Australia’s Anti-Money Laundering Law on Financial Institutions

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Abstract
This paper considers the impact of Australia’s anti-money laundering law on financial institutions. It describes the contextual background of Australia’s anti-money laundering regime and provides an outline of the main provisions of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth). The paper explains the implications of this legislation for Australia’s financial institutions. A further section addresses the recent Anti-Money Laundering and Counter-Terrorism Financing Rules. Finally, the paper discusses recent events that have touched upon the Act and Rules, specifically, the second tranche of AML/CTF reforms planned by the Australian government to include four new designated providers.

Introduction
The aim of this paper is to consider the impact of Australia’s anti-money laundering law on financial institutions. It is an important study because an uncomfortable truth for many of the leaders of the Group of 20 nations, including Australia, is that the worst examples of banking secrecy, money laundering and tax fraud, are found not just in offshore financial centres but also in the backyards of the world’s biggest economies. Developing countries’ financial institutions are particularly susceptible to fraudsters and money launderers, opening bank accounts and moving assets through anonymous companies at will.

The Asia/Pacific Group on Money Laundering (‘APG’) emphasizes that money laundering is not a legal term in international law but is used to loosely describe the conversion of dirty money into clean money. The act by which illicit funds are made to appear legitimate is defined in key international instruments, such as the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the UN Convention Against Transnational Organized Crime. More specifically, money laundering as:

The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action; or the concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property,


knowing that such property is the proceeds of crime.\(^4\)

The acts of concealment and conversion are crucial to the money laundering process. Laundered funds do not become legitimate; they just have the appearance of legitimacy. Since 1989, the Financial Action Task Force (‘FATF’)\(^5\) has produced international standards against money laundering and terrorist financing. As of 2008, the core documents of the FATF include: The Forty Recommendations on Money Laundering and The Nine Special Recommendations on Terrorist Financing (‘the standards’); the 2004 Methodology for assessing compliance with the standards; Interpretative Notes to the Recommendations; and Best Practice Guidelines for implementation of the standards.\(^6\) The FATF standards contain certain core, or essential, recommendations including the requirement to: criminalise money laundering and terrorist financing in accordance with international law; freeze terrorist assets and confiscate the proceeds of crime; establish a financial intelligence unit to collect, analyse, evaluate and disseminate suspicious transaction reports from financial institutions and other reporting entities; supervise those financial institutions and other reporting entities to ensure compliance with customer due diligence and other requirements contained in the standards; and ensure that comprehensive and effective mechanisms are in place to cooperate effectively on the international level given the growing international dimension to these crimes.

Although these standards have been accepted internationally as the global policy benchmark for anti-money laundering and anti-terrorist financing measures by the United Nations, International Monetary Fund, World Bank, Asian Development Bank and many other international organisations and bodies, there remain the problems of a lack of theoretical foundations in accounting and legislative steps for anti-money laundering.\(^7\)

Despite the importance of the anti-money laundering initiative in Australia, it has remained largely unexamined by accounting and legal researchers with the exception of a small group of case studies\(^8\) and newspaper articles. One reason for the paucity of literature on recent anti-money laundering measures in Australia is the complexity of the legislation introduced. Another is the timing of the two tranches of legislative reforms in the midst of the onset of the recent global financial crisis.

The present paper proceeds by describing the contextual background of Australia’s anti-money laundering regime. This is followed by an outline of the main provisions of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) (‘AML/CTF Act’). The section entitled ‘Reporting financial institutions’ explains the implications of this Act for Australia’s financial institutions. A further section addresses the recent Anti-Money Laundering and Counter-Terrorism Financing Rules. Finally, the paper discusses recent events that have touched upon the Act and Rules, specifically, the second tranche of AML/CTF reforms planned by the Australian government to include four new designated providers.


