



Australian Government

Australian Transaction Reports
and Analysis Centre

Productivity Commission

Annual Review of Regulatory Burdens on Business - Business and Consumer Services

**Australian Transaction Reports and Analysis Centre
Submission
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Introduction

The Australian Transaction Reports and Analysis Centre (AUSTRAC) welcomes the opportunity to make a submission to the Productivity Commission Annual Review of Regulatory Burdens on Business - Business and Consumer Services. Our paper will respond to a number of submissions made about the government's anti-money laundering and counter-terrorism financing (AML/CTF) legislative regime, and its regulatory impact on business.

AUSTRAC

AUSTRAC is Australia's anti-money laundering and counter-terrorism financing regulator and specialist financial intelligence unit (FIU). As Australia's FIU, AUSTRAC contributes to investigative and law enforcement work to combat financial crime and prosecute criminals in Australia and overseas. AUSTRAC's regulatory activities mitigate the risk of money laundering, terrorism financing and other organised crime. AUSTRAC works collaboratively with Australian industries and businesses in their compliance with anti-money laundering and counter-terrorism financing legislation.

AUSTRAC educates, monitors and works to improve the effectiveness of reporting entities' compliance with the requirements of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act). These regulatory activities have two key goals:

- To strengthen reporting entities against exploitation by criminals for money laundering and terrorism financing purposes
- To improve the quantity and quality of financial intelligence.

Australia's anti-money laundering regime

The Australian anti-money laundering regime was developed as a direct response to two Royal Commissions in the 1980s which exposed the links between money laundering, major tax evasion, fraud and organised crime.

The AML/CTF Act built upon the anti-money laundering obligations imposed under the *Financial Transaction Reports Act 1988*, implements Australia's international obligations to combat money laundering and terrorism financing, and is based on best practice standards set by the Financial Action Task Force (FATF). The FATF is recognised as the global standard setter on AML/CTF issues by the United Nations, the International Monetary Fund and the World Bank. For example, United Nations Security Council Resolution 1617 urged the international community to implement the FATF Standards¹.

Although it is not possible to calculate accurately the cost of money laundering and terrorism financing to the Australian economy, organised crime is estimated to cost the Australian community \$10 billion to \$15 billion a year. The Prime Minister's first National Security Statement identified organised crime as a significant national security threat and as a growing and continuing national challenge. The Commonwealth Organised Crime Strategic Framework ensures Commonwealth intelligence, policy, regulatory and law enforcement agencies are working together to prevent, disrupt, investigate and prosecute organised crime. Key to this coordinated response is improving criminal intelligence, including financial intelligence.

The Australian community benefits from any decrease in the amount laundered. Specifically AUSTRAC intelligence results in the detection and prosecution of serious crime (including people smuggling, kidnapping and drug trafficking), the confiscation of criminal assets and recovery of lost revenues. In 2008-09 alone, AUSTRAC intelligence contributed to 717 investigations conducted by law enforcement, social justice and revenue partner agencies, including Australian Taxation Office recoveries of more than \$131 million and Centrelink savings of \$8.1million.

Financial institutions and other reporting entities benefit directly from AUSTRAC's intelligence holdings. Law enforcement agencies use AUSTRAC's data to disrupt criminal activities that target financial institutions, for instance, by:

¹ The FATF Standards are comprised of the Forty Recommendations on Money Laundering and the Nine Special Recommendations on Terrorist Financing. See www.fatf-gafi.org.

- Detecting the embezzlement of funds by financial sector employees
- Investigating major loan fraud committed upon financial institutions
- Disrupting international scams involving malicious emails that impact financial institutions
- Following the money trail where corporate crimes have been committed in Australia and banks as creditors have suffered losses

Compliance with AUSTRAC's regulatory requirements protects firms' reputations by reducing the likelihood that criminals will use them for illicit purposes.

Lessening the regulatory burden

To a large degree the AML/CTF Act adopts a risk-based approach to compliance, under which businesses are given considerable flexibility to develop procedures according to different risks which they identify using their own AML/CTF programs. When determining and implementing risk-based systems, the AML/CTF framework requires that businesses consider a range of factors to assess the type of money laundering and terrorism financing risk that they might face, including the services provided and the nature of their customer base. As a result, a small business that provides a low risk service involving low monetary values to low risk customers may implement quite simple AML/CTF controls. For example, some industry associations in the gaming sector have developed template AML/CTF programs for their members which can assist small business in the implementation of the obligations.

