

Monday, 14 October 2024

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Sir/Madam

Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024

Chartered Accountants Australia and New Zealand, CPA Australia and the Institute of Public Accountants (we/our) together with our respective affiliate bodies represent over 350,000 professional accountants in Australia, New Zealand and around the world.

We support the Anti-Money Laundering and Counter-Terrorism (AML/CTF) Amendment Bill 2024 (the Bill) which expands the regime to include professional services, many of which are offered by our members. We provide this submission in response to the Bill and the accompanying Explanatory Memorandum (EM).

We acknowledge and support the changes since the final consultation in June 2024 which reflect stakeholder feedback and minimise the regulatory burden for new reporting entities. Of note the proportional approach taken as below:

- replacing prescriptive identification and verification procedures with taking reasonable steps for customer due diligence
- there is no obligation to risk-rate pre-commencement customers
- the amendment to proposed designated service 9, so that it captures only the forms of address which may obscure the true location of the business.

Below are our key comments which are further elaborated in Appendix A.

Key comments

- We note the Senate Standing Committee for the Scrutiny of Bills has raised several legal concerns in relation to this Bill in their Scrutiny Digest 12 of 2024. We recommend the Attorney General fully address each of the concerns raised.
- We support the transitional provisions contained in Part 4 of Schedule 3 addressing the commencement date for new reporting entities, which will include many of our members who are professional accountants. However, any significant delays to the passage of the Bill through parliament or finalising updates to the accompanying Rules should lead to an

adjustment to the proposed timeframes to enable an orderly and effective transition to the amended AML/CTF regime.

- The definition of “qualified accountant” in section 5 of the *Anti-Money Laundering and Counter-Terrorism Financial Act 2006* (the Act) must be amended to align with section 88B of the *Corporations Act 2001* and Australian Securities and Investments Commission (ASIC) Corporations (Qualified Accountant) Instrument 2016/786.
- We continue to seek an exclusion for restructuring practitioners appointed under the Part 5.3B of the *Corporations Act 2001* from the proposed designated professional services in Table 6.
- As there will be a cost burden for new reporting entities to become compliant, no additional costs such as an industry contribution levy should be imposed on these entities.

We also look forward to participating in industry forums to determine the necessary amendments to the *AML/CTF Rules Instrument 2007 (No. 1)* (the Rules). These rules are crucial in determining the impact on our members offering designated services.

In the first instance, if you would like to discuss our feedback in greater detail, please contact Belinda Zohrab-McConnell at

Sincerely,

Simon Grant FCA

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Appendix A

Scrutiny Digest 12 of 2024: Senate Standing Committee for the Scrutiny of Bills

Overall, we note the Senate Standing Committee for the Scrutiny of Bills (the Committee) has raised several legal concerns in relation to this Bill in their Scrutiny Digest 12 of 2024. We recommend the Attorney General to fully address each of these concerns.

Additionally, we provide our comments below.

Abrogation of privilege against self-incrimination

The Act already provides for compulsory production of documents/information and a general use immunity (subject to some exceptions for civil and criminal proceedings under the Act). The Bill inserts new offences, requires the production of documents and information and provides a general use immunity. However, it also expands the exceptions, such as the categories of proceedings in which compulsorily produced documents/information may be used in evidence against the person who produced them.

We support the Committee's view that privilege against self-incrimination is an important common law right. Any Bill which seeks to limit this privilege is only acceptable if it is accompanied by both a *use immunity* and a *derivative use immunity*. We request the Attorney General include a derivative use immunity within the Bill.

Reversal of the evidential burden of proof and significant matters in delegated legislation

The Bill proposes a new section 123(4) that disclosure of a suspicious matter report by specified persons will be excepted from the tipping off offence if:

- the disclosure is made in good faith for the purpose of dissuading the customer from engaging in conduct that does or may constitute an offence, or
- the disclosure is to another reporting entity for the purposes of detecting, deterring or disrupting money laundering, the financing of terrorism, proliferation financing, or other serious crimes.