Evaluation

In 2005, Australia was evaluated on its measures against anti-money laundering (‘AML’) and combating the financing of terrorism (‘CFT’), based on the FATF’s Forty Recommendations and Nine Special Recommendations on Terrorist Financing and using the AML/CFT Methodology. FATF sets international standards on anti-money laundering, and Australia and 31 other countries are members. Over 170 jurisdictions, including Australia, have endorsed the standards. The evaluation of Australia found that while narcotics offences provided a substantial source of the proceeds of crime, the majority of illegal proceeds were derived from fraud-related offences, such as fake balance sheets, fictitious entries and fictitious billing networks. Indeed, the amount of money laundering in Australia was estimated to range between A$2-3 billion per year, generated by a number of key activities:

Generally, money launderers seek to exploit the services offered by mainstream retail banking and larger financial service and gaming providers. Visible money laundering is predominantly carried out using the regulated financial sector, particularly through the use of false identities and false name bank accounts facilitated by forged documents to structure and transact funds. Money launderers often move funds offshore by using international funds transfers. Money launderers also move funds through smaller or informal service providers such as alternative remittance dealers. Australian authorities also identified other methods that served as money laundering vehicles: cash smuggling into and out of Australia, and the use of legitimate businesses to mix proceeds of crime with legitimately earned income/profits. Law enforcement has also recognised a growing trend in the use of professional launderers and other third parties to launder criminal proceeds.

The concerns raised by the evaluation prompted the enactment of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) (‘AML/CTF Act’). On 9 February 2006, the Senate referred the Exposure Draft of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2005 (Exposure Bill) to the Legal and Constitutional Legislation Committee for inquiry and report by 13 April 2006. The Attorney-General’s Department and the Australian Transaction Reports and Analysis Centre (‘AUSTRAC’) conducted a public consultation process, with comments and submissions to be sent to them by 13 April 2006. The Exposure Bill formed part of a package of reforms consisting of legislation, regulation and rules, which was intended to replace Australia’s principal anti-money laundering legislation, the Financial Transaction Reports Act 1988 (Cth) (‘FTR Act’), and the Financial Transaction Reports Regulations 1990. The Exposure Bill will supersede the FTR Act to the extent that the FTR Act applies to financial services. The aim of the package of reforms was intended to improve and strengthen Australia’s current anti-money laundering and counter-terrorism financing (AML/CTF) system, in line with international standards issued by the FATF. Early consultations with stakeholders resulted in a range of in-principle agreements between the Federal Government and industry on the approach to the proposed reforms, including implementation of the reforms in two tranches. Following the conclusion of these consultations, the Federal Government announced in October 2005 that the Federal Government had

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11 FATF, above n 8, 5. The IMF reports that the amount of money laundered in the world each year could be in the range of 2 to 5 per cent of global GDP. The Attorney General speculates that if the figure was 2 per cent, this would mean that one trillion US dollars is laundered each year which is more than Australia’s annual GDP (The Standing Committee for Attorneys-General, ‘A National Response to Organised Crime’ (Press Release, 7 August 2009) <http://www.attorneygeneral.gov.au/www/ministers/mcclellan d.nsf/Page/MediaReleases_2009_ThirdQuarter_7August2009-ANationalResponsetoOrganisedCrime>) at 25 November 2009.

12 FATF, above n 8, 5.

agreed to proceed with a package of reforms to strengthen Australia’s AML/CTF system. The Federal Government also announced that the next step in the reform process would be the release of the Exposure Bill.\textsuperscript{14}

The aims of the AML/CTF Act include bringing Australia into line with international AML/CTF standards\textsuperscript{15} set by the FATF and fulfilling Australia’s obligations under a variety of international treaties in this area\textsuperscript{16}. According to AUSTRAC, the AML/CTF Act will assist in the maintenance of international business relationships with the Australian financial sector and the prevention of money laundering and terrorism financing, by allowing law enforcement agencies to access targeted information on potential criminal activity. The Act also enables Australia to conform to the FATF standards.\textsuperscript{17} Other groups that share this view are the APG,\textsuperscript{18} some banks (BankSA\textsuperscript{19}) and certain law firms (Mallesons\textsuperscript{20}).