The legislation was adopted after extensive consultation with industry and other interest groups over a period of almost three years. Consultation included the development of issues papers, roundtable meetings, the establishment of a Ministerial Advisory Group (including selected industry associations and the Office of Small Business), public consultation periods for the draft bill and AML/CTF Rules, and an examination of the exposure draft bill by the Senate Legal and Constitutional Affairs Committee. The legislation was designed to meet the Government's law enforcement and revenue recovery objectives, while imposing the minimum regulatory burden

on industry. It was implemented in stages over 24 months from Royal Assent to assist businesses in meeting their new obligations.

Subsection 212(3) of the AML/CTF Act obliges the AUSTRAC Chief Executive Officer (CEO) to have regard, *inter alia*, to the following in the performance of his functions:

...

- (c) the desirability of ensuring that regulatory considerations are addressed in a way that does not impose unnecessary financial and administrative burdens on reporting entities;
- (d) the desirability of adopting a risk-based approach;
- (e) competitive neutrality;
- (f) competition;
- (g) economic efficiency ...

This provision applies to all the CEO's functions, and is particularly important in considering the making of Rules under the legislation and decisions relating to exemptions.

As part of its regulatory activities AUSTRAC publishes an extensive range of guidance materials, including the AUSTRAC Regulatory Guide, e-learning courses, public legal interpretations and guidance notes. AUSTRAC has also conducted face-to-face information seminars and runs a help desk facility for businesses. AUSTRAC also produces an annual "Typologies Report" which assists reporting entities to identify when there may be a high risk of money laundering or terrorism financing.

Exemptions

Under section 247 of the AML/CTF Act, AML/CTF Rules may be made by the AUSTRAC CEO exempting a designated service or the circumstances in which it is provided from all or any provisions of the AML/CTF Act.

In addition, under section 248 of the AML/CTF Act the AUSTRAC CEO, may, by written instrument, exempt a specified person from one or more specified provisions of the AML/CTF Act, or declare that the AML/CTF Act applies in relation to a specified person as if one or more provisions of the AML/CTF Act were modified as specified in the declaration.

Other provisions of the Act also provide for exemptions from particular provisions, for example sections 39, 42, 44, 67, 93, 107, 114 and 118.

The AUSTRAC policy in relation to exemptions is published on the AUSTRAC website (http://www.austrac.gov.au/exemption_policy.html). In assessing exemption applications, AUSTRAC will take into account such matters as:

- the nature of the exemption, including the impact it will have on the marketplace or the integrity of the legislation;
- whether granting the exemption would be consistent with the intent and purpose of the legislation;
- the risk profile of the applicant, the designated service, or the circumstances in which the designated service is provided;
- issues of competitive neutrality; and
- the level of regulatory burden to which the applicant is being subjected.

If an application under section 248 is successful, a copy of the signed instrument is published on the AUSTRAC website. At present, there are 56 active exemptions and 11 modifications that have been approved by the AUSTRAC CEO.²

Exemptions made by rule under section 247, or other provisions of the Act, are published as AML/CTF Rules and are disallowable instruments. They are of more general application and are subject to broad public consultation. Chapters 10, 13, 14, 20, 21, 22, 23, 28, 29, 31, 32, 33, 35 to 43 and 45 of the AML/CTF Rules provide exemptions from the Act. Other chapters are also drafted to ensure that the Act is applied in a less burdensome way. For instance, Chapter 4 includes some safe harbour provisions for low to medium risk customers and simplified verification procedures for customers which are not individuals; Chapter 2 allows reporting entities to take advantage of being part of a corporate group to lighten the burden of obligations across the group in a number of ways; Chapter 3.2 reduces the burden on banks by limiting the definition of a correspondent banking relationship; Chapter 10 reduces the burden on the gaming sector with respect to customer identification, verification and/or record keeping.

² http://www.austrac.gov.au/exemptions_granted.html (as at 6 May 2010).

Submissions to the Commission which raise AML/CTF issues

Submission 10: The Australian Hotels Association (AHA)

The only issue raised by the AHA in relation to the AML/CTF Act is in the area of hotel schemes which are registered managed investment schemes. These schemes fall within item 35 of table 1 in section 6 of the AML/CTF Act. This means that hotels which operate such schemes are reporting entities under the Act and, in respect of such schemes, have all the obligations of a reporting entity under the Act.

The AHA's submission calls for such schemes to be exempted from ongoing customer due diligence obligations on the basis that other property management schemes of similar low-risk profiles have been exempted.

As described above, the AML/CTF Act makes provision for the AUSTRAC CEO to consider possible exemptions to the legislation. AUSTRAC notes that the AHA lodged a submission for exemption on 14 April 2010, and this is currently under consideration.

