders after the closing date for submissions to discuss the issues raised in the submissions responding to the consultation paper.

The feedback from the submissions and the roundtable discussions will be considered as part of designing a preferred model for AML/CTF regulation of the sector. This model will be used to facilitate a cost-benefit analysis to allow the Government to assess the benefits of regulating these sectors relative to regulatory costs and make an informed decision about any future regulation.

Industry will also be consulted about the conduct of the cost-benefit analysis.

## 2. Why regulate TCSPs?

### 2.1 What are the benefits of regulating TCSPs?

The regulation of TCSPs under Australia's AML/CTF regime would deliver a number of benefits. These include dispersing the regulatory burden associated with combating ML/TF, closing a regulatory and intelligence gap, enhancing national security, and enhancing the reputation of the Australian financial system.

TCSPs provide financial and business services that can be abused to disguise beneficial ownership, conceal the origins and purposes of financial transactions, facilitate tax evasion and, ultimately, launder the proceeds of crime. Operating through or behind a TCSP can provide a veneer of legitimacy to criminal activity and, where complex structures are established, though they can be legal, these structures can be used to create distance between criminal entities and their illicit wealth.

Financial institutions in Australia currently bear the compliance burden of maintaining robust AML/CTF programs for customers who access Australia's financial system. While these AML/CTF programs increase the risk of detection for criminals seeking to use and exploit the financial system to launder illicit proceeds, they also increase the attractiveness of using the services of professionals (such as TCSPs) who operate outside of the AML/CTF framework to facilitate and disguise financial operations.<sup>7</sup> This, in turn, further increases the ML/TF risks faced by financial institutions when they engage in transactions facilitated by these professionals, requiring them to implement measures to mitigate these risks.<sup>8</sup> If professionals such as TCSPs were regulated under the AML/CTF regime, the ML/TF risks faced by financial institutions who process transactions conducted by TCSPs on behalf of a third person would be reduced, dispersing the compliance burden across a larger number of businesses.

The regulation of TCSPs under the AML/CTF regime would contribute to enhancing and systematising their awareness of ML/TF risks and aid these professionals in better understanding the identity of their clients, the source of the funds underpinning transactions and the nature of the transaction being handled. An obligation to conduct customer due diligence (CDD) would assist these professionals to identify 'red flags' that may be early indicators of criminality or potential misconduct, and reduce their exposure to criminal liability.<sup>9</sup> Red flags can relate to the client, the source of the client's funds and the choice of TCSP.

Red flag indicators should not automatically be considered as a basis for a suspicion of ML/TF, as a client may be able to provide a reasonable explanation for the circumstances surrounding the way in which a transaction is being conducted. However, where there are a number of indicators, it is more likely that TCSPs should have a suspicion that ML or TF (and the underlying predicate crimes) is occurring. For example, where a TCSP is asked to provide services to a client that uses nominee agreements to hide the beneficial ownership of client companies and to facilitate transactions that involve the transfer of funds in the form of 'loans' to individuals from trusts and non-bank shell companies located in jurisdictions with secrecy laws.

If a TCSP is subject to AML/CTF regulation, has an awareness of the ML/TF risks facing their business and is conducting robust CDD, they increase the likelihood of identifying these indicators and enable a proper assessment of the extent to which the client exposes them to ML/TF risks. The TCSP would also be well positioned to identify and report suspicions about specific customers or transactions earlier in the transaction chain, thereby activating the protections of the AML/CTF Act and providing 'early warnings' to detect and deter

---

<sup>7</sup> FATF, *Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals*, 2013, p. 7.

<sup>8</sup> FATF, *Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals*, 2013, p. 7.

<sup>9</sup> Red flags illustrate the types of abnormal or unusual circumstances that may give rise to a reasonable suspicion that a transaction may involve ML/TF or other criminal activity.

criminal activities. More robust CDD requirements for TCSPs, in particular, would enhance Australia's visibility and transparency of beneficial ownership of trust accounts and company structures that TCSPs often establish or initiate on behalf of their clients.

The AML/CTF regulation of TCSPs would also more broadly:

- strengthen the reputation of the sector as a trusted intermediary, and build a collaborative partnership with AUSTRAC and law enforcement agencies to combat and disrupt ML/TF
- fill intelligence gaps and improve the ability for Australia's intelligence community to discover, understand, and disrupt money laundering, terrorist financing, and the serious offences that predicate these activities
- reduce the harm and adverse impacts of ML and TF on the Australian economy and society
- enhance national security
- enhance Australia's international reputation as a destination for foreign business/investment, and
- more closely align Australia's AML/CTF regime with the FATF's international standards for combating ML/TF.

## 2.2 What are the money laundering and terrorism financing vulnerabilities?

The World Economic Forum identified the use of gatekeepers to the financial system, including TCSPs, as one of two key enablers of money laundering, alongside the related activity of concealing beneficial ownership through complex corporate and trust structures for the purpose of illicit financial transactions.<sup>10</sup> Internationally, the most significant money laundering cases involve 'schemes of notable sophistication'.<sup>11</sup> These schemes can include networks of businesses, proprietary companies, partnerships and trusts that are used to disguise the source and ownership of money. All of these types of corporate structures are likely to be set up with the assistance of skilled professionals, including TCSPs.<sup>12</sup>

In Australia there is increasing evidence that Australian and overseas-based organised crime groups are misusing and exploiting the services provided by professional gatekeepers such as TCSPs to undertake transactions to:

- conceal proceeds of crime
- 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.<sup>13</sup>