It should be noted that Australia is a member of the Asia/Pacific Group on Money Laundering (‘APG’), which is an international organisation consisting of 40 regional member partners. The APG also has a number of international and regional observers including the United Nations, IMF and World Bank.\textsuperscript{21} The APG is closely affiliated with FATF. The idea behind the APG is to implement the FATF’s 40+9 Recommendations.

**Australia’s AML/CTF Act**

The AML/CTF Act builds on existing obligations imposed under the FTR Act. A key aspect of the AML/CTF Act rests in Part 2–Identification procedures, which outlines the identification procedures for certain pre-commencement customers (ss 28-29) and low-risk services (ss 30-31), procedures for identification (ss 32-34), verification of identity (s 35) and ongoing customer due diligence (s 36).

**Part 3–Reporting obligations** describes the reporting obligations for suspicious matters (ss 41-42), threshold transactions (ss 43-44), international funds transfer instructions (ss 45-46) and compliance reports (s 47). A reporting entity must give the AUSTRAC CEO reports about suspicious matters and AML/CTF compliance reports. Specific reporting obligations are explained in Part 4–Reports about cross-border movements of physical currency and bearer negotiable instruments and Part 5–Electronic funds transfer instructions. Part 4 states that cross-border movements of physical currency (above a threshold) must be reported to the AUSTRAC CEO, a customs officer or a police officer, while Part 5 states that electronic funds transfer instructions must include certain information about the origin of the transfer money.

**Part 6–Register of providers of designated remittance service** explains the registration processes (s 76), particularly the system of registering providers of designated remittance services (s 75), updating (s 77) and removing (s 78) entries on the register of providers of designated remittance services, and gaining access to the register (s 79).

\textsuperscript{14} Minister for Home Affairs, above n 13.

\textsuperscript{15} Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) s 3(1).


\textsuperscript{18} APG, above n 3.


\textsuperscript{21} APG, above n 3.
Further obligations placed on the reporting entity are found in Part 7—Anti-money laundering and counter-terrorism financing programs, which states that all reporting entities must have an AML/CTF program that applies to the reporting entity (s 81). Separate provisions are made on standard (s 84), joint (s 85) and special (s 85) AML/CTF programs, together with information about their revocation (s 87). Different applicable customer identification procedures (s 88) are covered for the customer’s agent (s 89), customers other than individuals (s 90), and disclosure certificates (s 91). This part also covers a provision for requesting information from a customer (s 92).

Part 8—Correspondent banking prohibits entry into correspondent banking relationships with shell companies (s 95) which are defined in s 15. Provisions are also made on how to terminate such a relationship (s 96), and due diligence requirement assessments needed before (s 97) and after (s 98) entering into correspondent banking relationships. For example, if Financial Institution A has entered into a correspondent banking relationship with another Financial Institution B, Financial Institution A must carry out regular assessments of the risk it may face that the banking relationship involves or facilitates money laundering or financing of terrorism. Financial Institution A must carry out regular assessments of matters specified in the AML/CTF Rules and prepare a written record of each assessment as soon as practicable after the completion of the assessment.

Part 9—Countermeasures, which prohibits or regulates the entering into of transactions with residents of prescribed foreign countries (s 101), is followed by Part 10—Record keeping requirements which outlines the records of designated services (s 106), the transaction records (s 107) and customer-provided transaction documents (s 108) needed to be retained. Part 10 also makes provisions for the records of ADI accounts (s 109) and retention of records of closed ADI accounts (s 110). Here, Part 10 outlines how records of identification procedures involve copying documents (s 111), marking records (s 112) and retaining records (s 113). Part 10 also provides instructions for the retention of records about electronic funds transfers (s 115), AML/CTF programs (s 116) and due diligence assessments of corresponding banking relationships (s 116).

Unsurprisingly, given the sensitivity of anti-money laundering, the AML/CTF Act makes provisions for secrecy and access in Part 11—Secrecy and access which outlines the secrecy provisions of AUSTRAC information and AUSTRAC documentation (s 121), the disclosure provisions of the offence of tipping off (s 123) and non-admissible report and information (s 124).

