



FINANCIAL PLANNING
ASSOCIATION *of* AUSTRALIA

1 December 2021

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

Dear Sir / Madam

Questions on Notice - The adequacy and efficacy of Australia's anti-money laundering and counter-terrorism financing regime

The Financial Planning Association of Australia¹ (FPA) thanks the Committee for their time at the 9 November 2021 hearing of the inquiry into the adequacy and efficacy of Australia's anti-money laundering and counter-terrorism financing (AML/CTF) regime.

We would welcome the opportunity to discuss with the Senate Legal and Constitutional Affairs References Committee any matters raised in our response to the Questions on Notice from the hearing.

If you have any questions, please contact me on 02 9220 4500.

Yours sincerely

Ben Marshan CFP® LRS®

Head of Policy, Strategy and Innovation

Financial Planning Association of Australia

¹ The Financial Planning Association (FPA) is a professional body with more than 12,000 individual members and affiliates of whom around 8,500 are practising financial planners and 5,207 are CFP professionals. Since 1992, 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.
- In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and superannuation for our members – years ahead of the Future of Financial Advice reforms.
- The FPA was 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.
- We have an independent Conduct Review Commission, chaired by Dale Boucher, dealing with investigations and complaints against our members for breaches of our professional rules.
- We built a curriculum with 18 Australian Universities for degrees in financial planning through the Financial Planning Education Council (FPEC) which we established in 2011. Since 1 July 2013 all new members of the FPA have been required to hold, or be working towards, as a minimum, an approved undergraduate degree.
- When the Financial Adviser Standards and Ethics Authority (FASEA) was established, the FPEC 'gifted' this financial planning curriculum and accreditation framework to FASEA to assist the Standards Body with its work.
- We are recognised as a professional body by the Tax Practitioners Board.



FINANCIAL PLANNING
ASSOCIATION *of* AUSTRALIA

QUESTIONS ON NOTICE

The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter- Terrorism Financing Regime

Senate Legal and Constitutional Affairs References Committee

27 August 2021

Senate Legal and Constitutional Affairs Committee

Inquiry into the adequacy and efficacy of Australia's anti-money laundering and counter-terrorism financing (AML/CTF) regime

Questions on Notice – Financial Planning Association

The FPA provides this submission in response to the following Questions on Notice from the Public Hearing held on Tuesday 9 November 2021 of the Senate Constitutional and Legislative Affairs Committee Inquiry into the Adequacy and efficacy of Australia's anti-money laundering and counter-terrorism financing (AML/CTF) regime:

1. What aspects of Tranche 2 of the AML/CTF regime overlap with existing Australian laws that apply to financial planners?
2. What financial implications would Tranche 2 have on the members of the FPA should it apply to financial planners?
3. Is there a need for whistleblower protections for FPA members to meet their AML/CTF obligations?

QUESTION 1 - WHAT ASPECTS OF TRANCHE 2 OVERLAP WITH EXISTING AUSTRALIAN LAWS THAT APPLY TO FINANCIAL PLANNERS?

Existing obligations for financial planners

Financial planning licensees are considered item 54 reporting entities under the AML/CTF Act as such entities:

- hold an Australian Financial Services Licence (AFSL), and
- make arrangements for their clients to receive a designated service from other AUSTRAC reporting entities, such as product providers (rather than provide other services themselves).

Item 54 reporting entities are required to adopt and implement throughout their business a Special AML/CTF program². Special programs only need to include Part B of an AML/CTF program.

AFSL holders, known as 'licensees', authorise financial planners to provide designated services on their behalf. Financial planners may be employed directly by the licensee, or own and operate their own financial planning firm as an authorised representative of the licensee.

Hence, financial planners are the AFS licensee's 'frontline' representatives who interact directly with consumers and undertake identification and other risk assessments to ensure a licensee's compliance with their existing AML/CTF obligations.

