



Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act (Cth) 2006

FPA Submission

AML/CTF Review Team
Financial Crime
4 National Circuit
BARTON ACT 2600

By email: amlreview@ag.gov.au

28th February 2014

Dear Sir / Madam

RE: Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act

The Financial Planning Association of Australia (FPA) welcomes the opportunity to contribute to the statutory review of the *Anti-Money Laundering and Counter-Terrorism Financing Act (Cth) 2006* (the AML/CTF Act). Our submission to the Review reflects the desire of the financial planning profession to contribute in an appropriate, effective, and efficient manner to anti-money laundering and counter-terrorism financing in Australia.

A role for financial planners in the AML/CTF regime

Ensuring that Australia's financial framework remains a hostile environment to criminal organisations and terrorist networks is a vital undertaking. The FPA supports AUSTRAC's efforts to accumulate financial intelligence for this purpose. However, a structural analysis of the AML/CTF framework – regarding both underpinnings in principle and in operation – reveals systemic barriers to the financial planning profession being able to contribute to Australia's institutional hostility against criminal exploitation of our financial system. As a result of these barriers, the involvement of self-licensed financial planners, as well as larger bank-aligned dealer groups, is not achieving the objects of the Act as appropriately, effectively, or efficiently as it could be.

To resolve these issues, we are recommending a series of changes aimed towards improving; financial planners' understanding of the object of AML/CTF reporting; examining the framework of AML/CTF regulation in Australia to find an appropriate and effective role for financial planners; assisting financial planners and licensees to collaborate and identify ML/TF risks regarding their business model and customer base; and finding the correct balance between AML/CTF protection and efficient commercial activity.

The FATF reports and recommendations

The uncertainty around the role of financial planning in AML/CTF stems from the fact that neither the 2012 FATF Recommendations and the original 40 FATF Recommendations in 2003 contemplated the involvement of financial planners in their model regulatory principles. Those Designated Non-Financial Businesses and Professions (DNFBPs) which are contemplated by FATF, such as;¹

“[l]awyers, notaries, other independent legal professionals and accountants – when they prepare for or carry out transactions for their client concerning the following activities;

- buying and selling of real estate;
- managing of client money, securities or other assets;
- management of bank, savings or securities accounts;

¹ Financial Action Task Force, *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations* (February 2012), p 20



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- organisation of contributions for the creation, operation or management of companies;
- creation, operation or management of legal persons or arrangements, and buying and selling of business entities”

have only a tenuous relationship to the advisory services provided by financial planning professionals. Though FATF has considered the FPA as a “professional association of qualified financial planners in Australia, playing a role its self regulation,” it has thus far failed to identify financial planners as DNFBPs.²

The only guidance in the FATF guidelines which tends to support the involvement of financial planners in the Australian AML/CTF framework lies in the following discretion offered to FATF members,³

“Countries may also, in strictly limited circumstances and where there is a proven low risk of money laundering and terrorist financing, decide not to apply certain Recommendations to a particular type of financial institution or activity, or DNFBP... Equally, if countries determine through their risk assessments that there are types of institutions, activities, businesses or professions that are at risk of abuse from money laundering and terrorist financing, and which do not fall under the definition of financial institution or DNFBP, they should consider applying AML/CFT requirements to such sectors.”

The view that the financial planning sector poses an ML/TF risk is clearly not shared by the profession, as AUSTRAC’s July 2011 survey of financial planners indicated that only 8 respondents had identified any suspicious matters regarding their clients.⁴ At any rate, the difficulty lies not just in the open discretion to allow or exclude sectors from AML/CTF obligations, but the failure to establish overarching principles, at the level of FATF guidelines, about the money laundering and terrorism financing risks of financial advice.

