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17 November 2006

Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
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CANBERRA ACT 2600
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Dear Committee Secretary,

ASFA Submission to Senate Legal and Constitutional Affairs Committee on the Anti-Money Laundering and Counter-Terrorist Financing Bill 2006

The Association of Superannuation Funds of Australia Ltd (ASFA) is pleased to make this submission to the Senate Legal and Constitutional Affairs Committee on the *Anti-Money Laundering and Counter-Terrorist Financing Bill 2006* (“the Bill”), introduced into Parliament on 1 November 2006.

ASFA is a non-profit, non-political organisation whose mission is to protect, promote and advance the interests of Australia’s superannuation funds¹, their trustees and their members. Our members, which include corporate, public sector, industry and retail superannuation funds, account for more than 5.7 million member accounts and over 80% of superannuation savings.

ASFA’s General Position on AML/CTF

ASFA acknowledges that the Government has introduced this Bill to ensure that Australia meets its international obligations under FATF. ASFA’s general position on anti-money laundering and counter-terrorist financing (AML/CTF) legislation, as expressed in the *ASFA Policy Principles – November 2005*, is as follows:

“22.1 – ASFA supports the use of a risk-based approach to regulation but does not support an industry / government partnership approach which would require industry bodies to take on the role of regulator.

22.2 – ASFA considers that due to both the regulatory environment in which funds operate and the operating procedures in place to meet these requirements, complying

¹ The term ‘superannuation fund’ includes Retirement Savings Accounts (RSAs) and Eligible Rollover Funds (ERFs).



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regulated funds should be considered low risk of being used for money laundering and therefore exempted from specific record keeping and reporting requirements.”

ASFA strongly believes that the regulatory approach should be risk-based. This would require a legislative framework that sets down principles in line with the FAFT requirements. Such a regime should oblige reporting entities to implement policies and procedures that are tailored to the risks present as well as the size and complexity of the entity. A “one-size fits all” and / or highly prescriptive approach should be avoided.

ASFA therefore welcomes the Government decision to follow a risk-based approach. The current Bill sets down a series of high-level obligations in respect of identification, reporting and record-keeping. It permits the development of Regulations as well Rules to be issued by the Regulator, AUSTRAC. This is a desirable feature of the regime that affords flexibility. It will be very important to ensure that the Regulations and Rules reflect the Government’s risk based approach and avoid the introduction of prescription via subsidiary instruments.

Implementation timeframe

ASFA supports the phased implementation of the Bill’s provisions. It is important that sufficient time is provided between Royal Assent and the commencement date of specific requirements to enable implementation by the superannuation industry.

Part 1 - Commencement

ASFA is concerned that the proposed implementation timetable may be compromised by relevant rules not being available for some considerable time after the Bill has been passed. Reporting entities will be unable to finalise appropriate changes to operations until the details in the Rules and Regulations are available.

ASFA considers it more appropriate that where the operative requirements of Bill provisions are to be set out in Regulations, Rules or Guidelines, the commencement date of the provisions should be linked to the promulgation of those Regulations, Rules and Guidelines, rather than to Royal Assent of the legislation.

Additionally, any compliance activity by the Regulator, AUSTRAC, should be informed by the time of the delivery of the Rules and Regulations.

Part 2 - Identification Procedures - Up-front Identification in Respect of Superannuation

ASFA supports the proposal to require superannuation funds to only identify their members when money is leaving the superannuation system (section 39 of the Bill in conjunction with Items 40, 42 and 44 of Table 1, section 6). This recognises both the

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strong regulatory environment in which superannuation funds operate and the operating procedures currently in place to meet these requirements. The legislation correctly considers complying regulated superannuation funds to be of low risk of being used for money laundering and terrorist financing.

Non-Member Initiated Cashing

Item 43 of Table 1, section 6 specifies as a designated service the cashing of all or part of an interest in a superannuation fund. Cashing is not exempted from the up-front identification requirements by section 39 and thus identification of a member prior to undertaking such a transaction is required.

In the superannuation industry there are cashing transactions that are prescribed by law and not initiated by the member. Such transactions include the payment of unclaimed monies to a state registrar of unclaimed funds. The regime should ensure such transactions not captured by inappropriate customer identification requirements. ASFA will consult with Government on addressing this issue through the AML/CTF Rules or through Regulations amending the Items as permitted by subsection 6(7).