---

<sup>10</sup> World Economic Forum, Global Agenda Council on Organized Crime, *Organized Crime Enablers*, July 2012

<sup>11</sup> Financial Action Task Force, *Laundering the Proceeds of Corruption*, July 2011, p.19, available online at [www.fatf-gafi.org/media/fatf/documents/reports/Laundering%20the%20Proceeds%20of%20Corruption.pdf](http://www.fatf-gafi.org/media/fatf/documents/reports/Laundering%20the%20Proceeds%20of%20Corruption.pdf)

<sup>12</sup> *Ibid.*

<sup>13</sup> AUSTRAC, *Strategic Analysis Brief: Money laundering through legal practitioners*, 2015, p. 5

## 2.3 What are the international AML/CTF standards for TCSPs?

The AML/CTF regime provides the foundation of Australia's commitment to meet the global standards for combating ML/TF and other serious crimes set by the FATF.<sup>14</sup>

The FATF's international standards are formulated as 'Recommendations' and were most recently revised in 2012.<sup>15</sup> The Recommendations apply to financial institutions, remitters and a range of businesses and professions (lawyers, accountants, TCSPs, real estate agents and dealers in precious stones and precious metals).

The FATF define TCSPs as all persons or businesses that are not covered elsewhere under the Recommendations but which, as a business, provide any of the following services to third parties:

- acting as a formation agent of legal persons
- acting as (or arranging for another person to act as) a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal persons
- providing a registered office, business address or accommodation, correspondence or administrative address for a company, a partnership or any other legal person or arrangement
- acting as (or arranging for another person to act as) a trustee of an express trust or performing the equivalent function for another form of legal arrangement, and
- acting as (or arranging for another person to act as) a nominee shareholder for another person.<sup>16</sup>

The FATF's AML/CTF obligations for TCSPs centre on:

- CDD (customer identification and verification, ongoing due diligence, transaction monitoring and enhanced due diligence)
- applying enhanced due diligence to 'politically exposed persons' (PEPs)<sup>17</sup>
- assessing and mitigating the ML/TF risks associated with new technologies
- specific measures for relying on customer due diligence performed by third parties
- suspicious matter reporting
- internal controls and special measures for mitigating risks for foreign branches and subsidiaries
- enhanced due diligence when dealing with higher risk countries, and
- record keeping.

---

<sup>14</sup> These global standards have been developed by the Financial Action Task Force (FATF), an inter-governmental policy-making body that promotes the effective implementation of measures for combating ML/TF and other related threats to the integrity of the international financial system.

<sup>15</sup> Financial Action Task Force, *International Standards on combating money laundering and the financing of terrorism and proliferation, The FATF Recommendations*, February 2012, available online at [www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html](http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html)

<sup>16</sup> [http://www.fatf-gafi.org/glossary/0,3414,en\\_32250379\\_32236889\\_35433764\\_1\\_1\\_1\\_1,00.html#34277140](http://www.fatf-gafi.org/glossary/0,3414,en_32250379_32236889_35433764_1_1_1_1,00.html#34277140)

<sup>17</sup> The FATF identifies three categories of PEPs: *Domestic PEPs* are individuals who hold a prominent public position or function in an Australian government body; *Foreign PEPs* are individuals who hold a prominent public position or function in a government body of a foreign country; and *International organisation PEPs* are individuals who hold a prominent public position or function in an international organisation.



## DISCUSSION QUESTIONS

1. What services provided by TCSPs pose a ML/TF risk?
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?
3. What are the benefits of requiring TCSPs to comply with AML/CTF obligations when performing services that may pose an ML/TF risk?
4. To what extent are the FATF's CDD obligations already reflected in existing regulation (including self-regulation) for Australian TCSPs?

### 3. What existing laws regulate TCSPs?

Lawyers and accountants often provide trust and company services. These professions are subject to professional regulation but are not currently regulated under the AML/CTF regime. As these professions also provide a range of non-TCSP services that are required by the FATF Recommendations to be subject to AML/CTF regulation, separate consultation papers have been developed on the proposed models for AML/CTF regulation for lawyers and accountants.<sup>18</sup> The consultation papers provide an overview of the existing laws that regulate lawyers and accountants.

#### *Legal persons*

In Australia a number of companies provide TCSP services. Usually, companies that offer services and products relating to company and trust formation also offer a number of TCSP services. In Australia TCSP-type entities are largely regulated by Australian Securities and Investments Commission (ASIC) through the *Corporations Act 2001* where the provider holds an Australian Financial Services Licence.

The majority of companies registered with the ASIC are established through TCSPs specialising in company registration and the establishment of trusts. The clients of these TCSPs are often not the companies themselves, but lawyers and accountants acting on the behalf of their clients. Once registered, companies can still rely on TCSPs to fulfil their ASIC obligations under the *Corporations Act 2001* (Cth). While this registration process and other state and territory registration processes, allows for basic information to be collected, these processes do not ensure that accurate and up-to-date information on the beneficial owners of companies is maintained or is readily available.

#### *Licensed Trustee Corporations*

Trustee corporations usually specialise in personal trust services and estate administration. The services provided by these entities largely involve:

- will writing
- acting as an Executor and administrator of deceased estate
- trust formation including charitable trusts
- power of attorney, and
- acting for persons who do not have the capacity to manage their own affairs.

