25 June 2024

Attorney-General's Department
4 National Circuit
BARTON ACT 2600

By email: economiccrime@ag.gov.au

Dear Sir/Madam

Modernising Australia's Anti-Money Laundering and Counter-Terrorism Financing Regime

The Australian Financial Markets Association (AFMA) represents the interests of over 130 participants in Australia's wholesale banking and financial markets. Our members include Australian and foreign-owned banks, securities companies, treasury corporations, traders across a wide range of markets and industry service providers. Our members are the major providers of services to Australian businesses and retail investors who use the financial markets. A significant proportion of AFMA's members are reporting entities for the purposes of the AML/CTF Act.

We are pleased to provide a submission to the Department's Consultation Papers regarding modernising Australia's AML/CTF regime (**the Consultation Papers**). AFMA has long-supported both the simplification of the AML/CTF Act and Rules and the extension of the regulatory scope of the AML/CTF regime to incorporate Tranche Two entities. Accordingly, we remain committed to engaging with the Department throughout the consultation process.

In preparing our submission, it is noted that AFMA works closely with the Australian Banking Association (**ABA**) and Australian Custodial Services Association (**ACSA**) and has had the opportunity to review the submissions from these organisations to the Consultation Papers. We endorse the comments contained in these submissions, specifically the comments from the ABA regarding the reforms to the definition of "Bearer Negotiable Instrument" and the proposed reforms under the heading of Investigating a Serious Offence.

Australian Financial Markets Association
ABN 69 793 968 987
Level 18, 45 Clarence St, Sydney NSW 2001
Tel: +612 9776 7907
Email:secretariat@afma.com.au Web: www.afma.com.au

Executive Summary:

AFMA notes the following, by way of executive summary:

- It is imperative that reporting entities are provided with sufficient time to implement the reforms in a measured and appropriate manner, based on an implementation timeline that is agreed by Government and industry and provides sufficient comfort for reporting entities undertaking best endeavours to comply;
- In considering reforms to AML/CTF programs, AFMA supports restoration of the risk-based approach and the program being one that articulates high-level principles only. The collapsing of the current Part A/Part B framework will require further consideration of the application of governance processes, penalty provisions and independent review requirements;
- AFMA supports the proposed changes in relation to business groups and is of the view that membership of a business group should be voluntary as opposed to being mandatory;
- The Government should implement a regulatory model in relation to foreign branches/subsidiaries that minimises regulatory duplication and respects processes undertaken in foreign jurisdictions that are not materially deficient from a FATF perspective;
- Reforms to customer due diligence requirements should reduce regulatory burden, remove prescription and promote efficiency in terms of the provision of designated services;
- The Government should consult further on the proposed amendments to IFTI reporting, including engagement on reportability as well as the institution with the primary obligation for reporting. Consideration should be given to having a broad exemption for institutional transfers of securities, derivatives and financial products;
- Amendments to the tipping off offence need to be framed objectively and facilitate enhanced sharing of information between related parties;
- Government should align the definition of "financial institution" to the FATF definition; and
- The passage of the reforms, particularly including bringing Tranche Two entities within regulatory scope, should be the catalyst for a wholesale review of the AUSTRAC Industry Contribution model.

Principles Underpinning Simplification & Modernisation

In responding to the Consultation Papers, AFMA and its members support the following principles that should underpin the reform process and the design of Australia's AML/CTF legislative and regulatory framework:

- Articulation of core requirements only in the Act with additional granularity and detail in the Rules;
- Restoration of the primacy of the risk-based approach, with as little prescription within the Act and Rules as is permissible to achieve/maintain FATF compliance;
- Minimisation of regulatory duplication through deference to processes undertaken in other jurisdictions, to the extent that these jurisdictions have AML/CTF frameworks that are not materially deficient from a FATF perspective;

- Clear articulation of legal obligations that minimise ambiguity and the necessity for reporting entities to obtain independent legal advice on matters of interpretation;
- A formal definition as to what is AUSTRAC Guidance and how such guidance informs regulatory expectations; and
- The continuation of existing exemptions so as to not increase the regulatory burden for entities that currently benefit from those exemptions, with these exemptions being contained in the Rules to ensure that they remain current and fit-for-purpose.

