

Monitor 4 of 2022 – Ministerial Responses

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**THE HON KAREN ANDREWS MP
MINISTER FOR HOME AFFAIRS**

Ref No: MC22-008730

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Dear Senator

Thank you for your letter of 10 February 2022 seeking advice on the Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Rules Amendment Instrument 2021 (No.2) [F2021L01658]. I note that the concerns you have raised in your letter relate to the appropriateness of the exemption of the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1) (the Rules) from the sunset provisions of the Legislative Instruments Act 2003.

As you know, the Rules complement and provide the detail for the broader obligations set out in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the Act). I take these Rules seriously as they help Australia to meet its international obligations, support the combatting of money laundering and terrorism financing and assist industry in fulfilling their compliance with the Act. The possibility that the Rules may be repealed on a periodic basis would create significant commercial and regulatory uncertainty for industry.

For these reasons, the Rules are designed to be enduring and were exempted by the Governor-General from the sunset provisions of the *Legislative Instruments Act 2003*.

Given the Rules are issued by the Chief Executive Officer of the Australian Transaction Reports and Analysis Centre (AUSTRAC), I have asked AUSTRAC to address your specific questions in more detail. Their response is attached. I trust this information will assist the Committee in its consideration of the matter. If the Committee has further questions, I would be happy to discuss further with you.

Yours sincerely

KAREN ANDREWS

25 / 2 / 2022

Attachment A: AUSTRAC response to Committee questions

Question 1: *Why it is considered necessary and appropriate to use delegated legislation to set out an exemption from the operation of primary legislation in this instance.*

There are occasions when the requirements of the AML/CTF Act, as applied to particular situations, are disproportionate or go beyond the intention of the legislation. The exemption provisions included in the AML/CTF Act accommodate such circumstances.

Section 229 of the AML/CTF Act empowers the AUSTRAC CEO to make AML/CTF Rules prescribing matters permitted by any other provision of the AML/CTF Act.

Section 247 of the AML/CTF Act sets out four categories of general exemption each of which require the detail to be specified in the AML/CTF Rules. Subsection 247(3) requires the use of the AML/CTF Rules to specify circumstances in which the AML/CTF Act does not apply to the provision of a designated service.

The regulation of litigation funding schemes under the AML/CTF Act was an unintended consequence of changes made to the *Corporations Regulations 2001* (Corporations Regulations) in 2020. The money-laundering and terrorism financing risks associated with the provision of services to general members of a litigation funding scheme are negligible. In the absence of the exemption, litigation funders would be required to conduct the applicable customer identification procedures on any claimant that wishes to become a member of a scheme, including those that are passive members (unknown to litigation funders). AUSTRAC understands that this is unworkable and would likely result in litigation funders ceasing their activities pending regulatory relief.

Chapter 21 of the AML/CTF Rules, which was amended by *Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Rules Amendment Instrument 2021 (No.2)*, was made for the purposes of subsection 247(3).

Question 2: *Whether the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1) (the principal instrument) can be amended to provide that the measures inserted into the principal instrument by this instrument cease within three years after they commenced.*

It is preferable that measures inserted into the principle instrument by this instrument do not cease within three years after they commence.

The possibility of rule based exemptions being repealed on a periodic basis will create significant commercial issues for industry as a result of regulatory uncertainty.

As I outline in response to questions 3 and 4 below, the AML/CTF Rules are subject to an ongoing process of development, refinement and review, involving scrutiny and feedback from a wide range of stakeholders.

Question 3: *Why the principal instrument is exempt from sunseting, noting that this means that the measures in this instrument will remain in force within the principal instrument until they are proactively repealed;*

Regulation 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015* exempted the AML/CTF Rules from the sunseting provisions of the *Legislative Instruments Act 2003*. The reasons for this are:

- the AML/CTF Rules are designed to be enduring and not subject to regular review. The AML/CTF Rules aid in meeting Australia's international obligations and address matters of international concern; and support the combating of money laundering and terrorism financing
- commercial certainty would be undermined if the AML/CTF Rules were subject to sunseting. Regulatory uncertainty would impact on the significant investments which industry makes in fulfilling their compliance with the AML/CTF Act and Rules (including the development of IT systems and procedures), and investments in the future to ensure that those obligations are fulfilled on an ongoing basis.
- In addition, many chapters of the AML/CTF Rules relate to the exemption powers under the AML/CTF Act which allow for the complete or partial exemption from the obligations of the Act for reporting entities. The possibility that rules based exemptions may be repealed on a periodic basis would create significant commercial issues for industry as a result of that regulatory uncertainty, and
- that the AML/CTF Rules are subject to a more stringent statutory and non-statutory review process than is set out in the *Legislative Instruments Act 2003*. Preserving that process is important for the reasons given in response to question 4 below.

Question 4: *Whether there is any intention to conduct a review of the relevant provisions to determine if they remain necessary and appropriate, including whether it is appropriate to include the provisions in delegated legislation*

As outlined in my response to question 1, the regulation of litigation funding schemes under the AML/CTF Act was an unintended consequence of changes made to the Corporations Regulations in 2020. There is no intention to conduct a review of the relevant provisions other than in accordance with existing reviewing processes.

The AML/CTF Rules have been subject to both statutory and non-statutory reviews including a statutory review of the AML/CTF Act, Regulations and AML/CTF Rules that reported to Parliament in 2016. Non-statutory reviews of the Australian AML/CTF regime (including the AML/CTF Rules) are conducted by the international body, the Financial Action Task Force (FATF) on a regular basis.

The AML/CTF Rules are subject to an ongoing process of development, refinement and review, involving scrutiny and feedback from a wide range of stakeholders including industry, FATF, Australian Government agencies, law enforcement agencies, and other interested parties (including the Australian Information Commissioner).

Given the close interest stakeholders have in the AML/CTF Rules, the Rules undergo almost continual assessment and AUSTRAC is notified by the relevant sector of any concerns regarding the Rules and their operation. The number of additions and amendments made to the Rules since they commenced in 2007 indicate that the policy intention of the AML/CTF Rules is being fulfilled.