These services are considered to pose a low ML/TF risk except when it involves providing services to international customers. The ML/TF risk is low because the services do not have scope for abuse by criminals or terrorists due to the level of regulatory and court oversight associated with this sector. Trustee corporations also have obligations under the *Superannuation Industry Act 1993* (Cth) and the *Corporations Act 2001* (Cth). Trustee corporations are currently regulated by the Australian Prudential Regulation Authority (APRA) and ASIC, as well as state and territory governments. It is considered that this level of regulation combined with the nature of the services offered to customers mitigates the ML/TF risk associated with the industry to a degree.

#### DISCUSSION QUESTIONS

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?

---

<sup>18</sup> These papers are available online on the Attorney-General's Department's website ([www.ag.gov.au](http://www.ag.gov.au)).

## 4. What are the obligations under the AML/CTF regime?

### 4.1 Existing AML/CTF obligations

In Australia, the *Anti-Money Laundering and Counter-terrorism Financing Act 2006* (AML/CTF Act) provides the legislative framework under which regulated businesses (known as ‘reporting entities’) are regulated for AML/CTF purposes. The detail of obligations is set out in the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 No. 1* (AML/CTF Rules).<sup>19</sup>

Businesses are supervised for compliance with their AML/CTF obligations by AUSTRAC.

Businesses that provide a regulated service under the AML/CTF Act (a ‘designated service’) generally have obligations to:

- enrol with AUSTRAC
- register with AUSTRAC if the reporting entity provides a remittance service
- conduct CDD
- implement ongoing CDD procedures
- implement and maintain an AML/CTF compliance program
- lodge transaction and suspicious matter reports, and
- comply with various AML/CTF related record-keeping obligations.

An explanation of these obligations is provided at **Annexure A**.

CDD is a central obligation, requiring regulated businesses to identify and verify each of their clients so they can:

- determine the ML/TF risk posed by each client
- decide whether to proceed with a business relationship or transaction, and
- assess the level of future monitoring required.

CCD requirements under the AML/CTF regime include:

- considering the broader risks associated with clients
- collecting identification information in relation to clients
- collecting, where necessary, identification information about who owns and controls clients
- verifying information where necessary, and
- performing ongoing CDD and monitoring - including scrutiny of transactions.

The AML/CTF regime does not adopt a ‘one-size-fits-all’ approach to AML/CTF regulation. Instead, there are a number of mechanisms that allow obligations to be tailored to the level of ML/TF risk faced by the business.

Exemptions from complying with AML/CTF obligations can be provided under the AML/CTF Act. Applications for exemptions are assessed on a case-by-case basis and granted where there is evidence that a service, or the circumstances surrounding the provision of a service, poses a demonstrated low ML/TF risk.

---

<sup>19</sup> The AML/CTF Rules are contained in the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)*, available online at [www.legislation.gov.au/Series/F2007L01000](http://www.legislation.gov.au/Series/F2007L01000).

AML/CTF obligations can also be modified in the AML/CTF Rules. For example, regulated businesses can use simplified CDD procedures on customers in certain circumstances.<sup>20</sup> The simplified CDD diligence procedures can provide significant regulatory relief for some regulated businesses.

## 4.2 What is AUSTRAC's role?

As Australia's FIU and AML/CTF regulator, AUSTRAC's objective is to detect, deter and disrupt the ML/TF risks and threats that affect Australia's financial system, and to contribute to the growth of Australia's economy.

AUSTRAC collects and analyses financial transaction reports submitted under the AML/CTF Act to develop and disseminate actionable financial intelligence to national and international law enforcement, national security, revenue and regulatory agencies, as well as international counterparts, for investigation.

AUSTRAC's financial intelligence is an integral element in the detection and investigation of serious and organised crime, ML/TF and tax evasion.

As part of its regulatory role, AUSTRAC works collaboratively with its regulated population to promote compliance with the AML/CTF Act. AUSTRAC does this by providing, among other things, guidance and assistance to reporting entities. AUSTRAC also assesses reporting entities' compliance with AML/CTF obligations and undertakes enforcement action where it identifies serious non-compliance.

In performing its regulatory functions, AUSTRAC must have regard to matters including economic efficiency and competitive neutrality.

## 4.3 What approaches are adopted in other countries?

In recent years, there has been an increase in the number of international jurisdictions extending AML/CTF regulation to TCSPs in line with the requirements of the international standards, particularly within the member states of the European Union (EU) and across Asia.

The United Kingdom (UK) has generally adopted the FATF's definition of a TCSP. Any entity in the UK that performs TCSP services must undertake a 'fit and proper person' test and register with Her Majesty's Revenue and Customs (HMRC). HMRC is also responsible for supervising compliance (unless they are already supervised by the Financial Conduct Authority or another body).

In Canada, trust and company services are provided by trust companies, legal counsels, legal firms and accountants. Trust service providers are regulated under the AML/CTF regime and supervised by FINTRAC, Canada's combined AML/CTF regulator and financial intelligence unit. Trust companies are defined under the *Trust and Loan Companies Act* to include a company authorised to:

- act as an executor, administrator or official guardian or a guardian, tutor, curator, judicial adviser or committee of a mentally incompetent person, or
- a trustee for a trust.<sup>21</sup>

Company service providers in Canada are not subject to specific AML/CTF obligations.

TCSPs in New Zealand are required to comply with AML/CTF requirements when they:

- act as a formation agent of legal persons or arrangements
- arrange for a person to act as a nominee director or nominee shareholder or trustee in relation to legal persons or arrangements, or

---

<sup>20</sup> Paragraphs 4.2.10 to 4.2.13 of the AML/CTF Rules and Parts 4.3 and 4.4 of the AML/CTF Rules.

