



SUBMISSION PAPER:

Submission to the Senate Legal and Constitutional Affairs Committee: The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime

August 2021

This Submission was prepared by FinTech Australia, working with and on behalf of its Members; over 300 FinTech Startups, VCs, Accelerators and Incubators across Australia.



About this Submission

This document was created by FinTech Australia in consultation with its members.

In developing this submission, our members provided their views and reviewed drafts to consider key issues relating to the proposed changes.

We also particularly acknowledge the support and contribution of Cornwalls to the topics explored in this submission.



Context: AML/CTF law reform

FinTech Australia and its members strongly support the aim of combating all forms of financial crime, particularly money-laundering and terrorism financing. Money laundering and terrorism financing (**ML/TF**) represents the very antithesis of what FinTech Australia and its members stand for: robust ML/TF measures are needed for Australia to be globally competitive and foster innovation, including by challenging existing structures and driving policy reform to ensure the continued growth and evolution of Australian FinTech.

As a result, FinTech Australia welcomes the enquiry into the adequacy and efficacy of Australia's AML/CTF regime and is grateful for the opportunity to make this submission to the Australian Senate Committee on Legal and Constitutional Affairs.

FinTech Australia notes that the Terms of Reference (**ToR**) for the Enquiry primarily focus on expanding the regulatory perimeter, including by extending the scope of the Australian regulatory framework to cover designated non-financial businesses and professions. As noted above, FinTech Australia strongly supports a robust ML/TF regime and appropriate expansions of the regulatory perimeter. In particular, as outlined on page 2 of this submission, we strongly support the tranche 2 expansion of the AML/CTF regime to designated non-financial businesses and professions.

This submission will, however, primarily focus on the ToRs that go to:

- appropriately clarifying how the requirements imposed on FinTech Australia's members meaningfully advance the aim of combating ML/TF; and
- limiting existing requirements imposed on FinTech Australia's members where those requirements do not – in FinTech Australia's respectful submission – meaningfully advance the aim of combating ML/TF

Terms of Reference addressed in this submission

FinTech Australia's submissions go to the following ToR:

- (a) The extent to which AUSTRAC responds to and relies upon reporting entities' reports–
ToR (a)(i).
- (b) The extent to which AUSTRAC identifies problems based on reporting by reporting entities – **ToR (a)(ii).**
- (c) the Australian Government's response to the recommendations made in the April 2016 Report of the Statutory Review of the AML/CTF Act and Associated Rules and Regulations (**Statutory Review**) -**ToR (e)(ii).**

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In addition, we comment as follows on matters raised by members and not raised elsewhere in this submission.

- (d) in response to **ToR (d)** (the attractiveness of Australia as a destination for proceeds of foreign crime and corruption) one of our members noted that:

“Australia lags behind many of its counterparts, such as New Zealand and the United Kingdom, in the developed world with AML/CTF regulation of Designated Non-Financial Businesses and Professions (DNFBPs). Anecdotally, and based more on observation than empirical evidence, there appears to be a distinct theme with foreign nationals [from certain countries] purchasing prime real estate in Australia for the purpose of investment (or evasion), rather than genuine interest in utilising the property. While so much emphasis is put on the requirement of reporting entities to identify [ultimate beneficial owners] and verify the source of funds and wealth of customers, it seems that the fact foreign nationals are transferring large amounts of money into Australia and integrating into our financial system without being subjected to the same rigorous checks and balances as other persons is not commensurate and seemingly selective of a specific high-net worth cohort. High-net worth does not mean low ML/TF risk. This weakness in the current regime appears to be the elephant in the room.”

- (e) In response to **ToR (f)** (the extent to which adherence with FATF recommendations prevents systemic and reputational risks to Australia, the Australian economy, and Australia's capacity to access international capital) the same member noted that:

“It appears Australia has been considered a ‘light touch’ for organised criminals and high-net worth individuals to repatriate large amounts of money into the country and integrate into our financial system relatively unchecked. Onus is on the financial institutions involved to be the first and last lines of defence, whereas lawyers, accountants of real-estate agents (the “gatekeepers”) involved have little or no education or incentive to deter or prevent the proceeds of crime entering the Australian economy.”

- (f) In response to **ToR(g)**(the regulatory impact, costs and benefits of extending AML/CTF reporting obligations to designated non-financial businesses and professions (DNFBPs or ‘gatekeeper professions’)) the same member noted that:

“Any regulatory costs or impacts for extending AML/CTF reporting obligations to DNFBPs is far outweighed by the benefits of strengthening Australia's AML/CTF regime. Besides the moral and ethical expectations of its population, the Australian government has an obligation to protect its citizens and financial system from being abused by foreign bad actors. The Government spends significant financial resources on cybersecurity for example yet keeps the door open for those looking to park potential proceeds of crime in a safehouse where more authoritarian governments have no visibility or jurisdiction. As a country of similar geopolitical challenges and stance on disrupting financial crime, New Zealand has successfully implemented the regulation of DNFBPs, so if Australia genuinely wants to hold itself up it needs to stop procrastinating and prioritise tranche 2.”