Under s 128, the Act explains when AUSTRAC information can be passed on by an official of a designated agency. The AML/CTF Act’s provisions for secrecy and access in Part 11—Secrecy and access remain a concern for stakeholders, with some commentators suggesting Part 11 may lead to discrimination by financial institutions based on race, religion, nationality or ethnic origin. In particular,

22 Under s 5 of the AML/CTF Act, designated agency means the Australian Crime Commission, Australian Security Intelligence Organisation, Australian Commission for Law Enforcement Integrity, Australian Competition and Consumer Commission, Australian Customs Service, Australian Federal Police, Australian Prudential Regulation Agency, Australian Securities and Investments Commission, Child Support Agency, Commonwealth Services Delivery Agency (Centrelink), Commonwealth Royal Commission, Immigration Department, Inspector General of Intelligence and Security, Treasury Department, authority or agency of the Commonwealth, police force or police service of a State or the Northern Territory, New South Wales Crime Commission, Independent Commission Against Corruption of New South Wales, Police Integrity Commission of New South Wales, Crime and Misconduct Commission of Queensland, Corruption and Crime Commission of Western Australia, or authority or agency of State or Territory that receives taxation revenue.

financial institutions have considerable discretion in constructing the risk profiles of their customers. This discretion carries a serious danger of discrimination based on race, religion and nationality. There is also concern regarding the ability of staff to appropriately perform risk assessments and in particular the level of training required to undertake intelligence assessments.24

Provisions are also made in the AML/CTF Act for offences. Part 12–Offences outlines offences for false or misleading information (s 136), producing false or misleading documents (ss 136-137), providing a designated service using a false customer name or customer anonymity (s 139), receiving a designated service using a false customer name or customer anonymity (s 140). There are also provisions for the situation where the customer is commonly known by two or more different names (s 141), where transactions are conducted so as to avoid reporting requirements for threshold transactions, and where transactions are conducted so as to avoid reporting requirements for cross-border movements of physical currency (s 198).

Part 13–Audit is concerned with the appointment of authorised officers and the issue of identity cards (s 145), the powers of authorised officers (ss 147-150), obligations of authorised officers (ss 151-156), occupier’s rights and responsibilities (ss 157-158), the monitoring of warrants (ss 159-160), external audits (ss 161-164) and risk assessments (s 165). Part 14–Information-gathering powers is concerned with the obtaining (s 167), copying (s 168 and s 170) and retaining (s 171) of documents. Specific reference (s 172) is made to Division 400 and Chapter 5 of the Criminal Code.

The AML/CTF Act emphasises strong enforcement provisions. Part 15–Enforcement makes provisions for civil penalties (ss 174-183), infringement notices for unreported cross-border movements of physical currency and bearer negotiable instruments (ss 184-189), monitoring of compliance (s 190), remedial directions (s 191), injunctions (ss 192-196), enforceable undertakings (ss 197-198), powers of questioning, search and arrest for cross-border movements of physical currency and bearer negotiable instruments (ss 199-201), and notices to reporting entities (ss 202-207). Part 16–Administration provides for the establishment and function of AUSTRAC (ss 209-210); the office (s 211), function (ss 211-213) and appointment (ss 214-217) of AUSTRAC’s Chief Executive Officer; AUSTRAC staff (s 224-225) and reports (ss 226-227); and direction by the Minister (s 228). Part 17–Vicarious liability outlines the criminal (s 231) and civil liabilities (s 232) of corporations, together with the liability of persons other than corporations (s 233).

Provisions for protection from liability (s 235), the defence of taking reasonable precautions, and exercising due diligence, to avoid a contravention (s 236), the treatment of partnerships (s 237), unincorporated associations (s 238) and trusts with multiple trustees (s 239) are central to Part 18–Miscellaneous. To what extent this amounts to a reversal of proof is beyond the scope of this paper. Nevertheless, future research might consider this matter, particularly given there has been little public reflection on this matter.

