MinterEllison.

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BY EMAIL: economiccrime@ag.gov.au

Attorney-General's Department
Robert Garran Offices
3-5 National Circuit
BARTON ACT 2600

Dear Sir/Madam

Modernising Australia's AML/CTF regime Consultation Paper

MinterEllison appreciates the opportunity to make a submission in relation to the anti-money laundering and counter-terrorism financing (**AML/CTF**) Consultation Paper announced by the Attorney-General on 20 April 2023 (**Consultation Paper**).

MinterEllison is a leading Australian law firm. We advise major financial institutions, including banks, insurance companies and superannuation funds, as well as specialist fund managers, platform operators, financial advice firms, stockbrokers, and other financial intermediaries in Australia and overseas.

The views expressed in this submission are ours alone and do not necessarily reflect the views of our clients.

We agree the regulatory framework applying to money laundering (**ML**) and terrorist financing (**TF**) is unnecessarily complex, burdening the industry with onerous administrative costs. We believe the current regime could do more to facilitate compliance and thereby limits the effectiveness of many regulated entities in responding to ML/TF risk.

We support the following key proposals made in the Paper:

(a) streamlining parts A and B of AML/CTF Programs into a single requirement whilst broadening the applicability of joint Programs;
(b) amending the tipping-off offence to adequately facilitate complex business structures of regulated entities;
(c) extending the regulation of digital currency exchanges beyond 'on' and 'off' ramps;
(d) providing a statutory exemption for assisting an investigation of a serious offence; and
(e) repealing the *Financial Transactions Report Act 1988* (Cth) (**FTR Act**).

We support the adoption of a flexible principle-based model, reinforcing a risk-based approach rather than a high level of prescription. Likewise, we support updating the regime to reflect current international standards such to preserve the reputation of domestic reporting entities in the eyes of international investors.

1. Prescription versus principle-based approach (question 1)

1.1 We generally support the proposals to reinforce the principles, risk-based nature of the AML/CTF regime.

1.2 We believe a principles and risk-based regime is the most appropriate manner to regulate AML/CTF risks in Australia. This approach gives reporting entities the opportunity to respond

appropriately to risks relating to their particular business activities. It also ensures the regime is more adaptable and better placed to deal with emerging risk, without requiring regulatory change. This will help close the gap between the emergence of new threats and the implementation of a regulatory response.

1.3 However, adopting a principles and risk-based model can also lead to uncertainty and may detriment smaller, less well-resourced businesses. Uncertainty often creates a demand for guidance from the regulator (AUSTRAC). It is important that regulatory guidance does not, practically speaking, indirectly result in a high level of prescription. In this respect, the Department should review and clarify the legal status of guidance issued by AUSTRAC as the Rules currently require AML/CTF Programs to 'take into account' applicable AUSTRAC guidance.[1]

1.4 We submit that there should be a clear hierarchy between the AML/CTF Act, which sets out core obligations, the Rules, which contain minimum requirements and any regulatory guidance, which provides practical examples of compliance without binding reporting entities. MinterEllison has developed a set of principles for the design of financial services regulation in the context of the Australian Law Reform Commission Review of the Legislative Framework for Corporations and Financial Services Regulation. We believe that those principles are equally relevant to the structure of AML/CTF regulation. Our design principles and the basis for them are set out in our report on *Streamlining Insurance Regulation* which was attached to the submission of Insurance Australia Group Limited (IAG) to Australian Law Reform Commission's *Financial Services Legislation: Interim Report B* (Report 139, 2022).

1.5 We note that in some areas the Consultation Paper proposes that the Rules should specify detailed requirements – particularly in relation to risk assessments and risk mitigation measures. We believe that amending the Rules to include such prescriptive requirements across the board goes against the proposed principles-based regime. Rather, there should be a power for AUSTRAC to make Rules to where there is a demonstrated need to provide certainty for a section of the industry or where AUSTRAC identifies that industry is failing to take an appropriate risk-based approach.

1.6 AUSTRAC should be required to publish its strategic priorities on an annual basis, and make its own assessment of international and domestic ML/TF risks and the equivalence of foreign regimes publicly available.

2. Streamlining Part A and Part B into a single requirement

2.1 We agree the distinction between Part A and Part B of AML/CTF Programs serves no practical purpose in facilitating the response of reporting entities to economic crime. Separating the Program into two parts is inconsistent with other jurisdictions, making it more difficult for businesses that operate in multiple jurisdictions to comply with Australian requirements.