<sup>21</sup> *Trust and Loan Companies Act* (Canada), section 412

- provide a registered office, a business address, a correspondence address, or an administrative address for a company, a partnership or any other legal person or arrangement.<sup>22</sup>

#### **DISCUSSION QUESTION**

6. What lessons can be learned from the experience of regulating TCSPs under AML/CTF regimes in other jurisdictions?

---

<sup>22</sup> Regulation 17, Anti-Money Laundering and Countering Financing of Terrorism (Definitions) Regulations 2011 (NZ)

## 5. How would AML/CTF obligations impact on TCSPs?

### 5.1 What services provided by TCSPs would be regulated?

This paper proposes that businesses that provide services that fall within the FATF's definition of a TCSP (see section 2.2 above) should be regulated under the AML/CTF regime.

### 5.2 Regulatory impact

The regulation of TCSPs under the AML/CTF regime would have a significant regulatory impact on the sector, as these professionals would need to bear the initial costs associated with establishing and implementing AML/CTF systems and controls, and ongoing costs to maintain those systems and controls in order to meet compliance and reporting obligations.

The degree of the regulatory and compliance impacts on individual small businesses would vary depending on the degree of their ML/TF risks and the measures they take to manage and mitigate these risks.

### 5.3 Regulatory mitigation

The FATF provides for a number of measures that could be adopted to reduce or mitigate the regulatory impact of any AML/CTF regulation imposed on TCSPs.

#### *Use of simplified measures*

The FATF standards allow countries to permit regulated businesses to apply simplified CDD measures where demonstrated lower risks have been identified. This concession is reflected in Australia's regime, as the AML/CTF Rules provide for the following simplified verification procedures:

- streamlined 'safe harbour' procedures for verifying medium or low ML/TF risk customers who are individuals,<sup>23</sup>
- exemptions from the obligation to determine the beneficial owner of a customer for certain types of customers,<sup>24</sup> and
- simplified verification procedures for certain low ML/TF risk companies and trusts.<sup>25</sup>

These two procedures together constitute 'simplified CDD' and could provide regulatory relief for some TCSPs under an AML/CTF regulatory model.

AUSTRAC can also provide exemptions from obligations on a case-by-case basis and these are granted where there is evidence that a service, or the circumstances surrounding the provision of a service, poses a low ML/TF risk.<sup>26</sup>

#### *The risk-based approach*

The risk-based approach to regulation of the AML/CTF Act may assist some TCSPs to minimise compliance costs. The risk-based approach recognises that it is impractical and inefficient to apply an equal level of vigilance to every client transaction. Instead, it encourages directing resources and effort towards clients and transactions with a higher potential for ML/TF. This means that affected businesses must implement controls that are proportionate to their ML/TF risk.

---

<sup>23</sup> Paragraphs 4.2.10 to 4.2.13 of the AML/CTF Rules.

<sup>24</sup> Part 4.12 of the AML/CTF Rules.

<sup>25</sup> Parts 4.3 and 4.4 of the AML/CTF Rules.

<sup>26</sup> See Chapter 4 for a discussion of exemption processes under the current AML/CTF regime.

In practice, a risk-based approach requires a professional to consider the ML/TF risk of each client. This involves assessing relevant risk factors including the type of client, the jurisdictions they deal with, the services they provide and the method used to provide them, as well as the nature, size and complexity of the client's business. Clients considered to pose a higher ML/TF risk would need to provide additional information. Likewise, compliance reporting may well be more strategically targeted based on the assessment of risk particular to a service such as advice on corporate arrangements. A small business that provides a low risk service involving low monetary values to members of a local community may incur minimal compliance costs. On the other hand, a large business that provides a high risk service involving substantial sums of cash to foreign nationals or that is involved in establishing large or complex corporate structures may incur significantly greater compliance costs. However, these larger businesses will also benefit from economies of scale and organisational efficiencies.

#### *Staggered implementation*

When the AML/CTF Act was introduced, the obligations imposed on regulated businesses were phased in over a period of up to three years, with the first set of obligations not commencing until at least 12 months after the AML/CTF Act received Royal Assent. This gave businesses time to understand their obligations, and to develop cost effective policies and procedures to meet them. As the AML/CTF regulator, AUSTRAC provided assistance to support industry in efforts to comply with obligations under the new legislation and continues to consult with industry on their education and training needs on an ongoing basis.

If the Government decides to introduce AML/CTF regulation for TCSPs, the same transitional arrangements could be considered.

## **5.4 Legal professional privilege**

Legal professional privilege needs to be considered where the TCSP is a legal practitioner and, in certain circumstances as outlined below, where the TCSP is a third party to a relationship between a lawyer and a client.

Legal professional privilege protects the disclosure of certain communications generally between a legal practitioner and a client when these communications are for the dominant purpose of seeking or providing legal advice (advice privilege), or for use in existing or anticipated legal proceedings (litigation privilege).<sup>27</sup> The privilege belongs to the client, enabling the client to provide full and frank disclosure to his or her legal practitioner in the knowledge that this information will not be used against them. This full and frank disclosure is important because it enables lawyers to provide competent and independent legal advice.

In Australia, legal professional privilege is governed by the common law and statute (under the Evidence Acts of the Commonwealth, states and territories).<sup>28</sup> The statutory privilege under each of the Evidence Acts is generally known as 'client legal privilege' and overrides the common law to the extent of any inconsistency. While the statutory privileges are substantially the same across these pieces of legislation, there are some minor variations.