In addition to the vagueness regarding the involvement of financial planners in framework, the FATF analysis of financial activity offers an ambiguous interpretation of the financial activity which makes financial advice an ML/TF risk. FATF’s 2005 evaluation of Australia’s AML/CTF regime identified three types of financial activity which ‘financial advisers’ were involved in:

1. Participation in securities issues and the provision of financial services related to such issues.
2. Individual and collective portfolio management (covers mgt. of collective investment schemes such as unit trusts, mutual funds, pension funds).
3. Underwriting and placement of life insurance and other investment related insurance (including insurance undertakings and insurance intermediaries (agents and brokers)).⁵

While portfolio management and risk advice are central to the activities of almost all financial planners, FATF’s 2005 report seems to conflate many different kinds of ‘financial adviser’ for the purpose of categorising financial activity in Australia. In particular, they seem to conflate financial advisers who work in large institutions to support transactions with financial planners who offer advice to individuals, companies, and trusts. It is therefore unclear whether professional financial planners are considered

² Financial Action Task Force, ‘*Third Mutual Evaluation Report On Anti-Money Laundering And Combating The Financing Of Terrorism: Australia*’ (October 2005), pp 18-19

³ FATF, above n1 at p 31

⁴ Australian Transaction Reports and Analysis Centre, ‘*Financial services intermediaries*’ (April 2012), p 4

⁵ FATF, above n2 at pp 17-18



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by FATF to be DNFBPs or not, or whether the advice services offered by financial planners pose an ML/TF risk.

Without clear indications from international guidance and best practice about these two key matters, the FPA finds it difficult to assist its members in engaging with Australia's AML/CTF regime beyond customer identification and verification. We therefore rely upon AUSTRAC and the Attorney General's Department for guidance, and ask the Review to consult and consider these factors in their report.

Recommendation 1: The Review, through engagement with AUSTRAC and the FPA, should reconceptualise the framework of AML/CTF regulation in Australia to form a theoretically and operationally consistent role for financial planners.

Recommendation 2: AUSTRAC should engage with industry and representative bodies (such as the FPA) to clearly articulate the ML/TF risks associated with financial advisory services in Australia.

Recommendation 3: Where appropriate, AUSTRAC should consider raising the unique issues facing the Australian financial planning profession with FATF and other international bodies to help define the role of financial planners in the AML/CTF space.

Australia's AML/CTF regulatory framework

The FPA's view is that the lack of clarity regarding Australia's international commitments to AML/CTF regulation has influenced the regulation of financial planners through the AML/CTF Act and AUSTRAC. This manifests in the reporting behaviour of unaligned and independent financial planners, who understand the documentary reporting requirements but do not have the training to form views about the ML/TF risk of their services or clients.

Crucially, the issue does not lie in a lack of regulation. Increasing reporting requirements where the existing reporting requirements do not form part of the culture of financial advice would do little other than increase red-tape. Rather than a band-aid solution, the Review should consider the need to reconceptualise the role of financial advice in the Australian AML/CTF framework, and to re-engineer the relationship between AUSTRAC and the financial planning profession.

The willingness of financial planners to commit to AML/CTF is demonstrated through AUSTRAC's 2012 *Financial services intermediaries* report. In general, planners have an excellent understanding and implementation of customer identification and verification procedures, where 96% of respondents to that survey were confident in their ability to identify potentially suspicious matters regarding the identity of the client.⁶ Where AUSTRAC has raised compliance concerns about financial planners are only in regard to suspicious matter reporting obligations concerning risk factors that involve training specific to the AML/CTF space to identify.

Enforcing Part A obligations on financial planners is not our view of the way forward. As the 2012 FATF recommendations highlight;

"[i]n determining how the RBA should be implemented in a sector, countries should consider the capacity and anti-money laundering/countering the financing of terrorism (AML/CFT) experience of the relevant sector. Countries should understand that the discretion afforded, and responsibility imposed on, financial institutions and designated non-financial bodies and

⁶ AUSTRAC, above n4 at p 4



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professions (DNFBPs) by the RBA is more appropriate in sectors with greater AML/CFT capacity and experience.”⁷

Instead, AUSTRAC should help to empower financial planners with the skills necessary to identify the kinds of behaviour and clients which would form part of an SMR report. In order to provide detailed and effective financial advice, planners must intimately understand the client’s situation and goals. This perspective, when combined with proper training in identifying ML/TF risks, could effectively supplant a document-based regulatory approach to item 54 designated services. This strategy, in conjunction with the more efficient compliance mechanisms available to product distributors and larger financial services firms, could offer AUSTRAC two different but highly complimentary streams of financial intelligence.