Legislative Consultation and Assumption

AFMA notes the advice from the Department that it is currently unclear as to whether the consultation process will include consultation on an Exposure Draft of the Bill prior to it being introduced into the House. AFMA's view is that such consultation is vitally important and, while AFMA agrees that the Bill will be subject to Senate Committee review, it is our experience that undertaking significant amendments to a Bill through a Committee process is difficult. Accordingly, AFMA's strong preference is that meaningful consultation on the Bill (in conjunction with the draft Rules) occur prior to its introduction into the House.

AFMA also notes that a key aspect of simplification/modernisation is bringing Tranche Two entities within regulatory scope and that, in order to do so, a number of new types of designated services are proposed. Based on interaction with the Department, AFMA's submission assumes that these new types of designated service only impact external service providers and not services currently being provided by existing reporting entities, including by employees working in-house for reporting entities, and we recommend that this position be clarified in the drafting to exclude existing reporting entities. We note that the drafting of a number of the new designated services could capture current reporting entities providing advisory and other services and will engage further with the Department to the extent that the new designated service types may capture in-house personnel working for current reporting entities.

Implementation Timeframes and Commencement

We understand from discussions with the Department that, while ultimately a matter for Government, it is the current plan that the legislation and rules to give effect to the reform measures are to be completed in the 2024 calendar year, with reporting entities having a twelve-month period to operationalise the changes.

While AFMA is, in general, supportive of the reforms, the time and resources necessary to implement the reforms, including system changes (financial crime systems, front and back-end customer systems), reviewing and uplifting existing documentation and to implement the new program requirements, cannot be over-stated. To that end, our view is that it is necessary for the legislation/rules to provide a staggered implementation phase, one that allows for the highest priority issues to be addressed within the Government's timelines and allows for the other reforms to be implemented in a methodical and appropriate manner, together with timely AUSTRAC guidance and comfort for reporting entities from the Government and AUSTRAC that there will not be any risk of regulatory action where reporting entities are undertaking best endeavours to comply with the reforms.

This should ensure that Australia meets its international obligations and allows reporting entities an appropriate amount of time to give effect to the reforms and set a strong foundation for reporting entities to comply with the AML/CTF regime. It should also allow for Tranche Two entities to be brought within regulatory scope through the simplified and modernised requirements.

Similar to the views expressed by the ABA and COBA, AFMA recommends that the Department develop a transparent and realistic implementation timeline that demonstrates effective progress towards FATF expectations while allowing (existing and new) reporting entities to implement the reform program in a measured and appropriate way.

AUSTRAC Industry Contribution

Given the breadth of the proposed reforms, the bringing in of Tranche Two entities within regulatory scope and the potential changes to matters such as IFTI reportability obligations, AFMA strongly reiterates its previously-articulated view that the enactment of the simplification/modernisation reforms should be the catalyst for a wholesale review of the AUSTRAC Industry Contribution model.

For completeness, AFMA has held a long-standing view that the Government's Cost-Recovery Guidelines apply to the AUSTRAC Industry Contribution and that all reporting entities should contribute to the recovery of AUSTRAC's operating expenses. Our view is that these fundamental criteria should be reflected in the updated charging model.

AML/CTF Programs

The Consultation Papers articulate a theme of "streamlining" AML/CTF programs for reporting entities. While this includes the removal of the current Part A/Part B designation in existing programs, AFMA's view is that streamlining needs to be broader, through removing prescription in the Act/Rules and allowing reporting entities the autonomy to determine what is appropriate for inclusion in a program based on their understanding of the risks arising from their businesses and customers. Our view is that the AML/CTF Program should be a principles-based document that does not include matters of operational procedure or control.