Definition of 'cashing' – items 43 and 45 of Table 1

The term “cashing” (Item 43 and 45 of Table 1, section 6) is not defined in the Bill. In general industry usage, the term “cashing” means the paying out of all or part of a member’s benefit by way of a lump sum. This can be by cheque, electronic funds transfer or the transfer of an asset of equivalent economic value. The superannuation industry makes clear distinction between “cashing”, where a person actually obtains the benefit, and “rollovers and transfers”, where the benefit goes to another fund within the highly regulated superannuation system.

Significantly, while the benefit is cashed “in favour of the member” it may actually be paid to a third party e.g. to a bank in respect of a mortgage debt where the member has claimed financial hardship. Further clarification of the definition of “cashing” in the Rules would be of assistance.

Part 3 – Reporting Obligations – Suspicious Matters, Threshold Transaction and AML/CTF Compliance Reporting

Suspicious Matter Reporting

Section 41 places obligations on reporting entities to report on suspicious matters to the Regulator. It should be noted that the obligation to report on suspicious matters goes beyond money-laundering and terrorist financing to include tax evasion (subpara. 41(1)(f)(i) and (ii) and other illegal activities, investigations or prosecutions (subpara. 41(1)(f)(iii)).

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As these obligations extend beyond money-laundering and terrorist financing, it will be important for the Regulator to issue guidance to assist reporting entities. ASFA looks forward to working with the Regulator on the development of appropriate Rules and Guidelines for superannuation funds.

Scope of Threshold Transaction Reporting

The Bill imposes an obligation on reporting entities to report to the Regulator if they provide a service that involves a threshold transaction. A threshold transaction is a transaction involving the transfer of physical currency, or money in the form of e-currency, where the amount is \$10,000 or more.

Uncertainty remains as to exactly which transactions are captured under the reporting requirement as the term *threshold transaction* is broadly defined and contains linked definitions (e.g. the definition of *threshold transaction* contains the separately defined terms *transfer*, *physical currency* and *e-currency*). Clarification will be required within the Regulations or Rules as to the scope of transactions caught and whether particular transactions or services are exempt.

Superannuation and Threshold Transaction Reporting

Provision is made for the Regulations to specify other threshold limits for listed transactions as well as permitting certain designated services to be exempted under the Rules.

Without proper exemptions, the threshold transaction reporting requirements would significantly impact on superannuation funds. Funds would be required to report every transaction of \$10,000 or more to the Regulator within 10 business days of performing the transaction.

Contributions, rollovers and transfers should be exempted from threshold transaction reporting. Benefits paid out of the system should be subject to threshold transaction reporting but have a higher threshold. The purchase of an annuity, where the money remains within the superannuation system, could be subject to an even higher threshold as the risks are very limited.

ASFA has separately raised this issue with Government and the Regulator and will seek relief in respect of these transactions through the Rules.

Superannuation and AML/CTF compliance reports

Division 5 of Part 3 requires reporting entities to provide a compliance report to the Regulator. Section 49 enables certain Government agencies or an investigating officer to seek additional information and documents from a reporting entity in

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relation to a suspicious matter, threshold transaction or international funds transfer report.

ASFA is concerned that the wording of subsection 49(1), paragraph (i) may place a reporting entity in the position where they are subject to a civil penalty because they fail to produce a requested document even though the entity does not have, and could not reasonably be expected to have the requested document.

It is suggested that section 49 be amended to ensure that no civil penalty applies in respect of a failure to produce a document where the reporting entity does not have, and could reasonably be expected to have, the requested document.

Part 7 – Anti-Money Laundering and Counter-Terrorist Financing Programs

Part 7 of the Bill requires reporting entities to develop anti-money laundering and counter-terrorist financing programs (AML/CTF Programs). The Programs will include policies and procedures to identify, manage and mitigate risk (Part A) and identify customers (Part B).

ASFA believes that any specific customer identification requirements should reflect existing industry practice. For superannuation funds, this would include the member's name, date of birth, residential address and Tax File Number (TFN).

The AML/CTF programs will be required to comply with Rules issued by The Regulator. ASFA anticipates that any concerns with the operation of the provisions as they apply to superannuation entities will be addressed through the Rules.

If you have any questions or comments on this submission, please feel free to contact me at the ASFA Secretariat on 02 9264 9300.

Yours sincerely,

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