This approach conforms far better to the mindset of financial planners – particularly those who are members of the FPA. The obligations of an FPA member, particularly regarding our Code of Professional Practice, appeal to financial planners with a sense of self-responsibility, and a desire to achieve a high degree of competence.

Recommendation 4: AUSTRAC should keep industry engagement and education as a top priority for its surveillance strategy, particular regarding small business and the financial advice sector.

Effective and appropriate regulation for planners

The initial steps to effectively integrate the financial planning profession into Australia’s AML/CTF regime are to locate financial planners within the AUSTRAC’s regulatory system, and to understand that position within it. The following diagram, extracted from AUSTRAC’s supervision strategy, illustrates AUSTRAC’s understanding of the information flows within the Australian AML/CTF regulatory design.⁸

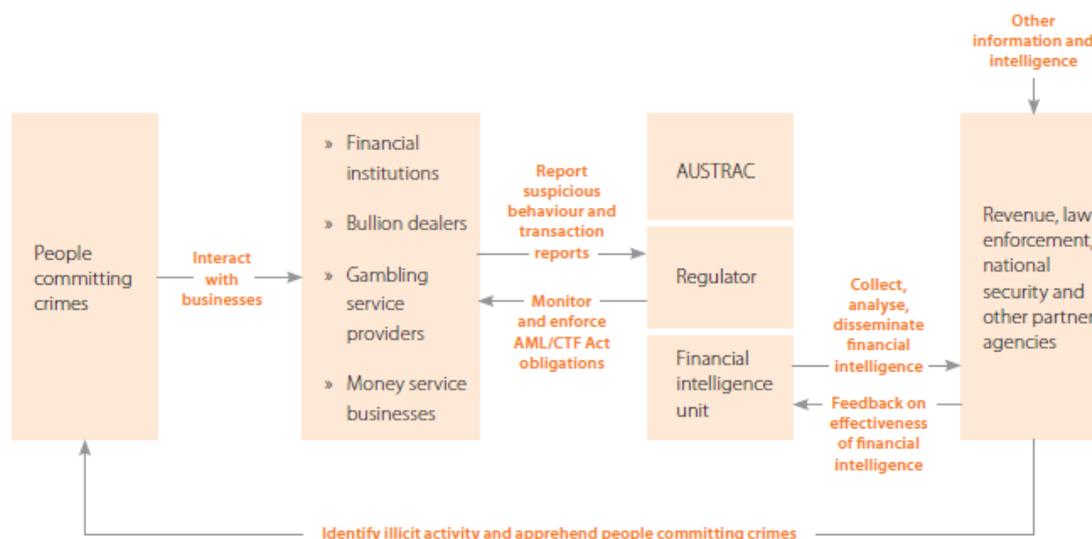


Diagram 1: Flow of information and activities

⁷ FATF, above n 1 at p 31

⁸ Australian Transaction Reports and Analysis Centre, ‘Supervision strategy: 2012-2014’ (December 2012), p 2

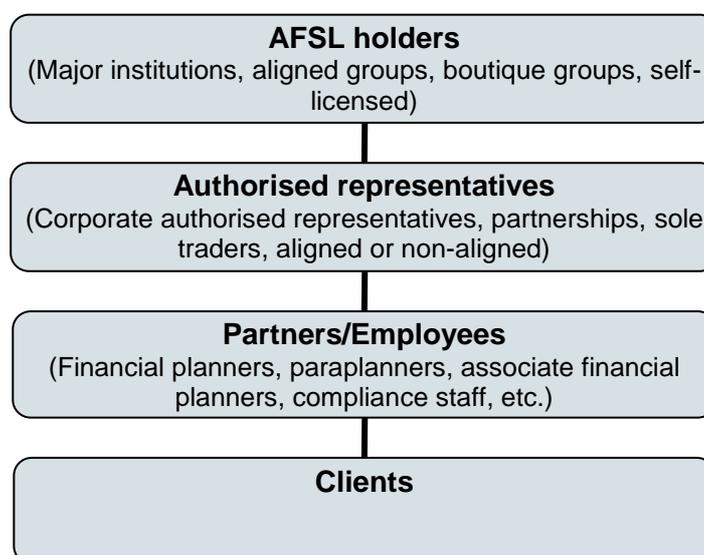


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Though it is not clear where AFSLs and financial planners sit within this framework, particularly in the case of independent or non-bank-aligned financial planners and dealer groups, we suggest that financial planners and licensees exist within the 'financial institutions' sector.