Currently, the application of the penalty provisions in the Act/Rules is dependent on whether an infringement relates to Part A or Part B of the program. In streamlining the AML/CTF programs into one consolidated program, it will be necessary for a clear articulation as to how the penalty provisions are proposed to apply, such that any penalty is calibrated to the infringement.

Similarly, the collapsing of the current Part A/Part B distinction into one consolidated program will require clarity as to the governance requirements. Noting that adherence to governance requirements is ultimately a matter for the reporting entity, AFMA supports a proposition that the Board has oversight of the reporting entity's risk assessment and strategic decisions in relation to risk management. The approval of the risk assessment should be provided by relevant senior management and the extent of the information to be provided to the Board for oversight/approval should be at the reporting entity's discretion. Clarity is also needed as to the independent review requirements in the event that Part A and Part B are consolidated into a single program.

AFMA also notes that a number of its members operate through a branch in Australia, that is, there is no local board as there is no separately incorporated Australian entity. In these circumstances, to

the extent that there is a requirement for an Australia-specific AML/CTF program, then adherence to any AML/CTF governance requirements specified by the Act/Rules may be delegated to senior management. AFMA notes that there are designations within the APRA/ASIC-regulated Financial Accountability Regime that may be instructive in terms of determining appropriate seniority from a governance perspective.

The current exemption for reporting entities that only provide Item 54 designated services to only maintain and comply with Part B of the program should be retained; that is, the collapsing of the existing Part A/Part B structure into one consolidated program should not increase the regulatory burden for such entities. AFMA also notes the large operational burden that will arise if it is necessary that the risk assessment is done on a per reporting entity basis and there should be the ability for the risk assessment to be conducted at the business group level.

Business Groups

AFMA broadly supports the proposed change from "designated business group" to "business group" and the removal of the requirement that an entity is required to be a reporting entity in order to be part of the business group. This change reflects how reporting entities with multiple entities in their corporate structure currently manage AML/CTF compliance. Given the myriad of corporate structures that exist and the different roles and responsibilities of different entities, the composition of a business group should be determined by reporting entities on an opt-in basis as opposed to being mandatory for all related entities.

The Consultation Papers refer to the concept of a "business group head" with significant responsibilities but does not provide clarity as to the nature of this role and how it interfaces with the responsibilities of senior management and the AML/CTF Compliance Officer. We recommend that the role of a "business group head" is defined with greater certainty and AFMA queries the utility of designating a "business group head" for existing reporting entities. We would also like to understand how the concept of Business Group Head interacts with requirements of the Financial Accountability Regime.

Similar clarity is required in relation to the nature and obligations of an AML/CTF Compliance Officer, such as in circumstances where the responsibility for AML/CTF compliance may be split between different lines of defence such that it is impractical for all responsibilities to be centralised in a singular AML/CTF Compliance Officer.

AFMA understands that that the Department has considered whether the business group concept is appropriate where reporting entities operate a "Non-Operating Holding Company" (**NOHC**) structure, which may be adopted by ADIs that operate diversified businesses and split their activities that are subject to prudential regulation from other activities. Our view is that the business group concept should be sufficiently broad to apply to NOHC structures, notwithstanding that the NOHC itself may not be a reporting entity.

Simplified Obligations for Foreign Branches and Subsidiaries

AFMA represents a number of members that operate, and provide designated services, in multiple jurisdictions. Our membership includes offshore headquartered institutions (including banks) that

operate in Australia through subsidiaries/branches and also Australian-headquartered entities that have offshore branches/subsidiaries.

AFMA has long-advocated for the recognition of and deference to AML/CTF frameworks and processes undertaken in offshore jurisdictions that are not materially deficient from a FATF perspective. AFMA strongly encourages the Department to implement a regulatory model that reduces duplication and enhances customer outcomes where a customer receives designated services from the same entity or related parties in different jurisdictions. We continue to support the ability for customers to be "passported" between jurisdictions.

