

7 September 2017

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

Dear Secretary

Submission on the Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017

We are grateful for the opportunity to provide our comments on the Anti-Money Laundering and Counter-Terrorism Financing Bill 2017 dated 17 August 2017 (the **Bill**).

The Bill and the other amendments to follow from the statutory review of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (the **AML/CTF Act**) are important reforms and their implementation will serve to prevent criminal abuse of our financial system.

We have identified a matter of drafting in the Bill which we would like to submit to the Committee for consideration. This matter is outlined below.

The tipping off offence and corporate groups

We welcome the proposal to introduce a concept of corporate groups in the AML/CTF Act to allow for greater sharing of information to help detect, deter and disrupt serious cross-border financial crimes.

In our experience, reporting entities that are part of a multinational corporate group have found that the AML/CTF Act prevents them from escalating potential AML/CTF issues to senior management and legal and compliance personnel. These personnel often form part of a global financial crimes team located offshore and have the expertise necessary to identify money laundering and terrorism financing risks.

The legal issue preventing our clients from doing this is that under the AML/CTF Act it is a criminal offence for a reporting entity to disclose to someone other than AUSTRAC:

- (a) that the reporting entity has reported a suspicion to AUSTRAC;
- (b) that the reporting entity has formed a reportable suspicion; or
- (c) any other information from which the recipient of the information could reasonably be expected to infer that the report has been made or that the suspicion has been formed.¹

This is also known as the offence of “*tipping off*”.

¹ AML/CTF Act section 123.

The term “*reporting entity*” under the AML/CTF Act means a person who provides a designated service and the term “*person*” means an individual, company, trust, partnership, corporation sole or body politic.² This means that the tipping off offence prevents a company who is a reporting entity from disclosing the matters above to any other company, including to a company in its corporate group.

This issue is mitigated in the AML/CTF Act by the inclusion of an exemption for disclosures within a designated business group. The exemption provides that a reporting entity “X” may disclose the matters in paragraphs (b) and (c) above to another reporting entity “Y” without committing an offence if:

- (a) the reporting entity X belongs to a designated business group;
- (b) the reporting entity X has adopted a joint AML/CTF program that applies to the reporting entity X and relates to the designated business group;
- (c) the information disclosed relates to the affairs of a customer of reporting entity X;
- (d) the disclosure is made to another reporting entity Y that belongs to the designated business group; and
- (e) the disclosure is made for the purpose of informing reporting entity Y about the risks involved in dealing with the customer.³

A limitation of this exemption is that it does not allow a reporting entity to disclose information to a company in its corporate group who is not a member of the designated business group.

Companies can only form a designated business group together if each of the companies is a reporting entity under the AML/CTF Act, which means that to qualify for the group each company must provide a designated service with the requisite geographical link to Australia.⁴ This means that a company offshore which provides no designated services and does not have the requisite geographical link to Australia is not a reporting entity and cannot form a designated business group with a reporting entity in Australia. In practice, within a multinational corporate group, it is unlikely that the group’s head office offshore or the company which employs senior management and legal and compliance personnel offshore would constitute a reporting entity under the AML/CTF Act.

The Final Assessment Regulation Impact Statement to the Bill also identifies this issue, noting at page 6 that:

A particular concern is that related bodies corporate are unable to share information about joint customers, thereby impeding the ability to effectively and efficiently manage the ML/TF risk associated with a joint customer across a corporate group.

The Bill has sought to amend the exemption for designated business groups to allow for disclosures within a multinational corporate group. As noted above we support this extension on the basis that this would allow for the consideration of risks by global AML/CTF experts. However we suggest that the proposed amendment does not achieve this objective.

The proposed amendment deletes paragraph (b) of the exemption above and adds the words “*or a corporate group*” to paragraphs (a) and (d). However it still requires the entity to whom the reporting entity X discloses

² AML/CTF Act section 5.

³ AML/CTF Act subsection 123(7).

⁴ AML/CTF Act subsection 6(6).



the information to be a reporting entity. As discussed above, it is unlikely that an offshore head office or the offshore company which employs relevant senior management and legal and compliance personnel would be a reporting entity under the AML/CTF Act. Further, even if the offshore company were a reporting entity, it is likely that it would have formed a designated business group with reporting entity X, which means that the existing exemption would already apply to the two entities.

We have provided some suggested amendments to the Bill in the Annexure for your consideration.

Yours sincerely

[Sgd K Jackson-Maynes]

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ANNEXURE

Suggested amendments to the Bill in relation to corporate groups

51 Paragraph 123(7)(a)

After “designated business group”, insert “or a corporate group”.

52 Paragraph 123(7)(b)

Repeal the paragraph.

53 Paragraph 123(7)(d)

After “designated business group”, insert “or [to a body corporate that belongs to](#) the corporate group (as the case may be)”.

[54 Paragraph 123\(7\)\(e\)](#)

[After “other reporting entity”, insert “or the body corporate \(as the case may be\)”.](#)

[After “dealing with the customer”, insert “or assisting a reporting entity to comply with an obligation to communicate information to the AUSTRAC CEO under subsection 41\(2\)”.](#)

[55 Paragraph 123\(7AA\)](#)

[After “A reporting entity”, insert “or a body corporate”.](#)

[After “subsection \(7\)”, insert “\(as the case may be\)”.](#)

~~54~~⁵⁶ Paragraph 123(7AA)(a)

After “designated business group”, insert “or [to another body corporate that belongs to](#) the corporate group (as the case may be)”.

[57 Paragraph 123\(7AA\)\(b\)](#)

[After “the other reporting entity”, insert “or the other body corporate \(as the case may be\)”.](#)

[After “dealing with the customer”, insert “or assisting a reporting entity to comply with an obligation to communicate information to the AUSTRAC CEO under subsection 41\(2\)”.](#)

~~55~~⁵⁸ At the end of section 123

Add:

Definition

(12) In this Act:

corporate group means a group of 2 or more bodies corporate that are related to each other under section 50 of the *Corporations Act 2001*.