**Reporting financial institutions**

A wide range of financial institutions exists in Australia’s financial services sector. Australia also has designated non-financial businesses and professions (“DNFBP”); casinos (mainly supervised at the State/Territory level), dealers in precious metals and stones, and lawyers are also subject to some AML/CFT requirements. Notaries, real estate agents, accountants, and trust and company service providers (called professional company incorporation providers) also operate in Australia. The AML/CTF Act s 5 defines a

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24 Ibid.
financial institution as an authorised deposit-taking institution, bank, building society, credit union or person specified in the AML/CTF Rules. These include depository corporations (banks, building societies and credit co-operatives); financial markets; insurance corporations and pension funds (life insurance, general insurance, superannuation funds); other financial corporations, including financial intermediaries (financial unit trusts and investment companies); financial auxiliaries (securities brokers, insurance brokers and flotation corporations); foreign exchange instrument dealers, money remittance dealers and bureaux de change.\(^{25}\)

The AML/CTF Act has a significant bearing on the financial services sector. First, a financial institution is categorised under s 4 as a reporting entity which provides designated services. Designated services (defined in s 6) include 54 ‘financial’ designated services, such as making loans as part of a loans business – loans are defined to generally cover any form of credit (other than for goods and services the lender provides themselves); accepting electronic funds transfer instructions or making money available to payees as a result of such instructions; issuing, selling, acquiring or disposing of securities and derivatives (as defined in the Corporations Act 2001 (Cth)) in prescribed circumstances; issuing (and in some cases, discounting) bills of exchange, promissory notes and letters of credit in prescribed circumstances; providing custodial or depository services in the course of a business of providing such services (custodial and depository services are as defined in the Corporations Act 2001 (Cth), essentially meaning any arrangement to hold a financial product or a beneficial interest in one in trust for another). Designated services also include two types of ‘bullion’ designated services and 14 types of ‘gambling’ designated services (such as receiving or accepting bets, accepting the entry of a person into a game or exchanging money for gaming chips or tokens – all in the course of carrying on a business). Second, as detailed in the previous section, a financial institution\(^{26}\) needs to identify customers before providing a service. Third, a financial institution needs to implement an AML/CTF program (see previous section). Fourth, as a provider of designated services to a customer, it is deemed a reporting entity (thus, a reporting financial institution) with reporting obligations (as summarised below).

Kahn\(^{27}\) points out that in relation to financial services, designated services include: services provided under a financial service licence; accepting money\(^{28}\) on deposit, making a loan, supplying goods to a person under a hire-purchase agreement; issuing, acquiring or disposing of a bill of exchange, promissory noted or a letter of credit; sending and receiving electronic funds transfer instructions; issuing or selling a security or a derivative; and exchanging a currency.

A reporting financial institution’s obligations may be summed up as follows:

- **Identification and verification:** the reporting financial institution must verify a customer’s identity before providing a customer with a designated service, and carry out ongoing due diligence on customers. A reporting financial

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\(^{26}\) As well as other financial service providers, bullion dealers and those in the gambling sector.


\(^{28}\) Under the AML/CFT Act, s 5, money includes: physical currency; and money held in an account, whether denominated in Australian currency or any other currency; and money held on deposit, whether denominated in Australian currency or any other currency; and e-currency, however amounts of the e-currency are expressed. Under s 5, e-currency means an Internet-based, electronic means of exchange that is known as e-currency, e-money, digital currency (or name specific in the AML/CFT Rules), and is backed either directly or indirectly by precious metal, or bullion or a thing of a kind prescribed by the AML/CFT Rules, and is not issued by or under authority of a government body.
institution must develop and implement systems to identify customers and third party service providers to monitor for and report suspicious transactions. A reporting entity must establish and verify (using documentary or electronic means) the identity of customers it provides with designated services, and carry out ongoing due diligence on these customers, monitoring things such as their transactions. The methods and level of verification and ongoing due diligence that are required depend to a great extent on the entity’s assessment of the risk that its provision of the relevant designated services may facilitate money laundering or terrorism financing.