2.2 New Zealand is an example of the inconsistency of Program requirements between Australia and other countries. New Zealand does not require AML/CTF Programs to be split between Part A and Part B requirements. Rather, customer due diligence measures are incorporated in the body of the Program. Removing the requirement to split AML/CTF Programs into two parts would be consistent with the objectives of the Australia-New Zealand Closer Economic Relations Trade Agreement (**ANZCER**). Further, we submit that consideration should be given to how a Trans-Tasman framework could allow entities to have a single Program that applies uniformly across both jurisdictions. This would be consistent with the ANZCER Single Economic Market agenda 'to enable business to conduct operations across the Tasman in a seamless and regulatory environment.'[2] We encourage the Attorney-General's Department (**AGD**) to liaise with New Zealand's Ministry of Justice to this end, particularly as the Ministry of Justice is also in the process of consulting on proposals to amend the NZ AML/CFT regime.

2.3 If the distinction between Part A and Part B is removed, there will be some resulting uncertainties that the Department will need to resolve. For example:

(a) Reporting entities are currently only required to undertake an independent review of Part A of their Program. The scope of that obligation will therefore need to be clarified. In our

[1] Part 8.7 and 9.7 of the AML/CTF Rules.
[2] https://www.dfat.gov.au/trade/agreements/in-force/anzcerta/Pages/australia-new-zealand-closer-economic-relations-trade-agreement

view, it would be appropriate for the requirement for independent review to apply to the entirety of the combined Program.

(b) A breach of Part A of a reporting entity's Program is currently a civil penalty provision under the AML/CTF Act. If the Department removes the distinction between Part A and Part B, consideration should be given as to whether any breach of the combined Program should give rise to a civil penalty provision. In this regard, we believe that isolated breaches of customer due diligence requirements should not give rise to a civil penalty – rather there should be an additional element, such as gross negligence, wilful misconduct or a systemic pattern of breaches.

3. Assessing risk (question 2)

3.1 We endorse the proposal to introduce an explicit requirement in the AML/CTF Act for reporting entities to assess risk. Setting out an express requirement will help embed the risk-based approach which is the basis of the current regime.

3.2 However, we are concerned about any proposal to introduce an extensive list of factors that reporting entities must consider when assessing risk or utilising the Rules to mandate additional prescriptive details, such as events that triggers a need to review a risk assessment. We refer you to our comments in section 1 above on how the regime should be structured to give effect to the proposal to simplify the regime and to ensure it is a principles and risk-based regime.

3.3 We also believe that industry would benefit if AUSTRAC was to provide greater clarity (in the form of guidance) regarding the role and functions of boards and senior management in relation to risk assessment methodology and processes.

4. Mitigating risk

4.1 We support the proposal to insert a high level requirement into the AML/CTF Act for regulated entities to develop systems to mitigate risks.

4.2 However, the obligation should be for reporting entities to implement appropriate controls to mitigate risk rather than imposing an absolute obligation to mitigate risk.

4.3 We support the proposed requirement that an AML/CTF Compliance Officer be appointed at a senior management level. This will improve the level of oversight and responsibility within an organisation over the entity's compliance with its AML/CTF obligations.

5. Group wide risk management for designated business groups (questions 4 and 5)

5.1 We agree that the current rules fail to recognise and cater for the modern day business – and in particular, the way in which business groups operate through related companies (located onshore and offshore). The proposed model would better facilitate information sharing within groups to address ML/TF, in so far as a flexible approach is maintained. Changes to the current framework would assist reporting entities manage compliance costs and resource constraints particularly where they operate in multiple jurisdictions and have to comply with various AML/CTF regimes.

5.2 We believe that any entity related to a reporting entity should be permitted to be a part of a designated business group (**DBG**). However, we also recommend the Department consider permitting other structures to operate as a DBG such as joint ventures, financial planning dealer groups and parties that together operate a fund or managed investment scheme.

5.3 However, becoming a member of a DBG should not trigger a requirement for the relevant member to have to comply with the AML/CTF regime. Rather, the existing test (i.e. provision of designated services and the geographical link test) should continue to apply to determine whether an entity needs to comply with the AML/CTF regime.

5.4 It is also important for the Department to consider any changes to the DBG definition when reforming the tipping-off offence.