There is recent case law that demonstrates that common law legal professional privilege may extend to communications with third parties (regardless of whether the third party is an agent of the legal practitioner or the client) if the communication is made for the dominant purpose of seeking legal advice where there is not actual or anticipated litigation.<sup>29</sup> This is an extension of legal professional privilege that recognises that clients

---

<sup>27</sup> *Eso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49 at 64–65 [35]; *Daniels Corporations International Pty Ltd v Australian Competition & Consumer Commission* (2002) 213 CLR 543 at 552 [9].

<sup>28</sup> Evidence Act 1995 (Cth), Evidence Act 1995 (NSW), Evidence Act 2001 (Tas), Evidence (National Uniform Legislation) Act 2011, and (NT) Evidence Act 2008 (Vic).

<sup>29</sup> *Pratt Holdings Pty v Commissioner of Taxation* [2004] FCAFC 122.

may seek expert advice from a third party to assist them to formulate a request for legal advice and ensure that the legal practitioner is apprised of all relevant information to enable accurate advice to be given. 'Expert' third parties can include accountants if the advice has been sought from the accountant to assist the client to prepare a request for legal advice.

The FATF does not require professionals who are subject to obligations of professional secrecy or legal professional privilege to report suspicious matters if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege under the laws of that country.<sup>30</sup>

## 5.5 Client confidentiality

The concept of client confidentiality applies to a range of professionals, including TCSPs, and all information obtained in the course of the professional's interaction with clients and potential clients. In most countries, confidentiality can be waived by the client or overridden by express provisions in law.

While client confidentiality is an important part of the relationship that many professionals have with their clients, confidentiality must not be used as a shield for money laundering or terrorist financing activity. Nevertheless, the AML/CTF regime should provide an appropriate balance between the confidentiality requirements of legitimate clients, and the needs of law enforcement.

### DISCUSSION QUESTIONS

7. What services provided by TCSPs should be regulated under the AML/CTF regime?
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?
9. What should be done if there is an overlap of regulation of DNFBPs?
10. What impact would the costs associated with complying with the AML/CTF regime have on TCSPs?
11. What additional administrative structures will legal practitioners need to put in place to comply with the requirements of the AML/CTF regime?
12. How would regulating TCSPs for AML/CTF purposes impact on the delivery of services to clients?
13. How would AML/CTF obligations impact on the client confidentiality obligations of TCSPs?

---

<sup>30</sup> FATF, *RBA Guidance for Accountants* (2008), available online at: [www.fatf-gafi.org/media/fatf/documents/reports/RBA%20for%20accountants.pdf](http://www.fatf-gafi.org/media/fatf/documents/reports/RBA%20for%20accountants.pdf).



## 6. Model for regulation

Any AML/CTF obligations proposed for TCSPs should be efficient, proportionate to ML/TF risks and tailored to the nature of the services provided by this sector.

The existing regulatory model under the AML/CTF regime is the starting point for consultation on a proposed regulatory model for TCSPs. The consultation process will explore whether and how the obligations under this regime could be applied to TCSPs, having regard to the FATF standards. The key obligations under the existing regulatory model are set out in Table 1 below and discussion questions posed as to how these obligations might be applied to services provided by TCSPs.

### 6.1 Enrolment and scope of services

OBLIGATION	DISCUSSION QUESTIONS
<p>Under the current regime, it is mandatory for all businesses with obligations under the AML/CTF Act to be enrolled on AUSTRAC's Reporting Entities Roll.</p> <p><b>COMMENT:</b></p> <p>The enrolment process, which is administrative in nature and does not attract any fees, provides AUSTRAC with information on every entity it regulates. This includes details about:</p> <ul style="list-style-type: none"> <li>- business structure</li> <li>- number of employees</li> <li>- annual earnings, and</li> <li>- the designated services they provide.</li> </ul> <p>This information is also used by AUSTRAC to understand and monitor the regulated population, and identify the entities subject to the annual AUSTRAC Industry Contribution<sup>31</sup> (based on earnings and transaction reporting criteria) and the amount that applies to each billable entity.</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>Businesses must enrol with AUSTRAC and be entered on the Reporting Entities Roll before they commence to provide designated services to their clients. Regulated businesses are required to advise AUSTRAC of any changes to their enrolment details within 14 days of the change arising. Penalties may apply to failing to enrol with AUSTRAC.</p>	<ul style="list-style-type: none"> <li>• What professional activities undertaken by TCSPs should be regulated under the AML/CTF Act?</li> <li>• Should TCSPs be required to enrol with AUSTRAC?             <ul style="list-style-type: none"> <li>- Alternatively, are existing obligations for these professionals to be enrolled/licensed with other regulators sufficient?</li> <li>- If these existing obligations are sufficient, how would any AML/CTF regulator for these sectors identify the regulated population?</li> </ul> </li> <li>• Are there services provided by TCSPs that should be exempted from AML/CTF obligations?             <ul style="list-style-type: none"> <li>- If yes, on what grounds?</li> </ul> </li> </ul>

<sup>31</sup> Information on Industry Contribution is available at: [www.austrac.gov.au/austrac-industry-contribution-information](http://www.austrac.gov.au/austrac-industry-contribution-information)