Financial planners must comply with and report into the AML/CTF program, processes, systems, and controls of the AFSL who is registered with AUSTRAC as the reporting entity. This is based on the higher ML/TF risk of licensee, not the ML/TF risk of the individual financial planner or their financial planning firm.

² Section 86 AML/CTF Act

The following table provides an overview of the current AML/CTF obligations for financial planning licensees who are item 54 reporting entities, and relevant requirements in the Corporations Act.

Current obligations under AML/CTF Act	Description of current AML/CTF obligations financial planners adhere to	Obligations under other Australian laws
<p>Special AML/CTF program (Part B):</p> <ul style="list-style-type: none"> Focuses on identifying customers and beneficial owners including politically exposed persons and must include how the entity meets 'know your customers' and their beneficial owners' requirements, and the money laundering/terrorism financing risk they pose. 	<p>Must include:</p> <ul style="list-style-type: none"> How the reporting entity collects and verifies customer information to make sure they are who they claim to be, or (for companies and organisations) that they exist. How the entity collects and verifies information about beneficial owners, and what information is collected and verified about beneficial owners How the entity determines if its customer or the beneficial owner is a politically exposed person (PEP). How the entity responds to discrepancies in customer information. How the entity decides when to collect additional information about a customer. 	<p>Corporations Act:</p> <ul style="list-style-type: none"> Licensee must have appropriate systems and processes to ensure financial planners comply with the 'Know Your Client' requirements Financial planner Code of Ethics <ul style="list-style-type: none"> Financial planners must "comply with all relevant laws" Exercise due care and skill in the way they engage each client; understand each client; diagnose each client's needs and issues
<p>Customer due diligence (CDD) procedures</p>	<ul style="list-style-type: none"> Collect and verify customer identification information Identify and verify beneficial ownership Identify whether a customer is a PEP Obtain information on the purpose and intended nature of the business relationship. 	<p>Corporations Act:</p> <ul style="list-style-type: none"> 'Know Your Client' includes: <ul style="list-style-type: none"> a fact find commencing with the identity of the client and their financial circumstances, such as income sources, investments, etc. research both existing financial products held by client and potential alternative products that would achieve client's goals – this process allows planners to identify risks and suspicious activity in relation to products and transactions Financial Adviser Code of Ethics <ul style="list-style-type: none"> exercise due care and skill in the way they engage each client; understand each client; diagnose each client's needs and issues

<p>ML/TF risk management assessment</p>	<p>Risk management assessment by:</p> <ul style="list-style-type: none"> • Identifying risks posed by reporting entity's: <ul style="list-style-type: none"> ○ customer types ○ customers' sources of funds and wealth ○ delivery channel ○ any foreign jurisdictions the reporting entity deals with. • Assessing and measuring risks • Applying controls including: <ul style="list-style-type: none"> ○ Risk-based customer due diligence procedures • Monitoring and reviewing effectiveness. 	<p>Corporations Act:</p> <ul style="list-style-type: none"> • Licensee risk management and conflict of interest obligations • Professional Indemnity Insurance policy requirements • Both these requirements assess the client information identified by financial planners to help determine the overall risks of the licensee <p>ATO reporting obligations</p>
<p>AUSTRAC Reporting obligations</p>	<ul style="list-style-type: none"> • Suspicious matter reports (SMR) for any transaction or interaction that makes you suspicious that someone is acting illegally. 	<p>Corporations Act:</p> <ul style="list-style-type: none"> • 'Know Your Client' includes: <ul style="list-style-type: none"> ○ a fact find commencing with the identity of the client and their financial circumstances, such as income sources, investments, etc. ○ research both existing financial products held by client and potential alternative products that would achieve client's goals – this process allows planners to identify risks and suspicious activity in relation to products and transactions • Whistleblower obligations: <ul style="list-style-type: none"> ○ Report information about a company or organisation, or an officer or employee of the company or organisation, giving reasonable grounds to suspect: <ul style="list-style-type: none"> – misconduct, or – an improper state of affairs or circumstances.... <p>that:</p> <ul style="list-style-type: none"> – breaches the Corporations Act – breaches other financial sector laws enforced by ASIC or APRA – breaches an offence against any other law of the Commonwealth that is punishable by