6. Proliferation financing risk (question 6)

6.1 We endorse proposals that capture proliferation risk in a flexible manner, to ensure that impose onerous obligations are not imposed on businesses which do not have any real risk of financing the propagation of weapons of mass destruction.

6.2 The government could introduce an entry level obligation requiring reporting entities to assess the level of proliferation risk relating to their business. If a reporting entity has a reasonable basis for concluding that the risk of proliferation financing is low, it should not have any further obligations.

6.3 We also believe that consideration should be given to the interaction between the AML/CTF regime and the UN and autonomous sanctions regimes. These regimes significantly overlap but are not well coordinated.

7. Foreign branches and subsidiaries

7.1 We do not agree with the proposals in respect of foreign branches and subsidiaries.

7.2 The proposals suggest amending the AML/CTF Act to include specific requirements for Australian businesses operating overseas to apply measures consistent with their Australian AML/CTF Programs in their overseas operations, to the extent permitted by local law. This would significantly increase the compliance requirements of Australian businesses.

7.3 The Australian AML/CTF regime has been developed based on a proposition that Australian AML/CTF law should regulate business conducted in Australia and local AML/CTF law should regulate business conducted in other countries. This is based on the requirement for Financial Action Task Force (**FATF**) members to implement measures to address the FATF recommendations and are assessed on the extent to which they have done so. We believe it would be more appropriate for the Australian regime to specifically recognise the equivalence of regulation in other jurisdictions which have committed to implement the FATF's standards and which are not under increased monitoring by FATF or identified by FATF as a high risk jurisdiction, so that no further measures need to taken by Australian business operating in those jurisdictions.

8. Customer due diligence (questions 8 and 9)

8.1 We agree with the proposed model of customer due diligence, subject to flexibility being afforded to entities to make their own assessment, rather than a strictly prescriptive model. We would however be concerned if this requires reporting entities to assess customer risk on an individual basis. Currently, entities can group customers for the purposes of identifying risk type. Any proposal to assess risk of individual customers would result in a significantly higher compliance burden for business.

8.2 We are also concerned with some of the language used in the proposals. For example, the Consultation Paper proposes that reporting entities should 'ensure' transactions are consistent with a customer's business and risk profile. This suggests that businesses should prevent unusual transactions rather than simply identify and if appropriate report such behaviour.

8.3 The proposals in relation to the enhanced customer due diligence and ongoing customer due diligence seem to involve a heightened level of prescription in the AML/CTF Act itself. This seems to contradict the overarching purpose of the reforms to reinforce a risk-based approach. Specific triggers requiring the implementation of enhanced due diligence should be located in the rules where appropriate.

8.4 We acknowledge that if Australia's safe-harbour and simplified due diligence provisions are not internationally compliant, they need to be amended. However, we believe that an safe harbour for low-risk customers is appropriate. Furthermore, any revised standards should be flexible and facilitative of modern forms of ID verification.

9. Lowering the reporting threshold for gambling sector (question 10)

9.1 We note that the new proposed customer due diligence exemption threshold for gambling services is based on current exchange rates. However, we note that the USD/EUR 3,000 threshold was adopted in the version of the FATF recommendations originally adopted on 20 June 2003. While USD 3,000 was worth approximately AUD 4,460 on that date, EUR 3,000 was worth approximately AUD 5,228.[3] We therefore submit it would be more appropriate to use a threshold of AUD 5,000.

[3] Based on historical exchange rates provided by OFX at: https://www.ofx.com/en-au/forex-news/historical-exchange-rates/ According to OFX, the exchange rates on 20 June 2003 were: AUD:USD 0.67255 and AUD:EUR 0.573799.

10. Amending the tipping-off offence (questions 11 and 12)

10.1 We support the Department's proposal to amend the tipping-off offence to better facilitate information sharing between related entities to better manage risk.

10.2 Having regard to our experience in advising clients, the current tipping off regime is too restrictive and obstructive of information sharing in a number of situations where there is a genuine need to share information about a SMR to manange and mitigate ML/TF risks amongst parties who are not related bodies corporate and/or because of a commercial transaction that results in SMR-related information being communicated from buyer to seller.

11. Regulation of digital currency exchanges (questions 14 and 15)

11.1 We acknowledge the need to regulate digital currency exchanges beyond 'on' and 'off' ramps, in line with FATF standards and we support the need to expand the types of services in relation to digital currency that should be regulated.