From a principles perspective, it is AFMA's view that where a designated service is provided to a customer outside of Australia through a foreign branch or subsidiary, then there should be no additional compliance obligations from an Australian AML/CTF perspective. To this end, we support the retention of the existing exemptions in the Act/Rules that apply to designated services that is provided by a reporting entity at or through a permanent establishment of the entity in a foreign country, including exemptions relating to applicable customer identification procedures, ML/TF risk assessments and ongoing customer due diligence (including transaction monitoring and enhanced customer due diligence).

Further, reference is made in the Consultation Papers to Recommendation 18 and the requirement that foreign branches/subsidiaries apply home country standards where the standards of the host country are "less strict" than the home country. AFMA's view is that the term "less strict" is to be interpreted in a manner that suggests material non-compliance from a FATF perspective, determined objectively. AFMA members operate in a number of jurisdictions that adopt a different, potentially more prescriptive approach to AML/CTF compliance; however, a differing approach does not result in a conclusion that the approach of one jurisdiction is "less strict" than the other. The practical application of the current provisions is that Australian obligations are triggered even where a customer is being booked to a legal entity outside Australia where some services are being provided by an Australian entity. This is an example of a circumstance where deference should be provided to the booking jurisdiction where that jurisdiction is not materially deficient from a FATF perspective.

We note that an authoritative definition/list of jurisdictions that AUSTRAC perceives to be "less strict" would assist compliance in this area.

In relation to the scenario where a foreign-headquartered organisation operates in Australia through a local branch or subsidiary, to the extent that the home office jurisdiction is not materially deficient from a FATF perspective then the program and processes that are required in the home office should pass muster from an Australian perspective, obviating the requirement for an Australian AML/CTF program. In the case of branches, this would also address the governance issues associated with there not being a local Board.

In discussions with the Department, the Phase 1.5 Reliance changes were cited by the Department as an example of a model that would reduce regulatory burden. AFMA's observation on this example is that, at least in terms of its membership, while not a large number of financial institutions have adopted reliance arrangements, the members who have implemented such arrangements have done so at a significant cost and time-expense which may not be proportionate to the AML/CTF risk

mitigation objective. These implementation exercises have highlighted the complexity and line-by-line theoretical legal analysis needed on a per jurisdiction basis to implement such arrangements. AFMA therefore suggests further industry consultations with AGD as a later phase to consider potential improvements to the reliance arrangements to ensure they are risk-based and proportionate.

Customer Due Diligence

AFMA notes the intention of the proposed changes to the customer due diligence requirements, which, at a high level, require a reporting entity to conduct an initial Customer Risk Rating (CRR) of each customer prior to the provision of a designated service, with the level of due diligence necessary being aligned to the category of risk that the customer is placed. There are a number of issues arising from a review of the Consultation Papers that will either need to be refined or clarified for the new customer due diligence requirements to deliver efficiencies as opposed to increasing complexity and regulatory burden.

The Consultation Papers state that the risk assessment needs to be undertaken "on reasonable grounds" and that there are six indicia of the customer that need to be known before the reporting entity can be reasonably satisfied. Many of these indicia are currently assessed after the provision of the designated services, such as identification/verification of beneficial owner and PEP screening. On this basis, if the six indicia are required to be known before the reporting entity can be "reasonably satisfied" as to the risk rating of the customer, then the provision of the designated service can only occur once those processes are undertaken, thereby slowing down the ability for the customer to receive services. As a result, it is unclear how there is a reduced regulatory burden under the proposed changes and it is unclear how this approach provides regulatory relief as compared to standard KYC, especially when considering the cost of implementing the changes.

Additionally, the proposed model may present challenges in terms of the provision of designated services to vulnerable customers and, in the event that the final model requires the determination of the risk rating prior to the provision of the designated service then an exemption akin to the current Chapter 79 should be included.

AFMA notes that the requirement in the Act will be that the reporting entity is "reasonably satisfied" that the customers are who they claim to be. This can be seen as being at odds with the indicia set out in the Consultation Paper, which relate more to the characteristics of the customers. AFMA maintains that the provision of the designated service should be able to occur once the necessary criterion in the Act is satisfied.