		<p>imprisonment for a period of 12 months, or</p> <ul style="list-style-type: none"> - represents a danger to the public or the financial system. <ul style="list-style-type: none"> • Breach reporting obligations - required to submit notifications about reportable situations to ASIC: <ul style="list-style-type: none"> ○ Gross negligence or serious fraud ○ Breaches or likely breaches of 'core obligations' ○ Significant breaches ○ Reasonable belief of a breach by an adviser of another licensee
Employee due diligence	Not required	<p>Corporations Act requirements:</p> <ul style="list-style-type: none"> • Mandatory registration on the Financial Adviser Register including fit and proper person test (s921U): <ul style="list-style-type: none"> ○ had a AFSL or Credit Licence suspended or cancelled; ○ had a banning order, or a disqualification order by ASIC ○ has ever been disqualified from managing corporations; ○ has ever been linked to a refusal or failure to give effect to a determination made by AFCA; ○ has ever been an insolvent under administration; ○ in the last 10 years, has been convicted of an offence; ○ in the last 10 years, a Financial Services and Credit Panel has made an instrument against them or given them an infringement notice • Code of Ethics – must comply with all relevant laws (std 1); uphold integrity of profession and hold each other accountable for the protection of the public interest (std 12) • Single Disciplinary Body within ASIC <ul style="list-style-type: none"> ○ Can cancel or suspend mandatory registration

		<ul style="list-style-type: none"> • Licensing requirements <ul style="list-style-type: none"> ○ Authorised by licensee ○ Licensee oversight of compliance with all legal requirements, including AML ○ Comply with the AML program of the licensee as the reporting entity • Reference checking obligations and protocol (s912) <ul style="list-style-type: none"> ○ Licensees must undertake a reference check on an individual seeking to be employed or authorised as a financial adviser <ul style="list-style-type: none"> ▪ appropriate background checks (e.g. referee reports, searches of ASIC's banned and disqualified register and police checks) ○ Former licensees must share information about the performance history of financial advisers with prospective licensee ○ Must use ASIC reference request template <ul style="list-style-type: none"> ▪ help identify the prospective representative and seek details about their previous role and responsibilities. ▪ results/outcomes of compliance audit(s) ▪ breach reports made to ASIC where the breaches were caused or contributed to by the prospective representative in any capacity ▪ any unresolved inquiries or investigations in progress for the prospective representative
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<p>Employee training: AML/CTF risk awareness training program</p> <ul style="list-style-type: none"> for employees, employees being promoted or transferred, senior managers, consultants and new directors 	<p>Not required</p>	<p>Corporations Act</p> <ul style="list-style-type: none"> Minimum education standards include understanding requirements under all relevant laws CPD standard includes undertaking training on legal obligations Exam includes legal obligations Financial Adviser Code of Ethics <ul style="list-style-type: none"> Competency standards and value <p>Professional association obligations</p> <ul style="list-style-type: none"> Membership entry standards CPD <p>Licensee requirements</p> <ul style="list-style-type: none"> Risk management training
<p>Compliance report</p>	<p>Not required</p>	<p>Corporations Act</p> <ul style="list-style-type: none"> Obligation to report breaches or likely breaches of the Corporations Act and Code of Ethics to ASIC <ul style="list-style-type: none"> This includes compliance with Australian laws Breach of Code of Ethics std 1 – advisers must comply with the letter and intent of all relevant laws Annual compliance report and certificate must be lodged with ASIC
<p>AML/CTF Compliance officer</p>	<p>Not required</p>	<p>Corporations Act</p> <ul style="list-style-type: none"> Licensee Responsible Manager Compliance Officer
<p>Third-party reliance</p>	<p>Comply with Chapter 7 of AML/CTF Rules:</p> <ul style="list-style-type: none"> Undertake CDD (identification and verification) and record-keeping, so that the other person is satisfied that it knows who the customer is, <ul style="list-style-type: none"> Based on the type and level of ML/TF or other serious crime risks that the product provider may reasonably be expected to face in its provision of designated services, considering the nature, size, and complexity of the business, including its products, services, delivery channels, customer types, and countries it operates in. CDD processes and systems must be appropriate and consistent with the 	<p>Corporations Act</p> <ul style="list-style-type: none"> Licensing regime <ul style="list-style-type: none"> Financial Planners must either hold an Australian Financial Services Licence or be authorised to provide financial advice by an entity that holds an AFSL. Licensees set policies and controls to meet their financial advice obligations under the Corporations Act Financial planners must operate under and comply with the policies and controls set by the licensee, including record-keeping requirements.