11.2 However, rather than just expanding the services captured, we encourage the Department to review the definition of digital assets more broadly, noting FATF's uses the concept of 'virtual asset service providers'. New Zealand's AML/CFT regime has adopted that definition and therefore doing the same here would facilitate better trans-Tasman and global alignment. In any case, the definition of digital currency should be aligned with the broader process of consultation and reform in relation to digital assets, such as Treasury's 'token mapping' process.

11.3 We query the need to regulate financial services provided in relation to an ICOs and other related fund raising activities. We note that companies engaging in capital raising by issuing securities are current exempt from AML/CTF regulation. It is not clear why capital raising through an ICO should be treated differently.

12. Modernising the travel rule obligations (questions 16 and 17)

12.1 It is our understanding that the Department is proposing the following two key changes to the existing travel rule provisions:

(a) requiring the verification of payer information and inclusion of payee information (in line with FATF recommendation 16); and

(b) extending the travel rule to remitters and digital currency exchange providers, requiring those providers to collect and verify payer and payee information for transfers on behalf of customers to other businesses.

12.2 We are concerned that imposing the travel rule across remittance services would be inefficiently broad in its application. Similarly, where payment involves the transfer of value through bank accounts, imposing such obligations on designated service providers will result in duplication. We therefore suggest limiting the application of the travel rule to digital currency exchanges where payment does not flow through a bank account.

12.3 Care also needs to be taken when defining the roles performed by entities in the wire transfer process (i.e. who is the originator, ordering institution, intermediary institutions, beneficiary institution, and beneficiary) which has a flow-on effect on who must obtain and/or send what information.

12.4 Any new information requirement requires systems to be designed or altered which will involve cost and time. This needs to be taken into account when setting the timeline for implementing any such reform.

13. Exception for assisting an investigation of a serious offence (question 18)

13.1 We acknowledge the need to reduce the practical inefficiencies of the current framework relating to this exemption. However, we suggest certain measures should be adopted to prevent the proposed reforms from producing undesirable outcomes. It is important that any changes do not impose any further obligations on reporting entities. The consultation paper states that a reporting entity would need to form a 'reasonable belief that carrying out the customer due diligence measures would alert the customer to ethe existence of a criminal investigation'. We submit that

the 'keep open notice' should be exhaustive in stipulating what is required from a reporting entity in assisting an investigation, as opposed to a reporting entity having to form its own view.

13.2 Likewise, unlike the current system, which limits the granting of the exemption to one regulatory body, AUSTRAC, the proposals could involve a number of different entities issuing 'keep open notices'. This could give risk to uncertainty as to the validity and form of such notices. Likewise, there is potential for two agencies to issue similar or contradicting notices to the same entity, greatly increasing the difficulty of compliance. We therefore believe there should be a detailed regime regulating the framework under which agencies can issue keep open notices. The rules should provide a specific form which the notices must adopt, such to provide certainty to industry as to the validity of the notices. Likewise, AUSTRAC should monitor individual agencies in their use of 'keep open notices'.

13.3 Finally, consideration must be given to the interaction with the sanctions regimes and the *Criminal Code Act 1995* (Cth). If a reporting entity is provided with a 'keep open notice', this may conflict with prohibitions in these regimes.

14. Revised obligations during COVID-19 pandemic (question 19)

14.1 We support the proposal to provide longer-term options for flexibility in how regulated entities meet their customer due diligence obligations. This should be a risk-based decision for reporting entities and should not be based on prescriptive requirements.

14.2 We believe that there are many low risk circumstances where the use of unauthenticated copies of identification documents does not create significant risk and reporting entities should be free to do this where they have appropriately assessed the risk of doing so.

15. Repeal of the *Financial Transactions Report Act 1988*

15.1 We support this reform as it will remove a 'legacy' statute and help to streamline the laws that regulate AML/CTF in Australia.

16. Legal, accounting, conveyancing and trust/company services (questions 23 to 28)

16.1 We acknowledge the need for Australia to align its AML/CTF regime with international standards by regulating 'tranche-two entities'. In terms of what services should be regulated under the AML/CTF Act we suggest the Department make a category of designated services unique for legal service providers.

16.2 The extension to lawyers should apply at the business level (i.e. partnership or incorporated practice) and should not impose any liability on individual lawyers who are not in sole practice.