- **Reporting:** the reporting financial institution must report suspicious matters (eg, a person is not the person he or she is claimed to be), certain transactions above a threshold (eg, a transaction involving the transfer of physical currency not less than $10,000) and international funds transfer instructions. A reporting financial institution must collect and retain records, providing a variety of reports (such as reporting suspicious matters relating to the provision of designated services, transactions above specified thresholds and certain international funds transfer instruction and lodge compliance reports) to AUSTRAC and other law enforcement agencies.

- **Developing and maintaining an AML/CTF Program.** The reporting financial institution must have and comply with anti-money laundering and counter-terrorism financing programs (AML/CTF programs), which are designed to identify, mitigate and manage money laundering or terrorist financing risks the reporting financial institution may reasonably face. 29 A reporting financial institution must implement and comply with a potentially wide-ranging AML/CTF program, which includes a number of sub-programs such as a risk awareness program for employees and an employee due diligence program. The program must take into account a reporting financial institution’s provision of designated services at any permanent establishment in Australia and also, if it is a resident of Australia or a subsidiary of a company that is a resident of Australia, at any permanent establishment in a foreign country. Importantly, a program must be approved by the reporting financial institution’s governing board and senior management and be subject to their ongoing oversight (s 83). According to Kahn 30, the key components of an AML/CTF program include customer due diligence, enhanced customer due diligence, suspicious matters reporting, awareness and training program, employee due diligence, compliance program, board oversight, independent review, record keeping, third party due diligence, and risk identification and mitigation. The main purpose of the program is to identify, mitigate and manage the risk the reporting entity may provide designated services that involve or facilitate money laundering or financing of terrorism.

- **Customer due diligence and know your customer:** One of the requirements of a reporting financial institution’s AML/CTF program is the need to have a Customer Due Diligence (CDD) (s 36) and Know Your Customer (KYC). In order to assess the customer, a number of factors must be considered. Examples included customer types,

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29 Members of a designated business group (DBG) may enter into a joint AML/CTF program with other members of that DBG.
30 Kahn, above n 22.
including any politically exposed persons; the types of designated services it provides; the methods by which it delivers designated services; and the foreign jurisdictions with which it deals.

- **Record keeping**: the reporting financial institution must make and retain certain records (and other documents given to the reporting financial institution by customers) for seven years. Note, that the Australian Privacy Foundation argues that the period of seven years is unexplained and unjustified.

- **Correspondent banking**: reporting financial institutions are prevented from entering into a correspondent banking relationship with a shell bank or another financial institution that has a correspondent banking relationship with a shell bank. Banks must carry out risk-based due diligence assessments before entering into correspondent banking relationships and while in such relationships. The US Financial Crimes Enforcement Network (FINCEN) notes that:

  By virtue of the ease of formation and the absence of ownership disclosure requirements, shell companies – generally defined as business entities without active business or significant assets – are an attractive vehicle for those seeking to launder money or conduct illicit activity. While business entities generally, and shell companies specifically, have legitimate commercial uses, this lack of transparency in the formation process poses vulnerabilities both domestically and internationally.

- **Advice and assistance**: Advice and assistance to reporting financial institutions on their obligations is given by AUSTRAC. Reporting financial institutions must not disclose they have formed an applicable suspicion or reported information to AUSTRAC under the suspicious matter reporting requirements or that they have given further information to a law enforcement agency in response to a request. This may be problematic in practice.

- **Civil penalties**: It is an offence if reporting financial institutions produce false or misleading information or documents, forge a document for use in an applicable customer identification procedure, provide or receive a designated service using a false customer name or customer anonymity and structure a transaction to avoid a reporting obligation. The Act provides for significant penalties if breached (for example, up to AS$11 million for a breach of a civil penalty provision for a body corporate).