The proposed approach exacerbates regulatory friction to the extent that it is inconsistent with how other jurisdictions undertake customer due diligence, which is at odds with a fundamental objective of the simplification/modernisation process, being to enhance regulatory efficiency through alignment with other jurisdictions.

Given that the risk rating is proposed to be assigned to the customer prior to the provision of a designated service and the Department's confirmation that it is not proposed that reporting entities

have an "ongoing KYC" obligation, then the risk rating will be determined without access to key customer information, such as transaction information.

Additionally, the Consultation Papers retain an element of prescription regarding certain matters, such as the applicable customer identification procedures for particular entity types. AFMA maintains the view that a key goal of the simplification process is to reduce prescription and restore the primacy of the risk-based approach, given that reporting entities know their businesses and customers.

Noting that simplified due diligence is currently available for listed entities and their subsidiaries, amongst other entity types, AFMA submits that these customer-types continue to be eligible for simplified due diligence going forward and additionally that simplified due diligence be available for other appropriate entity types, e.g., entities that are subject to either prudential or conduct regulation in the offshore jurisdiction.

In summary, AFMA supports a simplified CDD requirement that removes prescription and requires reporting entities to assess and understand the risks associated with each new and ongoing business relationship. Reporting entities should be required to demonstrate that CDD steps are undertaken as soon as reasonably practicable.

International Funds Transfer Instruction (IFTI) Reporting

AFMA notes the proposed changes to the IFTI Reporting requirements, which may broadly be summarised as:

- Amending the trigger for reportability from the instruction to the transfer, so as to reduce the operational burden and ambiguity associated with amended/aborted instructions;
- Streamlining the current IFTI-E and IFTI-DRA into one report; and
- Changing the party with primary responsibility for reporting to that closest to the Australian customer.

For completeness, it is noted that the Consultation Papers are silent on the types of transactions that are reportable.

We have set out our comments in relation to each of these aspects and other aspects to the proposed reforms to IFTIs below.

<u>Timing for IFTI Reform</u>

AFMA very much agrees with the comment in the Consultation Papers that the simplification and modernisation of the IFTI reporting framework is a priority for reform. However, given the breadth of the proposed changes, the IFTI-related issues that are not considered in the Consultation Papers and the operational impact should the changes in the Consultation Papers materialise, IFTI reform should be the subject of additional consultation and industry engagement beyond the 2024 calendar year. Consideration should be had to consulting on IFTI reform on a standalone basis.

Lack of clarity on reportability

AFMA and AUSTRAC engaged significantly from 2020 to 2022 regarding various scenarios where there was not sufficient clarity as to whether a reporting obligation arose and indeed some scenarios where industry was steadfastly of the view that no obligation arose, with AUSTRAC suggesting otherwise. This detailed engagement, which included a series of workshops and brought in subject matter experts from AFMA member firms on the various products under discussion, resulted in AUSTRAC producing a Draft Regulatory Guide.

Importantly, this Draft Regulatory Guide was not finalised, primarily due to legal ambiguity arising as to whether the views on reportability that were articulated by AUSTRAC in the draft guide aligned with independent legal advice obtained by AFMA's members. Given this disconnect, it was agreed that the reportability of certain scenarios would be clarified through the simplification/modernisation reform process. Accordingly, it is surprising to AFMA that the Consultation Papers do not address the fundamental threshold issue as to what scenarios are reportable. This is particularly concerning against the proposed timeline to adopt the upcoming changes. Reporting entities continue to amend its systems and processes with the adoption of the ISO20022 format.

A key example of the disconnect as to reportability is trade finance. AFMA's view, as expressed to AUSTRAC, is that for trade finance transactions involving guarantees, the legal nature of the relationship is one whereby the ordering institution is providing an independent guarantee to the payee through the beneficiary institution, as opposed to just facilitating a transfer. The nature of this relationship results in differences which are fundamental from a reportability perspective, such as:

- The issuing bank has the personal obligation to pay and may do so prior to receiving funds from the importer, and has no recourse should the importer default and becomes insolvent, calling into question whether there is an instruction by a payer to transfer money controlled by the payer;
- It is up to the ordering institution and not the importer to determine whether the conditions of the letter of credit have been satisfied.