16.3 Each new designated service must also be capable of being interpreted and applied in the Australian context. Terms such as 'assets', 'securities accounts', operation or management of companies', 'legal arrangements', 'business entities' are broad and have no established meanings. The reforms should make appropriate references to existing legislation (such as the *Corporations Act 2001* (Cth)) and well understood legal terminologies.

16.4 We do not believe the following legal services pose a material ML/TF risk and therefore should not be covered by tranche-two regulation:

(a) Property and M&A transactions undertaken by listed companies or regulated entities are subject to rigorous risk based due diligence and oversight by the transacting parties. These transactions take place within a mature regulatory framework and facilitated by the banking system.

(b) Property, infrastructure and related corporate activities undertaken by government departments, agencies and statutory bodies take place within the public procurement process including probity, risk assessments and auditing.

(c) Advisory services which do not involve handling of funds/assets for the underlying transaction should be excluded from AML or at last be given relief from full compliance. For example advice on a proposed tax structure or financing deals can take place at different stages. The proposed transaction may not proceed. Lawyers may cease to be involved before a transfer of funds or assets takes place.

(d) Managing client money in the course of providing legal services should not be deemed to be carrying out a 'designated remittance arrangement' which attract additional AML/CTF compliance obligations under the AML/CTF Act.

(e) Appropriate consideration needs to be given when or if providing legal services for non-commercial purposes, ie pro bono legal services, should be regulated.

Adjusting the regime for lawyers

16.5 Guidance is needed to assist lawyers in understanding what specific ML/TF risks pervade the legal services industry. Furthermore, regulated legal service providers should have access to the new beneficial ownerships register for client due diligence.

16.6 Any AML/CTF obligations that apply in relation to parties that are not clients should be carefully defined. For instance, a counterparty in a property transaction or an agent of the client (such as an overseas law firm).

16.7 It is also important for legal service providers to be able to rely on the completed due diligence conducted by another reporting entity including a referring law firm.

Ethical and professional obligations to clients

16.8 AML/CTF obligations must not cause lawyers to breach their professional and ethical obligations owed to the courts and to their clients.

16.9 Legal professional privilege must be preserved which includes making an express exemption for suspicious matter reporting and in responding to requisitions and exercise of powers by AUSTRAC and law enforcement agencies.

17. Real estate sector (questions 29 and 30)

17.1 Care needs to be taken when bringing new sectors into the regime to ensure AML/CTF procedures are not duplicated across the same transaction. Many property transactions have already been vetted for ML/TF risks by banks. For acquisitions of indirect property interests in wholesale property funds, AML customer due diligence requirements already apply. Duplicating these obligations will create significant and needless cost and effort for property companies. Cross-border restrictions on capturing and storing customer information under privacy policy must also be considered in how they will impact the ability of real estate agents to uphold proposed AML/CTF obligations.

17.2 It will also be important to ensure that the customer of real estate service providers is properly identified to ensure customer due diligence obligations only arise for customers who pose a ML/TF risk and the timing of those obligations also needs to reflect that.

17.3 It is important that a risk-based approach applies to the sector, where the appropriate level of due diligence is determined by the assessment of risk. Consideration should be given to distinguishing between low-risk assets, such as retail shopping centres and commercial property transactions which are subject to high levels of due diligence and scrutiny, and higher-risk assets such as residential properties with higher customer turnover. It is also important to exclude services provided within corporate and joint venture structures.

17.4 There also needs to be flexibility in the application of the regime to the real estate sector. Obligations should not be imposed on service providers posing no material risk. We query the application of the regime to leasing and property management. Such an approach does not seem consistent with international practice or the requirements of the FATF standards (Recommendation 22 only applies to real estate agents when they are involved in transactions for their client concerning the buying and selling of real estate).

17.5 In any case, where real estate transactions involve the provision of finance from a bank, real estate service providers should be able to rely on the customer due diligence processes undertaken by other parties involved in the transaction. This may require facilitation to require reporting entities to certify they have performed customer due diligence on request by another reporting entity.

Please contact us if you have any questions about any of our submissions. We committed to working with the Department and the industry to develop a regulatory framework to combat ML/TF risk that is fit for purpose, modern and compliant with international standards. We would welcome the opportunity to meet with the Department to discuss our submission.

Yours faithfully
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