## 6.2 Customer due diligence (CDD)

EXISTING OBLIGATIONS	DISCUSSION QUESTIONS
<p>A business that provides designated services regulated under the AML/CTF Act must conduct CDD measures that allow the business to be reasonably satisfied that:</p> <ul style="list-style-type: none"> <li>• an individual customer is who they claim to be, and</li> <li>• for a non-individual customer (e.g. a business), the customer exists and their beneficial ownership and/or control details are known.</li> </ul> <p>The CDD measures include:</p> <ul style="list-style-type: none"> <li>• collecting and verifying customer identification information - for example, identity documents, data or other information which can be verified using a reliable and independent source</li> <li>• identifying and verifying the beneficial owner(s) of a customer</li> <li>• identifying whether a customer is a politically exposed person (PEP) (or an associate of a PEP) and taking steps to establish the source of funds used during the business relationship or transaction<sup>32</sup></li> <li>• ongoing CDD and transaction monitoring, and</li> <li>• obtaining information on the purpose and intended nature of the business relationship.</li> </ul> <p>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"> <li>• full name, and</li> <li>• date of birth or full residential address.</li> </ul> <p>The business must take <u>reasonable measures</u> 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> <p>Where a business is unable to verify the identity of the client (including beneficial owners) and the purpose and intended nature of the business relationship, the business should generally not agree to act and terminate the business relationship.</p> <p>Simplified CDD verification procedures are permitted. These are:</p> <ul style="list-style-type: none"> <li>• streamlined ‘safe harbour’ procedures for verifying medium or low ML/TF risk customers who are individuals</li> <li>• exemptions from the obligation to determine the beneficial owner of a customer for certain</li> </ul>	<ul style="list-style-type: none"> <li>• What CDD obligations should TCSPs have?</li> <li>• What CDD obligations do TCSPs have that duplicate CDD obligations under the AML/CTF regime?</li> <li>• Should simplified CDD measures be available for some services provided by TCSPs? <ul style="list-style-type: none"> <li>– If yes, in what circumstances?</li> </ul> </li> <li>• When should the obligation for TCSPs to conduct CDD on clients commence?</li> <li>• What opportunities are there for TCSPs to rely on CDD performed by other businesses involved in the same transaction?</li> </ul>

<sup>32</sup> See footnote 17 above for information about the categories of PEPs.

EXISTING OBLIGATIONS	DISCUSSION QUESTIONS
<p>types of customers, and</p> <ul style="list-style-type: none"> <li>simplified verification procedures for certain low ML/TF risk companies and trusts.</li> </ul> <p><b>COMMENT:</b> The AML/CTF regime focuses on requiring businesses to implement systems and controls for the purpose of detecting suspicious activity and to take steps to prevent their services from being misused and exploited by criminals to launder illicit funds. The collection of information about client identity is a central component of these systems and controls, allowing a business to determine whether the interaction with that client is commensurate with the transactional activity on which they are seeking advice and to understand and assess the ML/TF risks posed by accepting the client’s business.</p> <p>The AML/CTF regime currently allows regulated businesses to rely on CDD procedures carried out by a third party in limited circumstances.<sup>33</sup> Reforms are being developed to expand these opportunities. These reforms will be useful where regulated businesses have a shared customer, or where a customer uses services provided by different entities within a corporate group. If TCSPs, conveyancers, legal practitioners, real estate professionals, and mortgagees 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>	

### 6.3 Ongoing customer due diligence

EXISTING OBLIGATIONS	DISCUSSION QUESTIONS
<p>Regulated businesses have obligations to conduct ongoing customer due diligence (OCDD), including:</p> <ol style="list-style-type: none"> <li><b>An enhanced due diligence program.</b> This includes systems and controls in place to determine whether the business should collect and/or verify additional information relating to a customer on an ongoing basis. These systems help a business to ensure that it holds up-to-date information about its customers.</li> <li><b>A transaction monitoring program.</b> This program assists a business to identify suspicious transactions, complex or unusually large transactions, and unusual patterns of transactions that may be suspicious.</li> </ol> <p><b>COMMENT:</b> Conducting ongoing due diligence and scrutiny of transaction activity throughout the business relationship is important to ensure that the activity is consistent with the business’ knowledge of the customer and their business and risk profile, including where necessary the source of the customer’s funds. Ongoing due diligence means that clients engaging in ML/TF may be detected after the business relationship with the client has commenced. Where a business is unable to verify client identity (including beneficial owners) and the purpose and intended nature of the business relationship, the business should generally not agree to act and terminate the business relationship.</p>	<ul style="list-style-type: none"> <li>What ongoing due diligence obligations should apply to TCSPs?</li> <li>Are there existing ongoing due diligence obligations or industry standard practices for TCSPs that duplicate CDD obligations under the AML/CTF regime?</li> </ul>

<sup>33</sup> Section 38 of the AML/CTF Act and Chapter 7 of the AML/CTF Rules.

## 6.4 Reporting obligations

OBLIGATIONS	DISCUSSION QUESTIONS
<p>There are three primary reporting obligations under the AML/CTF regime:</p> <ul style="list-style-type: none"> <li>• suspicious matter reporting</li> <li>• international funds transfer instruction reporting, and</li> <li>• threshold transaction reporting.</li> </ul> <p><b>COMMENT</b></p> <p>Once a client is accepted, the ongoing monitoring of their activities and reporting by the regulated business is intended to detect whether the client is engaging in unusual or suspicious transactional activity.</p> <p><i>Threshold (cash) transaction reporting</i></p> <p>Australia imposes threshold transaction reporting (TTR) obligations on cash transactions because of the high ML/TF risks posed by transactions involving large amounts of cash. TTRs must be reported to AUSTRAC where a regulated business that provides a designated service to a client that involves the payment or transfer of physical currency or e-currency of AUD10,000 or more (or foreign currency equivalent).</p> <p><i>Suspicious matter reporting</i></p> <p>If at any time while dealing with a customer a regulated business forms a suspicion that matter may relate to any serious offence under any law of the Commonwealth, including, tax evasion or proceeds of crime, the business must provide a suspicious matter report (SMR) to AUSTRAC. Relevant offences include money laundering, terrorism financing, or operating under a false identity.</p> <p>Regulated businesses are required to submit a SMR to AUSTRAC within three business days of forming the suspicion. If the suspicion relates to the financing of terrorism, the SMR must be submitted within 24 hours of forming the suspicion.</p> <p><i>Reporting international funds transfers</i></p> <p>Any person who sends or receives a funds transfer instruction to or from a foreign country must complete an international funds transfer instruction (IFTI) report. The IFTI report must be submitted to AUSTRAC within 10 business days of sending or receiving the international funds transfer instruction.</p>	<ul style="list-style-type: none"> <li>• Should all reporting obligations apply TCSPs?</li> <li>• If TCSPs have suspicious matter reporting obligations, should such reports be lodged with AUSTRAC or an industry body?</li> <li>• To what extent do TCSPs conduct IFTIs?</li> <li>• 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?</li> </ul>