The scenario is best thought of as a transfer of the financial institution's own money to fulfil a contractual obligation and, as noted in the Draft Regulatory Guide, where a transfer is at the complete discretion of the financial institution, then the money cannot be construed as being controlled by the payer. In other words, it is difficult to see how the control criterion is satisfied for transaction scenarios where it is fundamental that the payer does not have control over the funds. In addition, there are many components to a trade finance transaction in which complete payer information may not be complete, impacting a reporting entity's compliance.

In AFMA's view, it is impossible to properly reform the reportability of funds transfers without addressing the fundamental question as to what is reportable and ensuring that there is both consistency as to the legal basis for transactions being reported, an understanding of the ML/TF risks associated with the payments and an appropriate implementation time-frame should there be a

change to reportability of certain transactions. These considerations inform AFMA's approach to timing.

Amending the trigger from instruction to transfer

Broadly, AFMA is supportive of the change of the trigger for reporting from the instruction to transfer the funds to the actual transfer. We note some member feedback that there still may be circumstances where a transfer is initiated by the ordering institution but rejected by the beneficiary institution, which could still result in some reports arising from transfers that do not proceed. However, the incidences of reporting aborted transfers should be reduced through the change to the trigger.

Streamlining the IFTI-E/IFTI-DRA into one report

The Consultation Papers states that the Department is proposing to streamline the currently separate IFTI-E and IFTI-DRA reports into one report. AFMA is supportive of the proposal to streamline the IFTI-E and IFTI-DRA into one report, which aligns with the proposal to change the trigger for IFTI reporting to the value transfer. There is, however, no detail as to the form of this streamlined report apart from a commitment from the Department that the streamlined report will help reduce regulatory burden and complexity. We encourage further engagement between AFMA, AUSTRAC and the Department to ensure that the streamlined report may deliver on these objectives and be agnostic as to payment channels and other messaging types.

AFMA is also of the view that, given the significant operational challenges that reporting entities will need to undertake in changing reporting requirements, reporting under the existing requirements be grandfathered until the reporting entity is operationally equipped to undertake reporting under the new requirements.

Changing the primary obligation for reporting

The Consultation Papers state that the Department is proposing to change the institution that has the primary obligation to report the IFTI from the sending/receiving institution to the ordering/beneficiary institution. The catalyst for this change is stated to be to align the reporting obligation with the institution that has the customer relationship, thereby enhancing data quality. Additionally, given that the proposed change will impose a significant, new compliance burden on smaller ordering/beneficiary institutions, the Consultation Papers suggests that correspondent banks/remittance providers will be able to report on these institutions' behalf, subject to having in place certain controls around assuring the data quality for the reports.

This proposed change represents a fundamental shift in IFTI reporting and will take a number of years to operationalise. In AFMA's view, the case for such a fundamental shift has not been made and there may be other ways to enhance data quality to meet the stated policy rationale behind the reforms. Further, it is difficult to envisage a circumstance where an institution will voluntarily agree to assume a reporting obligation on another institution's behalf, particularly given the assurances that will be required to be given around data quality. Given the proposed change to the reporting entity for IFTI purposes is not driven by FATF compliance, this is a particular area of the proposed reforms that should be the subject of further consultation before policy positions are finalised.

AFMA notes that it is unclear as to where the reporting obligation sits where the ordering/beneficiary institution is not a "financial institution" for the purposes of the AML/CTF Act. Additionally, in circumstances where a credit card scheme is the mechanism through which the payment is initiated, clarity is needed as to whether the scheme will be considered to be the ordering institution.