The structural model for the financial planning profession can obstruct the flow of this information to the regulator. The general regulatory structure of our profession, as has formed in response to the requirements of the Corporations Act, tends to follow this form;



Even so, this diagram does not identify all the business and regulatory structures which are relevant to the profession. However, in this case, the relevant 'financial institution' is the AFSL holder, which presents some difficulties for the flow of risk assessment and suspicious matter information through the AML/CTF framework. It is incumbent on the licensee to form views about the ML/TF risks of its designated services, anticipated clients, business model, and other factors. However, in almost all cases, it is only the financial planner – as an authorised representative, employee, or principal - who has face-to-face interaction with the client. There is also wide variance between business models for financial planning practices, some of which are not suited to risk-based AML/CTF regulation at a licensee level.

To solve this problem, the AML/CTF Act and Rules must be sensitive to the different business models of financial planning practices. The Review should examine whether the regulatory burden can be shared between AFSL holders and their authorised representatives. Ideally, this would allow licencees to bear responsibility for KYC obligations, whereas financial planning practices could develop ML/TF risk assessment strategies for their businesses and customers, facilitate training for their planners to recognise suspicious or unusual clients, and submit suspicious matter reports where appropriate.

Recommendation 5: The AML/CTF Act and AML/CTF Rules should allow AFSLs to delegate particular risk assessment and reporting functions to authorised representatives, and AUSTRAC should become actively involved in guidance and soft regulation to better understand and facilitate this regulatory model.



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Education and standards for financial planners

As stated above, the international framework for AML/CTF regulation does little to inform financial planners of their role in the framework. Furthermore, it was established that the regulatory structure of the profession, and of entities within the profession, inhibits the free flow of ML/TF risk information – particularly SMR. To utilise this change to the financial advice regulatory framework, individuals and entities at every stage of the financial planning business model should have access to guidance and education on ML/TF risk assessment. This advice should be appropriate and adapted to the financial advice regulatory structure, as well as the particular financial planning business structure which is relevant to that entity or individual.

In particular, there is a perception amongst financial planners that ML/TF risk assessment primarily relates to their view as to whether or not the client is a money launderer or is financing terrorist activities. This perception is not unwarranted, as the financial planning profession is isolated from the overarching theoretical framework of AML/CTF internationally and in Australia. Misunderstandings about their role within the practical operation of AML/CTF are to be expected, and the only effective response is to establish the role of financial planners in the theory and operation of AML/CTF regulation at a cultural level.

Recommendation 6: The Review should examine the sufficiency and effectiveness of AUSTRAC guidance and engagement on ML/TF risk assessment, particularly regarding the role and objectives of financial planners in this regulatory space.

Thank you again for the opportunity to participate in the AML/CTF Act review. Going forward, we hope to facilitate positive engagement on these issues. If you have any questions, please contact me on 02 9220 4500 or dante.degori@fpa.asn.au.

Yours sincerely,

Dante De Gori
General Manager Policy and Conduct
Financial Planning Association of Australia⁹

⁹ The Financial Planning Association (FPA) represents more than 10,000 members and affiliates of whom 7,500 are practising financial planners and 5,500 CFP professionals. The FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first “policy pillar” is to act in the public interest at all times.
- We banned commissions and conflicted remuneration on investments and superannuation for our members in 2009 – years ahead of FOFA.
- We have an independent conduct review panel, Chaired by Professor Dimity Kingsford Smith, dealing with investigations and complaints against our members for breaches of our professional rules.
- The first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices. This is being exported to 24 member countries and the 150,000 CFP practitioners that make up the FPSB globally.
- We have built a curriculum with 17 Australian Universities for degrees in financial planning. As at the 1st July 2013 all new members of the FPA will be required to hold, as a minimum, an approved undergraduate degree.
- CFP certification is the pre-eminent certification in financial planning globally. The educational requirements and standards to attain CFP standing are equal to other professional bodies, eg CPA Australia.
- We are recognised as a professional body by the Tax Practitioners Board.