Submission 12: The Real Estate Institute of Australia

The Institute's submission briefly mentions the potentially significant additional requirements when the proposed second tranche of AML/CTF obligations is introduced. The proposed second tranche of reforms would extend the AML/CTF regime to capture specified transactions performed by a range of businesses, including real estate agents.

Noting the challenges faced by Australian businesses given the global economic downturn, it was essential that economic conditions be taken into account when considering the timetable for the implementation of the second tranche. The Government has advised industry groups that it would reconsider the timetable for the implementation of reforms and that process is currently underway.

AUSTRAC notes that the development of further reforms to the AML/CTF Act will be the subject of further consultations with industry to ensure that the regulatory burden for affected industries is fully considered.

Submission 14: NSW Bookmakers' Cooperative Ltd

The Bookmakers' submission argues that requirements under the AML/CTF Act and Rules are disproportionate to the relative risks inherent in on-course bookmaking activities. It particularly notes the significant burden placed on sole trader bookmakers and argues for the exemption of the majority of on-course bookmakers.

Bookmakers are particularly vulnerable to money laundering activities, due in part to the opportunities for cash transacting. Indicators of the use of illicitly attained funds in horse racing may include structuring bets below AUSTRAC reporting thresholds, the use of large amounts of physical currency, and requests for winnings to be paid to third parties. It is, therefore, important that bookmakers' services are captured within the scope of the AML/CTF Act.

On page 4 of the submission a number of points are made. AUSTRAC does not agree that the legislation provides excessive coverage, nor that risk assessment policies and methodologies are not flexibly available. AUSTRAC notes the risk based approach of the Australian AML/CTF regime, described earlier, which does provide flexibility for businesses to design their own systems and controls to suit their own risks. In the development of the regime, AUSTRAC worked closely with the gambling sector to develop particular rules relating to that sector which are intended to lessen the burden of complying with the AML/CTF Act (see chapter 10). For instance, on course bookmakers are not required to identify a person when they are receiving or accepting a bet, nor do they have to identify them when paying out a bet unless they are paying out \$10,000 or more, unless they have determined that the risk of money laundering or terrorism financing is high.

AUSTRAC recognises that the industry sectors that it regulates are made up of both small and large operators with different levels of risk and different levels of sophistication. To reflect this, AUSTRAC is currently developing more detailed and targeted practical guides for specific industry sectors. A guide for bookmakers has been drafted and was sent to a number of state industry associations (Australian Bookmakers Association, NSW, Victoria and SA) for review. AUSTRAC has also trialled the draft guide with a number of small bookmakers and is currently incorporating their comments. The result is based more on a question and answer format, which will provide greater assistance to entities using the guide.

When finalised, the guide will assist bookmakers in developing their AML/CTF programs, including customer identification and verification programs and enhanced customer due diligence programs.

AUSTRAC has confirmed with the Office of Best Practice Regulation that the guide would have no to low regulatory impact on the industry. AUSTRAC has also signalled to industry its willingness to consider further measures to reduce the regulatory burden on small bookmakers, including considering whether there are circumstances in which small bookmakers could be exempted from some elements of the AML/CTF regime.

At a recent AUSTRAC Gambling Sector Consultative Forum bookmakers' representatives indicated that they would lodge an application for the introduction of an exemption in relation to small bookmakers.

Submission 17: Australian Bankers' Association (ABA)

The ABA seeks an overarching risk based approach to AML/CTF. As noted on page 4 above the Australian AML/CTF regime is risk based. What this means is that a reporting entity must have an AML/CTF program the primary purpose of which is to identify, mitigate and manage the risk that the entity may reasonably face that its provision of designated services might, whether inadvertently or otherwise involve or facilitate money laundering or terrorism financing (Part A). The program must also set out the reporting entity's customer identification procedures (Part B). Many of

the requirements of the AML/CTF Rules may be complied with by putting in place appropriate risk based systems or controls. When determining and putting in place such systems or controls, the reporting entity must have regard to the nature, size and complexity of its business and the type of ML/TF risk it might reasonably face.

There are, however, some requirements which are mandatory. For instance the requirement to have an AML/CTF Program, which has both a Part A and a Part B is mandatory. There are also mandatory minimum requirements for customer identification procedures, see for instance AML/CTF Rule 4.2.3. It is government policy that all customers of designated services should at the very least provide their full name, their date of birth and their residential address, and that at least their name and either their date of birth or address be verified, for example, by providing various identification documents. Similar requirements apply to customers which are not individuals. In relation to a company, AML/CTF Rule 4.3.2 requires Part B of a program to include risk based systems and controls which are designed to enable a reporting entity to be reasonably satisfied that the company exists and that, in respect of certain companies, the name and address of any beneficial owner has been provided.