Exemption for Institutional Transfers of Securities, Derivatives and Financial Products

Noting the policy intent behind IFTI reporting and the operational burden applying the IFTI reporting requirements to transfers of property as opposed to money, AFMA strongly suggests that there is a broad exemption from reporting for transactions in securities, derivatives and financial products, including sales and also custody and funding transactions (such as repo transactions and securities lending arrangements). The intelligence value in these types of transactions is very small compared to the operational burden, and it remains open to reporting entities to lodge a Suspicious Matter Report to the extent that there is an aspect of concern in relation to a transfer of such a product.

In this regard, we note that in the IFTI Draft Regulatory Guide, AUSTRAC proposed an exemption for foreign exchange swap transactions, which aligns to the request for a broader institutional exemption.

Definition of "financial institution"

A significant aspect of the engagement leading to the Draft Regulatory Guide was the disconnect between the SWIFT definition of "financial institution" and that in the AML/CTF Act, which resulted in institutions being required to manually screen and consider reporting obligations for message types that are utilised by SWIFT "financial institutions" but are not similarly defined in the AML/CTF Act. A significant compliance burden would arise to the extent that Australia amended the definition of "financial institution" to align to the FATF definition such that reportability of wholesale payments and transfers only occurs where there has been misuse. As per the submission point in relation to securities/derivatives/financial products above, such an amendment would reflect the limited intelligence value associated with large institutional payments and would assist with the future proofing of the reporting regime.

In this regard, AFMA notes that the proposed value transfer services and the role that non-financial institutions (as currently defined) play in the value transfer chain should be the catalyst for expanding the definition of "financial institution," both for the purposes of IFTI reporting and also correspondent banking.

Tipping Off

Amendments to the tipping off offence was a key priority for AFMA in its submission to the Department in 2023 and AFMA is pleased with the proposal to narrow the tipping off offence. In particular, AFMA supports the trigger for the offence being the disclosure of information where it is likely to prejudice an investigation or potential investigation, only on the basis that the offence is framed on an objective basis, such as where it is reasonably likely that the disclosure of the information is likely to prejudice an investigation or potential investigation. It remains imperative that the manner in which the offence is framed allows for enhanced sharing information between related parties and other reporting entities so as to properly disrupt serious financial crime. In

framing the tipping off offence, there should be clarity as to the class of investigations that are within the scope of the offence and ensure that sharing of information with law enforcement and other government agencies will not invoke application of the offence.

The amendments to the tipping off offence should also address current issues, such as in relation to dispute resolution processes with customers and staff in circumstances where the dispute has arisen due to financial crime related concerns.

AFMA also notes that the offence should apply at the reporting entity level and not impact employees that are giving effect to the instructions of their employer.

In making reforms to the tipping off provisions, consideration should be given to eliminating the requirements set out in the current Section 123 of the Act, which require written confirmations/attestations in advance of sharing information within a corporate group. These requirements are impractical and there are other internal checks/balances that ensure that the shared information is not misused.

Other Issues Arising from the Consultation Papers

Bearer Negotiable Instruments

As noted above, AFMA has had the opportunity to review the submission points made by the ABA on proposed reforms in relation to Bearer Negotiable Instruments (BNIs). We agree that the definition of BNI should be limited to instruments that are in physical form, not negotiable and are genuinely bearer in nature (i.e. the bearer is not named).

Consideration should be given as to whether the transfer of such instruments should always give rise to a reporting obligation, with AFMA agreeing that the ML/TF risks of BNIs (including transfers of BNIs) should be assessed as part of the National Threat Assessment.

Travel Rule

AFMA notes that reforms being proposed in relation to payment information and the travel rule are currently the subject of FATF review. AFMA urges the Department to ensure that any changes made to the Australian requirements are consistent with the FATF recommendations. To that end, AFMA would support including any changes in this area to be included in the Rules, given the relative ease associated with making amendments to ensure continued compliance with FATF recommendations. We also submit that any changes in relation to the travel rule be aligned to the Government's Strategic Review of the Payments System.

AFMA notes that, under the proposed changes to the travel rule, intermediary institutions are required to screen for and potentially undertake remedial action in circumstances where the information received is incomplete or incorrect. It is our view that there will need to be a clear articulation and/or AUSTRAC guidance to minimise ambiguity as to when such remedial actions need to be undertaken.