	<p>higher ML/TF risk of financial product providers.</p> <ul style="list-style-type: none"> • Assess ML/TF risk of the customer for the service provided by the product provider, not the services provided by the planners. • Records which demonstrate that the CDD procedure was conducted in a manner consistent with product providers ACIP requirements <ul style="list-style-type: none"> ○ Provide records of the applicable customer identification procedures used to verify the identity of the customer, the beneficial owner of the customer or a person acting on behalf of the customer, and all relevant documents, data and information obtained during CDD. 	
Record keeping	<ul style="list-style-type: none"> • customer identification procedures • Reports made to AUSTRAC: • Suspicious matter reports (SMR) • AML/CTF program and compliance 	<p>Corporations Act</p> <ul style="list-style-type: none"> • Reports made to ASIC • Compliance reports • Advice documentation • 'Know your client' information • Best interest duty – document client's circumstances, objectives including income, investments, assets etc • Financial Adviser Code of Ethics <ul style="list-style-type: none"> ○ must ensure that records of clients, including former clients, are kept in a form that is complete and accurate.
Part B AML/CTF program review	<p>Review Part B AML/CTF Program to ensure the controls, systems and processes remain effective to meet current AML/CTF obligations and ML/TF risks.</p>	<p>Compliance review</p>

Financial planners and third-party reliance

AML/CTF Rule 8.1.7 requires that a reporting entity must apply Part A to all areas of its business that are involved in the provision of a designated service, including in relation to any function carried out by a third party.

Due to the designated services they offer customers, product providers must have in place a Part A AML/CTF program due to their higher ML/TF risk. Financial product providers use financial planners to comply with their CDD verification, re-verification, and ongoing CDD obligations.

The Financial Planning Association (FPA) and Financial Services Council (FSC) developed an agreed AML/CTF customer identification, verification and due diligence guideline and forms based on

appropriate customer identification procedures (ACIP) for the type and level of ML/TF or other serious crime risks product providers may reasonably be expected to face in the provision of the designated services they offer customers. Financial planners' AML/CTF procedures, systems, controls and record keeping must also be appropriate to meet the requirements in the agreed industry guideline and enable planners to effectively complete the customer identification forms and procedures on behalf of product providers and maintain appropriate records³.

Financial planners use the industry developed guideline agreed to by members of the Financial Planning Association and the Financial Services Council. The guideline is consistent with FATF requirements and the Foreign Account Tax Compliance Act (FATCA), and includes standardised customer verification forms covering⁴:

- Individuals
- Australian Companies
- Foreign Companies
- Australian Regulated Trusts
- Unregulated Australian Trusts and Foreign Trusts
- Partnerships
- Associations
- Registered Co-operatives
- Verifying Officer
- US Tax Status Declaration (curing) Individuals
- Tax Status Declaration (curing) Individuals
- Foreign Tax Status Declaration (curing) Entities

As product providers have ongoing CDD requirements⁵, financial planners are regularly requested to undertake ongoing CDD of their clients under the third-party reliance provisions, even though item 54 reporting entities are exempt from ongoing CDD.