- **Financing risk assessment**: AUSTRAC’s CEO monitors compliance by reporting financial institutions with their obligations, and may give a remedial direction to a reporting financial institution that has contravened a civil penalty provision, or may require a reporting financial institution to carry out an external audit or a money laundering and terrorism financing risk assessment.

- **Overseas entities**: A reporting financial institution’s obligation applies to the provision of designated services at or through any permanent establishment in Australia, regardless of where the customer is located. A reporting financial institution does not need to do very much in order to be found to be

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33 Note, that ‘offence’ is a term usually reserved for a criminal provision. Civil penalties usually attract the term ‘liable’.

34 An AUSTRAZ official, a customs officer or a police officer must not disclose information or documents obtained under the Act.
providing a designated service at or through such an establishment in Australia.

Registered AML/CTF rules
Under s 229 of the AML/CTF Act, the CEO of AUSTRAC may, in writing, make Anti-Money Laundering and Counter-Terrorism Financing Rules (‘AML/CTF Rules’), which are legislative instruments. AUSTRAC notes that many AML/CTF Rules have been made and registered. Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1), for example, gives explanatory statements on a great many AML/CTF issues, such as designated business groups, correspondent banking, customer identification, AML/CTF programs, gambling services, AML/CTF compliance reports – reporting and lodgement periods, electronic funds transfer instructions involving use of a credit card, ‘approved third-party bill payment system’ definition, monetary thresholds for certain designated services, ongoing customer due diligence, international funds transfer instruction reportable details, suspicious matter reportable details, threshold transaction reportable details, record-keeping obligations under s 114, issuing or selling a security or derivative, over-the-counter derivatives market – exemption of certain transaction types, designated remittance arrangements, movements of physical currency into or out of Australia, receipts of physical currency from outside Australia, movements of bearer negotiable instruments, and Register of Providers of Designated Remittance Services.


Developments and discussion
The AML/CTF reforms have been introduced by the Australian government in two tranches. This paper has exclusively dealt with the first tranche. The first tranche, which commenced in December 2006, covers a wide range of services provided by the financial sector (the focus of this study), gambling service providers and bullion dealers. The second tranche (outside the scope of this study) focuses on lawyers, accountants, real estate agents and jewellers, and attempts to bring in 26 new designated services for the four new designated providers.

Nevertheless, Winterfold raises the possibility that the AML/CTF Act could reduce the $4.5 billion that money laundering costs the Australian economy each year as well as reducing the funds to terrorism groups. In considering the real intent of the legislation, van Fossen points out that:

some countries have broadened the legal definition of money laundering to include

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36 This instrument contains the AML/CTF Rules previously found in the Anti-Money Laundering and Counter-Terrorism Financing Rules (relating to cross-border movements of physical currency and bearer negotiable instruments and the Register of Providers of Designated Remittance Services) and the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 2) (relating to paragraph (c) of the definition of ‘correspondent banking relationship’ in s 5 of the AML/CTF Act).
37 The government proposes to reconsider the implementation process for the second tranche of reforms in December 2009 (see AUSTRAC, above n 30).
38 Ord, above n 9.
illegal capital flight, tax evasion, insider trading, bribery, fraud corruption, misappropriation of public funds, racketeering, terrorism, prostitution, and a growing number of other crimes as ‘predicate offences’ (ie, transgressions for which money can illegally be laundered).40

The difficulty across the globe is that many countries cannot agree on the definition of money laundering and that “money laundering” is a stimulus eliciting unreflective conditioned responses rather than thought or insight’.41

For the 2007-2008 financial year, Intheblack reports that AUSTRAC received more than 17.9 million financial transactions reports (equivalent to 69,000 reports a day), of which 29,089 were suspect transaction reports by cash dealers.42

AUSTRAC intelligence analysts assess and categorise suspect activity reports according to suspect activity types such as:

- Country of interest
- Unusually large cash transaction
- Unusual account activity
- Structured transfers – international
- Structured deposits/withdrawals
- Unusually large transfer
- Not determined
- Other avoiding of reporting
- Structuring – other
- Customer behaviour – suspicious
- Unusual gambling activity
- Inconsistent with customer profile
- Fraud – credit/loan
- Tax evasion
- Unusual use/storage/exchange of cash
- Fraud – cheque
- False identity/name
- Fraud – internet banking
- Unusually large foreign exchange transaction
- Interesting industry/occupation.43

AUSTRAC notes that there was an increase in reporting relating to most activity types, most notably in relation to unusually large cash transactions, activities which appear inconsistent with a customer profile, advanced fee fraud and transactions involving a common beneficiary or account. This increased reporting is likely to be the result of enhanced customer due diligence and know-your-customer programs by reporting entities, combined with the implementation of effective monitoring programs by entities. It is difficult to speculate why these transactions were not caught by earlier legislation.44 Some commentators perceive ‘know your customer’ provisions as threatening human rights, fostering mistrust and resentment of government, particularly among immigrants and minority groups.45

A further development, noted by Deitz, is that from December 2008, reporting entities regulated by the AML/CTF Act must report significant cash transactions, suspicious matters and international funds transfers to AUSTRAC.46 The Financial Transaction Reports Amendment (Transitional Arrangements) Act 2008 (‘the Amending Act’) (FTRA), which commenced in November 2008, provides cash dealers regulated by the FTRA with transitional arrangements for complying with the AML/CTF Act reporting requirements. The 2009. In 2007-08, three new classifications were introduced: ‘intellectual property crime’, ‘objectionable goods’, and ‘superannuation-related issues’. ‘Intellectual property crime’ includes counterfeit goods and copyright infringements, ‘objectionable goods’ includes goods that are offensive to any reasonable adult, such as censorship restricted material, while the category ‘superannuation-related issue’ was introduced to reflect an increase in potentially fraudulent matters involving superannuation funds.

44 AUSTRAC, above n 34.
Amending Act allows the cash dealers under the FTRA to continue to report under the FTRA until March 2010 or when they become compliant with the AML/CTF Act reporting, whichever is earlier. Madinger observes that the uniqueness of provisions on cash dealers is that the provisions are designed to catch a type of large cash transaction that might occur in cash-intensive business. Cash dealers represent:

a big hole in the paper trail; the point where the dirty cash enters the financial system isn’t always a bank, sometimes it’s a jewelry store or a car dealership or a real estate broker. If the reporting system works properly, that cash is reported when the jeweler or the car dealer deposited it into a bank account, but the question of who provided the money to the merchant would be unanswered.

Allied to the push for the tightening of Australia’s AML/CTF regime, the Standing Committee of Attorneys-General (‘SCAG’) has agreed to:

- enhanced law enforcement powers and offences for combating and prosecuting organised crime;
- nationally coordinated arrangements to identify, prioritise and respond to organised crime threats, including considering the development of a national ‘Organised Crime Threat Assessment’;
- nationally consistent criminal asset confiscation regimes;
- strengthen criminal intelligence capabilities and law enforcement information sharing;

- greater engagement and coordination with business to combat organised crime.

It is against this enhanced law enforcement background that reporting financial institutions, as members of the APG, face not only domestic obligations but also regional duties. Recently, there have been a number of high profile money laundering cases in Pacific Island Countries (PIC). A clear implication from these cases is that it is incumbent on Australian financial institutions to have both a familiarity with the Australian AML/CTF Act and overseas AML/CTF legislation.

47 A cash dealer under the FTRA has a choice either to comply with the AML/CTF reporting obligations as reporting entities under the AML/CTF Act commencing from December 2008; or as a cash dealer under the FTRA until the cash dealer becomes compliant with the AML/CTF Act reporting requirements by no later than March 2010 (see Deitz, above n 41).

48 Deitz, above n 41, notes that although AUSTRAC expects all reporting entities to be compliant with the AML/CTF Act reporting obligations by December 2008, it recognises that some entities may not be fully compliant at that date. However, AUSTRAC expects an entity to take reasonable steps towards compliance and be fully compliant with the reporting obligations at the latest by March 2010.


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