Correspondent Banking Due Diligence

AFMA reiterates its concern regarding the level of prescription that is currently contained in relation to correspondent banking relationships, both in terms of the frequency of the due diligence on

correspondent banking relationships, the timing of the requirement for a written record and the requirement for senior management approval. Each of these matters should be determined by the reporting entity in accordance with the risk-based approach, as opposed to being prescribed. In particular, it should be confirmed that the "written record" requirements includes entry into a reporting entity's systems.

Definition of "financial institution" and related definitions

As noted above, a key source of friction in the Australian AML/CTF framework is the narrow definition of "financial institution," which has implications for IFTI reporting, correspondent banking and threshold transaction reports. AFMA recommends that the Australian definition of financial institution is aligned to the FATF definition, thereby ensuring that future FATF recommendations relating to financial institutions may be more easily incorporated into the Australian framework.

Further, AFMA supports the inclusion of an internationally-consistent definition of "non-bank financial institution" which would remove the requirement for a definition of Authorised Deposit-Taking Institution (ADI).

Certainty is required around the definition of "agent" such that there is only one definition that encompasses current concepts of "signatory" and "agent." There is currently ambiguity regarding who is able to act with authority and/or be the legal representative of another person.

Transaction Monitoring/Suspicious Matter Reports

The low threshold for suspicion and the extension of the suspicion to all crimes leads to a significant number of SMRs being reported that may have limited intelligence value, particularly where it is not related to money laundering or terrorism financing. Additionally, it is difficult to apply the current SMR provisions in circumstances where a suspicion arises in Australia but the customer is a counterparty with an offshore entity. We reiterate our previously expressed view that SMR reporting should be part of the simplification/modernisation reform project through rationalisation of the types of crime that give rise to a reporting requirement and a risk-threshold that needs to be met to trigger reportability.

AFMA welcomes clearer guidance on the types of criminal activity to be targeted in tailored transaction monitoring. The revised approach would require reporting entities to undertake risk-based, tailored transaction monitoring for the following categories of designated offences which focus on primary money-laundering and terrorism financing and serious offences:

- terrorism financing;
- money laundering;
- proliferation financing (where relevant); and
- serious money laundering predicate crimes.

We submit that to align with this approach, the scope of reporting obligations in section 41 of the Act be similarly defined. Presently, an obligation to report a suspicious matter under section 41 arises (provided certain conditions are met) in relation to the investigation of, or prosecution of, a person for the following offences:

- evasion, or attempted evasion, of a Commonwealth, State or Territory taxation law;
- an offence against a law of the Commonwealth or a State or Territory; or
- offences under the Proceeds of Crime Act 2002 or associated regulations, or Commonwealth or Territory legislation corresponding to that Act or regulations.

Should Section 41 not be amended to align with the proposed approach to designated categories of offences, an obligation to report against a broader range of offences than a reporting entity is required to monitor against may arise. We note that aligning Section 41 would still enable a reporting entity to voluntarily report on other matters, should it be considered appropriate. At a minimum, it is proposed that the inclusion of "an offence against a law of the Commonwealth or of a State or Territory" be amended to reflect only those serious predicate offences that are contemplated in the Consultation Paper.

AUSTRAC Information

A number of unintended consequences follow the extension of the definition of "AUSTRAC Information" to include information generated by' AUSTRAC "for the purposes of the AML/CTF Act." This definition remains extremely broad and is unworkable and it has created difficulties in determining the appropriateness of sharing such information in various contexts, including within the business group. AFMA's view is that this definition should be included as part of the consultation process.

Fintel Alliance

Given the expansion of regulated entities to include a number of new types of reporting entity, AFMA would support expansion of the membership of the Fintel Alliance such that it is more representative of reporting entity types, including global banks.

* * * * *

Please contact me on (02) 9776 7996 or rcolquhoun@afma.com.au if you have any queries about this submission.

Yours sincerely,

Rob Colquhoun
Chief Operating Officer
Head of AML