## 6.5 Internal controls– AML/CTF programs

OBLIGATIONS	DISCUSSION QUESTIONS
<p>Regulated businesses generally have an obligation to develop, implement and maintain an AML/CTF program to identify, mitigate and manage the ML/TF risk arising from the provision of a regulated service.</p> <p>An AML/CTF program should provide for:</p> <ul style="list-style-type: none"> <li>• an ML/TF risk assessment</li> <li>• approval and ongoing oversight by boards (where appropriate) and senior management</li> <li>• appointment of an AML/CTF compliance officer</li> <li>• regular independent review</li> <li>• an employee due diligence program</li> <li>• an AML/CTF risk awareness training program for employees</li> <li>• policies and procedures for the reporting entity to respond to and apply feedback from the AML/CTF regulator</li> <li>• systems and controls to ensure the entity complies with its AML/CTF reporting obligations</li> <li>• CDD procedures (see above), and</li> <li>• OCDD procedures (see above).</li> </ul> <p><b>COMMENT:</b> Systems and controls that assist a business to detect suspicious activity allow the business to take steps to prevent their services from being misused or exploited by criminals to launder illicit funds.</p> <p>Regulated businesses can develop AML/CTF programs that reflect their commercial environment, knowledge of their clients and knowledge of the ML/TF risks they face. Some of the measures included in an AML/CTF program may already constitute standard industry practice.</p> <p>Industry associations, professional bodies and the AML/CTF regulation would need to provide leadership and guidance on developing AML/CTF programs to comply with AML/CTF obligations.</p>	<ul style="list-style-type: none"> <li>• Should TCSPs have an obligation to develop and maintain an AML/CTF program?</li> <li>• If yes, what should the components of the AML/CTF program be?</li> <li>• Do TCSPs that operate internationally already have AML/CTF programs in place that comply with the FATF standards?</li> <li>• What are the implications of a risk-based approach for TCSPs?</li> <li>• How could professional bodies and/or the AML/CTF regulator assist TCSPs in developing AML/CTF systems and procedures suited to their professional practices?</li> </ul>

## 6.6 Record-keeping

OBLIGATIONS	DISCUSSION QUESTIONS
<p>Regulated businesses must make and retain the following records for seven years:</p> <ul style="list-style-type: none"> <li>records relating to the provision of a regulated service to a customer</li> <li>records of the CDD procedure the regulated business undertakes for customers to whom they provided, or proposed to provide, a regulated service</li> <li>records of electronic funds transfer instructions, and</li> <li>AML/CTF programs.</li> </ul> <p><b>COMMENT:</b> In tracking down money trails, it is essential that law enforcement agencies be able to recreate patterns of suspicious activity and reconstruct individual transactions. This ability is very much dependent upon the record management practices of regulated businesses.</p>	<ul style="list-style-type: none"> <li>What records should TCSPs be required to keep?</li> <li>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)?</li> </ul>

## 6.7 Monitoring and supervision

REGULATORY APPROACH	DISCUSSION QUESTIONS
<p>While AUSTRAC currently monitors and supervises enrolled businesses for compliance with their AML/CTF obligations, a number of regulatory approaches could be taken to monitor and supervise TCSPs regulated under the AML/CTF regime. This includes a risk-based industry collaborative approach.</p> <p>Under this co-regulation approach, professional bodies would have primary responsibility for developing guidance to assist their membership to implement appropriate detection systems and for monitoring effectiveness. Rather than legislating customer due diligence models for each sector, professional bodies would design appropriate procedures for their industry. The AML/CTF regulator would be responsible for setting principles and guidelines.</p> <p>Risk-based procedures are essential to this approach. The risk-based approach allows professionals to tailor their policies and procedures to the potential risk of ML/TF in particular client transactions. The risk-based approach minimises the regulatory burden on both firms and clients while maintaining effective controls. It is an approach adopted by Australia and supported by the FATF.</p> <p>Alternatively, professional bodies or AUSTRAC could have sole responsibility for monitoring and supervising these sectors for AML/CTF purposes.</p>	<ul style="list-style-type: none"> <li>Should AUSTRAC monitor and supervise TCSPs for compliance with AML/CTF obligations?             <ul style="list-style-type: none"> <li>Are there professional bodies or existing regulatory authorities that could regulate or co-regulate TCSPs?</li> </ul> </li> <li>What regulatory approach should be adopted TCSPs?</li> <li>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?</li> <li>What advice and assistance should the AML/CTF regulator provide to support TCSPs to implement AML/CTF obligations?</li> </ul>

# ANNEXURE A: EXPLANATION OF OBLIGATIONS UNDER THE ANTI-MONEY LAUNDERING AND COUNTER-TERRORISM FINANCING REGIME

## 1. Enrol/register with AUSTRAC

Any business that provides a service regulated under the AML/CTF Act must be enrolled on AUSTRAC's Reporting Entities Roll.