The evidential burden of proof is reversed for each of these, meaning each person relying on the exception must prove they made the disclosure in line with the exemption rather than the prosecution proving they didn't. However, the EM has not provided sufficient basis for this reversal which overrides common law principles. We support the Committee's view that the EM should be appropriately amended.

It will also be critical for appropriate regulatory guidance to be provided by AUSTRAC that clarifies what evidence the person should retain and provide illustrative examples of likely situations where the exception applies.

Strict liability offences

The Bill provides that failure to appear for examination will be a strict liability criminal offence (eg proof of recklessness, negligence or intention to commit a crime is not required) punishable by up to 3 months imprisonment. However, the *Guide to Framing Commonwealth Offences* states that strict liability is only appropriate where the penalty is fines or penalty units, not imprisonment.

We do not consider it appropriate to hold a person criminally liable unless intention, recklessness or negligence is proven. If the policy intent is to compel compliance with the provisions relating to the attendance at hearings without creating an undue burden on the courts, then we suggest the Bill is amended to limit the penalty to a fine of up to 60 penalty units, not imprisonment.

Transitional provisions

We support the transitional provisions contained in Part 4 of Schedule 3 addressing the commencement date for reporting entities providing services listed in Table 6. Table 6 includes services offered by professional accountants. Given the considerable regulatory workload that professional accountants already face, we consider the proposed timeframes reasonable, and necessary. Professional accountants need this time to become familiar with their new compliance obligations, which include developing an AML/CTF program, embedding new processes where needed and training staff in both AML/CTF risk awareness and effective implementation of new processes.

Adequate time for industry consultation with AUSTRAC is also needed to amend the AML/CTF Rules to reflect an amended Act and develop the necessary sector specific guidance materials and toolkits for new reporting entities. An adequate transition period will also enable other regulators to adjust/reduce their compliance obligations to enable those professional accountants, that will become reporting entities, to apply their limited resources to become compliant with the AML/CTF regime.

Where there are significant delays in the passage of the Bill through parliament, we would seek for the Minister to invoke their powers under Schedule 12 and adjust the proposed timeframes to maintain an 18-month transition period. Equally, where extended time is required for consultation on the Rules, we would also seek for the Minister to invoke their powers under Schedule 12 and adjust the proposed timeframes to maintain an 18-month transition period from the finalisation of amended Rules.

Definition of Qualified Accountant

The Bill refers to the defined term “qualified accountant” in sections 67A (exemption-escrow services) and 123 (offence of tipping off, exception – crime prevention). However, section 5 of the Act defines “qualified accountant” as “a person who is a member of “(a) CPA Australia; or (b) “Chartered Accountants Australia and New Zealand” or (c) a body specified in the AML/CTF Rules”.

The definition in the Act must be amended for legislative consistency with section 88B of the [Corporations Act 2001](#) and [ASIC Corporations \(Qualified Accountant\) Instrument 2016/786](#) with the explicit inclusion of the Institute of Public Accountants.

Restructuring practitioners

Designated service 3 in Table 6: Professional Services, captures handling a person's property (money, assets, digital assets etc) whilst acting for or assisting a person in a transaction.

Designated service 6 captures assisting and planning corporate restructures. We are concerned the inclusion of these services may unintentionally capture registered liquidators appointed under the *Corporations Act 2001* to a small business as a restructuring practitioner or, to a small business restructuring plan.

Unlike other external administrations, where a registered liquidator stands as an officer of the company, in the role of a restructuring practitioner, they act on behalf of the company. Even so, the activities of a restructuring practitioner are regulated by ASIC under the *Corporations Act 2001*, agreed to by the directors and overseen by creditors.

As the activities of a restructuring practitioner are already highly regulated, as distinct from other parties handling a person's property or assisting to undertake an informal corporate restructure, we seek an explicit exclusion for registered liquidators appointed under section 5.3B of the *Corporations Act 2001* from designated services 3 and 6.

AUSTRAC Funding

As there will be a cost burden for new reporting entities to become compliant, no additional costs such as an industry contribution levy should be imposed on these entities. We reiterate our comments made in earlier submissions, that as the extension of the AML/CTF regime will benefit all Australians and the nation's reputation, the work of AUSTRAC should be funded by all Australians.