The reasons for such minimum requirements relate to strengthening the financial and gambling sectors against misuse. For many years now Australians have been well used to complying with the “100 point check” when opening a bank account. The AML/CTF Act extended the requirement to identify a customer to all designated services covered by the Act, although it does not specify the means by which this identification should be verified.

The ABA submission argues that if there were an overarching requirement that the regime be risk-based, it would be left to reporting entities to perform a risk assessment and determine the extent to which such actions would need to be undertaken based on the level of risk. This suggests that there would be times when (to use the two examples given by the ABA) it would be appropriate not to identify a customer at all or not to collect beneficial owner information in relation to proprietary or private companies which are not

licensed and subject to the regulatory oversight of a Commonwealth, State or Territory statutory regulator.

The banking sector is by far the most significant reporter to AUSTRAC, with the four major banks alone submitting over 50 per cent of the volume of transaction reports. The threat of criminal organisations using the banking sector to launder the proceeds of illicit activity through constantly evolving methodologies requires ongoing diligence. The government consulted with industry, and the ABA directly, over an extended period of time to find the correct balance between the minimum required activities to maintain this diligence and the overarching risk-based approach.

One major way of reducing misuse of the financial system is through requiring that reporting entities know with whom they are doing business. This is referred to as “know your customer”. The extent to which a reporting entity must know their customer will depend on the risk of money laundering. It is also an offence to provide a designated service to a person using a false name.

In its submission the ABA claims that an overarching risk based approach is consistent with the approach of the FATF. In fact Australia has been criticised by the FATF for the extent to which it applies the risk based approach in its legislation, particularly the extent to which it applies it to the concept of beneficial ownership. Australia reports to FATF annually on its progress in relation to matters which the FATF says are non-compliant. In June 2009 the FATF Secretariat stated that where financial institutions were permitted by the Australian regime to apply a risk based approach to determine whether or not to apply certain measures, including identifying and verifying beneficial owners for companies, this seemed to go beyond what can be determined using a risk based approach as defined by the FATF Recommendations. The FATF Plenary agreed with this view at their June meeting.

The ABA submission notes that the avoidance of unnecessarily burdensome, complex, redundant, inconsistent or duplicative regulation is best approached by rigorous, transparent and timely consultation with affected

entities. AUSTRAC agrees with this view, always subject of course to particular issues requiring confidentiality or affecting timing. The development of the AML/CTF Act was marked by a lengthy and detailed consultation with the ABA, its members and other entities affected over a period of around 2 years. The AML/CTF Rules were also developed in close consultation with industry, including the ABA and its members and AUSTRAC continues this practice in developing its rules.

Submission 20: The Association of Superannuation Funds of Australia (ASFA)

ASFA's submission raises inefficiencies involved in reporting to multiple regulators and gives reporting of identity fraud as an example.

Reporting to AUSTRAC of identity fraud occurs because under section 41 of the AML/CTF Act, reporting entities are required to report to AUSTRAC when a suspicion is formed on reasonable grounds that a person is not who they claim to be or that there is information relevant to investigation or prosecution for an offence against a law of the Commonwealth or a State or Territory. Potential cases of identity fraud may be linked to serious and organised crime or the financing of terrorism which AUSTRAC refers to the relevant law enforcement agency.

A reporting entity must submit a suspicious matter report (SMR) in the approved form to AUSTRAC within 24 hours after the time the relevant suspicion was formed if it relates to the financing of terrorism, or three business days after the day the relevant suspicion was formed in all other cases. The details which must be reported are set out in Chapter 18 of the AML/CTF Rules. Reports may be submitted electronically or in paper form. A copy of a paper form is attached. SMRs are disseminated by AUSTRAC to relevant law enforcement agencies designated in section 5 of the AML/CTF Act for investigation.

In 2008/09 AUSTRAC received a total of 32,449 SMRs of which 297 involved false names or identity documents. It is possible that other suspicions reported as relating, for instance, to credit/loan facility fraud (273), credit

card fraud (93) or ATM/cheque fraud (247) could also have involved identity fraud. Suspicious matter reporting by superannuation funds under the AML/CTF Act only took effect on 12 December 2008, coming fully into force after the expiration of a 15 month grace period on 12 March 2010. On current holdings it appears that AUSTRAC has received 232 SMRs from superannuation funds in the 12 months to 30 April 2010.