Businesses which intend to provide remittance services (remitters) must also apply to be registered with AUSTRAC.

More than 14,000 regulated businesses across the financial, remittance, gambling and bullion sectors are currently enrolled with, and regulated by, AUSTRAC for their compliance with their AML/CTF Act obligations.

## 2. Conduct customer due diligence

A regulated business must conduct CDD measures that allow the business to be reasonably satisfied that:

- an individual customer is who they claim to be, and
- for a non-individual customer, the customer exists and their beneficial ownership details are known.<sup>34</sup>

By knowing its customers a regulated business should be better able to identify and mitigate ML/TF risks in the conduct of their financial transactions, particularly where the activity or transactions are unusual or uncharacteristic.

The CDD measures include:

- 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 politically exposed person (PEP) (or an associate of a PEP) and taking steps to establish the source of funds used during the business relationship or transaction<sup>35</sup>
- ongoing customer due diligence and transaction monitoring, and
- obtaining information on the purpose and intended nature of the business relationship.

The CDD procedures developed by a regulated business must be included in a business's AML/CTF program (see below).

## 3. Implement ongoing customer due diligence procedures

Regulated businesses must have in place appropriate systems and controls to determine whether additional customer information (including beneficial owner information) should be collected and/or verified on an ongoing basis to ensure that it holds up-to-date information about its customers. This process is known as 'ongoing customer due diligence' (OCDD). The decision to apply the OCDD process to a particular customer depends on the customer's level of assessed ML/TF risk.

---

<sup>34</sup> A beneficial owner of a customer is defined as an individual (a natural person or persons) who ultimately owns or controls (directly or indirectly) the customer.

<sup>35</sup> See footnote 17 above for a description of the categories of PEPs.

Ongoing customer due diligence also includes:

- implementing a transaction monitoring program, and
- developing an 'enhanced customer due diligence' program (ECDD).

A transaction monitoring program is a program for monitoring transactions using a risk-based approach and allows a regulated business to:

- identify transactions that are considered to be suspicious, and
- identify complex, unusually large transactions and unusual patterns of transactions which have no apparent economic or visible lawful purpose.

ECDD is the process of undertaking additional CDD in certain circumstances deemed to be high risk. For example, ECDD may be appropriate where the customer is located in a country where there are weak AML/CTF controls. The ECDD program details the procedures the reporting entity must undertake in these high risk circumstances.

The OCDD procedures developed by a regulated business must be included in the business's AML/CTF program (see below).

#### **4. Implement and maintain an AML/CTF program**

Regulated businesses must develop and maintain a written AML/CTF program that sets out the operational framework for meeting compliance obligations under the AML/CTF Act.

The AML/CTF program must have two parts and should specify how the business identifies, mitigates and manages the risk of its products or services being misused to facilitate ML/TF.

Part A covers identifying, managing and reducing the ML/TF risk faced by a regulated business and includes:

- an ML/TF risk assessment of the business conducted by the entity
- approval and ongoing oversight by boards (where appropriate) and senior management
- appointment of an AML/CTF compliance officer
- regular independent review of Part A
- an employee due diligence program
- an AML/CTF risk awareness training program for employees
- policies and procedures for the reporting entity to respond to and apply AUSTRAC feedback
- systems and controls to ensure the entity complies with its AML/CTF reporting obligations, and
- ongoing customer due diligence (OCDD) procedures (see above).

Part B covers a regulated business' CDD procedures and includes:

- establishing a framework for identifying customers and beneficial owners of customers so the reporting entity can be reasonably satisfied a customer is who they claim to be, and
- collecting and verifying customer and beneficial owner information.

#### **5. Lodging transaction reports**

Regulated businesses have a number of ongoing reporting obligations. These obligations relate to:

- threshold transaction reports (TTRs)



- international funds transfer instructions (IFTIs) reports, and
- suspicious matter reports (SMRs) with AUSTRAC.

Where a business provides or commences to provide a regulated service to a customer that involves the payment or transfer of physical currency or e-currency of AUD10,000 or more (or foreign currency equivalent), the business must submit a TTR to AUSTRAC. The TTR must be submitted to AUSTRAC within 10 business days of the transaction taking place.

If a business sends or receives a funds transfer instruction to or from a foreign country, the business must complete an IFTI report. The IFTI report must be submitted to AUSTRAC within 10 business days of sending or receiving the international funds transfer instruction.

If at any time while dealing with a customer the regulated business forms a suspicion on a matter that the regulated business suspects may relate to any serious offence, tax evasion or proceeds of crime, the business must provide a SMR to AUSTRAC. Offences include money laundering, terrorism financing, operating under a false identity or any other offence under Commonwealth, State or Territory law.

Regulated businesses must submit an SMR to AUSTRAC within three business days of forming the suspicion. If the suspicion relates to the financing of terrorism, the SMR must be submitted within 24 hours of forming the suspicion.

## **6. Record-keeping**

Regulated businesses have a range of record-keeping obligations under the AML/CTF Act. These obligations depend on the type of regulated service it provides but generally include records about:

- transactions
- electronic funds transfers
- customer identification procedures
- AML/CTF programs, and  
due diligence assessments of correspondent banking relationships.