Financial planners and AFSL's are exempt from the following ongoing reporting requirements as they do not provide funds "transaction" services and do not transfer currency.

- Threshold transaction reports (TTR) for transfers of A\$10,000 or more in cash (or the foreign currency equivalent).
- International funds transfer instruction reports (IFTIs) for transfers of funds of any value into or out of Australia, made either electronically or under a designated remittance arrangement
- Report cross-border movement (CBM) of physical currency of A\$10,000 (or the foreign currency equivalent) or more if you carry, mail or ship money into or out of Australia.

³ Division 7 of Part 2 of the AML/CTF Act

⁴ Industry is currently reviewing the industry guideline and forms in response to the recent changes to third party arrangements.

⁵ s36 of the AML/CTF Act

QUESTION 2 – WHAT FINANCIAL IMPLICATIONS WOULD TRANCHE 2 HAVE ON THE MEMBERS OF THE FPA SHOULD IT APPLY TO FINANCIAL PLANNERS?

Financial Planners already meet AML/CTF obligations

Tranche 2 of the AML/CTF Act is a duplication of existing requirements that financial planners have complied with for over a decade. Since the enactment of the AML/CTF Act on 12 December 2006, AFS licensees have been required to register with AUSTRAC and meet the obligations of item 54 reporting entities under the Act.

Financial planners either hold their own AFSL or operate as an authorised representative, Corporate Authorised Representative (CAR), or employed planner, under another entity's AFSL, and must comply with and report into the AML/CTF processes, systems, and controls of the AFSL who is registered with AUSTRAC as the reporting entity. This is based on the higher ML/TF risk of licensee, not the ML/TF risk of the individual financial planner risk or their firm.

Undermine existing AML/CTF systems, significant cost to small business

Applying Tranche 2 to financial planners or financial planning firms would create significant confusion and cost; undermine the effective AML/CTF risk management and compliance systems, processes and controls that have been efficiently and effectively assisting AUSTRAC to fulfil its role in protecting Australia since the commencement of the Act; and deliver no additional AML/CTF benefit or protection.

Financial planners would incur the significant cost of undoing existing AML/CTF processes and controls, to put in place new systems and controls based on Tranche 2 requirements and reporting obligations. It will also significantly undermine cost-effective and efficient industry developed solutions to addressing ML/TF risks by financial planners, AFS licensees and Part A AML/CTF program reporting entities; and make the above ACIP/CDD guideline and forms redundant.

This will have a significant impact on financial planners, the majority of whom operate small businesses or are sole practitioners (nearly 90% of licensees have 10 or less financial planners operating under their licence).

Financial planners are not accountants

The FPA is concerned that financial planners are being considered as designated non-financial businesses and professions (DNFBPs or 'gatekeeper professions'), under the banner of accountants.

Accountants offer different services to financial planners. As such, accountants play a different 'gatekeeper' role, and interact differently with the financial system on behalf clients, than financial planners.

The provision of financial planning services is regulated by ASIC under the Corporations Act 2001 licensing regime. An Australian financial services (AFS) licence authorises licensees to:

- provide financial product advice to clients
- deal in a financial product
- make a market for a financial product

- operate a registered scheme
- provide a custodial or depository service
- provide traditional trustee company services.

Financial planners must either be authorised by a licensee or hold an AFSL to provide financial advice to consumers. Accountants are not required to hold an AFSL to provide accounting services to consumers.

Similarly, under the AML/CTF Act financial planning licensees are considered reporting entities who provide item 54 designated services. The AML/CTF Act 2006 has applied to financial planners since the commencement of Tranche 1. To date, the AML/CTF regime has not applied to accountants who provide accounting services.