Although there may be good reasons why different agencies require different information from industry, AUSTRAC would be prepared to consult further with ASIC, the ATO and APRA to see if there is scope for harmonising reporting. All three are agencies to which AUSTRAC is permitted to disseminate information. Accordingly, there may be scope for rationalising the required reporting.

Other reports required by the AML/CTF Act are threshold transaction reports (TTRs) relating to cash transactions of \$10,000 or more and reports of international funds transfer instructions (IFTIs). AUSTRAC has received 18 TTRs from superannuation funds in the 12 months to 30 April 2010 and no IFTIs.

The submission also states that the *Superannuation Industry (Supervision) Act 1993* (SIS Act) and the AML/CTF Act have differing identity verification requirements, and advocates that these regimes be unified. We are aware that there has been work done in the past to try and harmonise the two regimes. We would be happy to look further at this with APRA and the ATO.

The submission argues for the removal or relaxation of identity verification requirements for rollovers between APRA regulated funds, where the verification has already taken place at one of these funds.

Subsection 39(6) of the AML/CTF Act already provides a general exemption to the applicable customer identification procedures for, *inter alia*, trustees of a superannuation fund accepting a contribution, rollover or transfer in respect of a new or existing member of the fund. Superannuation trusts that are reporting entities undertake ongoing customer due diligence as set out in Part 2 Division 6 of the AML/CTF Act. In situations where money

laundering/terrorism financing risk is considered to be high, identification and verification may be undertaken as part of a superannuation fund's enhanced customer due diligence program. A superannuation benefit can only be cashed out to a customer after his/her identity has been established and verified and additional 'know your customer' measures have been applied, as appropriate. Finally, self-managed superannuation funds are not reporting entities under the AML/CTF Act.

The requirement for regulated entities to report any breaches of relevant legislation is a commonly used regulatory tool, particularly in financial sector regulation. AUSTRAC notes, however, that its legislation does not mandate the self reporting of regulatory breaches.

Submission 22: Abacus – Australian Mutuals

In its submission, Abacus supported the ABA submission for an overarching risk-based approach to the AML/CTF Act. This issue is addressed above.

The Abacus submission also raises issues relating to the means of verifying a customer's identity. One of the key requirements of the AML/CTF Act is that reporting entities must verify the identity of their customers before providing a designated service. This can be done through document-based or electronic-based means, or a combination of the two. The Abacus submission requests access to the National Document Verification Service, which falls under the responsibility of the Attorney-General's Department.

The Australian Law Reform Commission (ALRC) considered the issue of electronic verification of identity under the AML/CTF Act as part of its review of Australian privacy law, *For Your Information: Australian Privacy Law and Practice*. The ALRC recommended amendments to allow businesses to have access to credit reporting data for the purposes of identity verification under the AML/CTF Act.³ The Government has accepted this recommendation in principle and has undertaken a Privacy Impact Assessment (PIA) in consultation with the private sector. The PIA recommended several privacy safeguards which are informing the development of legislative amendments

³ See Recommendation 57-4.

to facilitate the electronic verification of customer identity by businesses regulated under the AML/CTF Act.

The submission also requested centralising relevant information, such as Reserve Bank of Australia sanctions information and the Department for Foreign Affairs and Trade's terrorist asset freezing list, on the AUSTRAC website. AUSTRAC notes that it already publishes information circulars about these issues on its website, as well as about terrorist entities prescribed by the Attorney-General.

In addition, the submission raised a concern about new requirements for entities to collect and verify information about third parties or agents making transactions on behalf of a principal. AUSTRAC notes that consultation with industry about this measure is ongoing, with consideration being given to changes to take account of industry concerns.

Finally there was comment about the lack of feedback from AUSTRAC to industry. Within the confines of the secrecy provisions of the AML/CTF Act, AUSTRAC publishes sanitised cases showing how information within reports lodged by entities is used for law enforcement and revenue collection purposes by our designated partner agencies, for example, the AUSTRAC Typologies and Case Studies report. These reports assist industry to fulfil its AML/CTF obligations.

It is, however, not generally possible to provide feedback on specific cases to reporting entities until prosecutions are concluded. This can be several years after an SMR may have been made. In many cases it will be a combination of reports made under the Act (i.e. SMRs, TTRs and IFTIs), by a number of reporting entities, in combination with information from other sources which leads to a successful prosecution. For all these reasons it may not be possible to give a reporting entity specific feedback on action resulting from a particular report.