The different licensing requirements, and the application of the AML/CTF regime, clearly shows that accountants and financial planners provide different and distinct professional services under the law.

These distinctions should be recognised in determining the appropriate application of Tranche 2 AML/CTF obligations.

The FPA request the Committee acknowledge this distinction by excluding from Tranche 2 of the AML/CTF requirements, financial planners who provide Item 54 designated services and are already regulated under the AML/CTF Act.

Cost recovery levy

The current AUSTRAC cost recovery levy applies to entities based on earnings and the number and value of transactions reported to AUSTRAC. Usually, only medium to large businesses are required to pay the levy. These are businesses with one or more of the following:

- earnings of A\$100 million or more
- a large number of transaction reports relative to other entities
- a high total value of transaction reports lodged with AUSTRAC during a calendar year, relative to other entities.⁶

Under the Act, the Minister has the ability to make a determination including for reporting entities to incur a levy of nil based on criteria included in the determination. In the past, this criteria has included small businesses.

The FPA recommends small business should continue to pay nil.

⁶ [Industry contribution levy | AUSTRAC](#)

QUESTION 3 - IS A NEED FOR WHISTLEBLOWER PROTECTIONS FOR FPA MEMBERS TO MEET THEIR AML/CTF OBLIGATIONS?

Financial planners and licensees must comply with suspicious matter reporting obligations in relation to money laundering, tax evasion, welfare fraud, cyber-enabled fraud, and terrorism financing. This requires planners to whistleblow on clients.

As financial planners may hold their own AFSL, or be authorised or employed by a licensee, they may play the role of whistleblower in relation to:

- consumers and business clients
- their employer and/or the entity that holds the AFSL
- product providers who may request certain AML/CTF activity to be undertaken by financial planners under a third-party reliance arrangement.

The FPA notes that s35 of the AML/CTF Act provides protection from liability in relation to anything done, or omitted to be done, in good faith, in carrying out an ACIP, not providing/continuing to provide a designated service due to a suspicious matter, or AML/CTF compliance concerns; and that the information in a suspicious matter report cannot be introduced as evidence in criminal proceedings (s124).

However, financial planners and reporting entities who identify suspicious matters and make a report about a client to AUSTRAC are not offered vital protections under the AML/CTF Act and do not qualify for protection under the whistleblower regime established in the Corporations Act 2001 and Taxation Administration Act 1953. For example, the AML/CTF Act does not include appropriate protection for financial planners and reporting entities from potential client reactions to a belief that a financial planner has made a report to AUSTRAC about them, in line with the following provisions:

- Corporations Act
 - 1317AC - Victimisation prohibited
 - 1317AB - Disclosure that qualifies for protection not actionable etc.
 - 1317AD - Compensation and other remedies—circumstances in which an order may be made
 - 1317ADA - Detriment
 - 1317AE - Compensation and other remedies—orders that may be made
 - 1317AF - Interaction between civil proceedings, civil penalties and criminal offences
 - 1317AH - Costs only if proceedings instituted vexatiously etc.
- Taxation Administration Act 1953
 - 14ZZY Victimisation prohibited
 - 14ZZZ Compensation and other remedies—circumstances in which an order may be made
 - 14ZZZAA Detriment
 - 14ZZZA Compensation and other remedies—orders that may be made
 - 14ZZZC Costs only if proceedings instituted vexatiously etc.

These gaps in the protection of financial planners are a significant concern for the profession and influence the common misconceptions about suspicious matter reporting identified by AUSTRAC in its 2016 *ML/TF risk assessment: financial planning sector* that “financial planners believed that reporting will damage the customer relationship”.

It would provide the profession with greater confidence in the AML/CTF regime if financial planners and item 54 reporting entities who identify and report client conduct that requires a suspicious matter report to be made to AUSTRAC were protected by the law to the same extent as whistleblower disclosures under the Corporations and Tax Administration acts.