1. The extent to which AUSTRAC responds to and relies upon reporting entities' reports

1.1 General

We commend AUSTRAC's success as an AML/CTF regulator. We acknowledge and support the following features on the regime in Australia:

- AUSTRAC's combination of major regulatory enforcements with community outreach type events.
- AUSTRAC's use of its power to appoint an independent auditor rather than reaching immediately for other enforcement tools available to it.
- The merging of the 'regulator' and 'financial intelligence unit' roles within AUSTRAC (typically separated elsewhere) is an example of successful innovation which has led to AUSTRAC being considered a leader in the international compliance and regulatory communities.
- AUSTRAC has published a number of useful industry ML/TF risk assessments that demonstrate how quantitative reports provided by reporting entities can provide qualitative macro insights into new and emerging typologies.

1.2 AUSTRAC's response to, and reliance on, reports

We have the following observations:

- AUSTRAC is not a leader in responding to and relying upon the output of the many regulatory reports it receives. Our members have a sense that AUSTRAC's investment in technology has not kept pace with – and has not enabled AUSTRAC to synthesise and analyse appropriately - the many types of reports provided to it by reporting entities. One of our members has commented as follows:

"AUSTRAC does not only receive reports when reporting entities actually suspect their customers of having laundered money or committed other crimes. The reports which AUSTRAC receive are composed of:

1. *Yearly 'compliance reports' from reporting entities, which offer a high level overview of each reporting entities' AML/CTF Compliance Program and processes for the year past;*
2. *Threshold Transaction Reports (or "TTRs") for any transaction (or series of transactions in a short period of time) which entails the*

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deposit or withdrawal of a sum total of \$10,000 AUD cash or equivalent;

3. *International Funds Transfer Instruction Reports (or “IFTI reports”) for any transaction into or out of Australia, whether conducted via traditional means (such as the ‘SWIFT’ network) or via alternative means (such as a ‘Designated Remittance Arrangement’);*
4. *Finally, ‘Suspicious Matter Reports’ (or “SMRs”), for instances when reporting entities can reasonably infer that their customer’s conduct or transactions might implicate them in criminal wrongdoing.*

Although these reports are very distinct, their one commonality is that they are all extremely complicated and data rich. AUSTRAC’s inability to respond to and rely upon these reports is simply a result of their resourcing and technology budget being incommensurate with the task of synthesising this number of complex reports into actionable insights and intelligence. As evidence of this, the Committee may consider the lack of investment in “AUSTRAC Online” (the front-end system through which reporting entities must submit reports) and AUSTRAC’s back end systems since the inception of the AML/CTF Act. While AUSTRAC are presently investing in uplifting these systems, the fact remains that this comes after reporting entities have invested hundreds of millions of dollars at their end to attempt to streamline the reporting process, while AUSTRAC Online still cannot cater adequately to Apple Mac computers or the Google Chrome internet browser.

...

AUSTRAC has been rightfully vocal in its criticism of those it regulates who have failed to invest in resourcing and technology to understand ML/TF risk as they scale up in size and complexity; it may be appropriate for the Committee to consider AUSTRAC’s own inaction to ensure it is able to ingest increasingly numerous and complex regulatory reports.

...

Many financial institutions have the same complaint of not receiving feedback from AUSTRAC on the regulatory reports they submit. AUSTRAC is hesitant (and likely under resourced) to provide any specific feedback to reporting entities on the manner in which they have completed technical reports such as IFTI’s and TTR’s, or the quality and overall utility of SMRs to criminal investigations. This lack of feedback for industry participants may also be regarded as a failure on AUSTRAC’s part to respond to the regulatory reporting they receive, which in turn makes it far more challenging for compliance staff to justify large expenditures on regulatory reporting when the actual outcomes from the reporting are unknown.”

We appreciate that law enforcement imperatives quite properly limit AUSTRAC's ability to provide detailed information to reporting entities about how their reports have been utilised. However, we submit that AUSTRAC could provide reporting entities with general feedback on the reports made by those entities, in a manner that is consistent with law enforcement imperatives and would assist our members' compliance staff in performing their functions. This approach could be enhanced by following the proposals outlined by the Attorney General's Department (in response to Recommendations of the Statutory Review) in its *Industry Consultation Paper* of December 2016 (at pp 18-20), to give AUSTRAC additional powers to share information with the private sector (including reporting entities).

2. The extent to which AUSTRAC identifies emerging problems based on reporting entities' reports

2.1 IFTIs and TTRs

We note that IFTI and TTR reporting breaches to date are overwhelmingly self-disclosed, rather than having been detected by AUSTRAC through any intelligent analysis or like-for-like comparison based on the data they receive from reporting entities.

We respectfully suggest that there is a real question as to whether the actual use that AUSTRAC makes of the immense number and complexity of the IFTIs and TTRs received by it justifies the inclusion of those reports in the regulatory matrix in their current form. Members contributing to this submission are of the view that AUSTRAC is simply not empowered by its resourcing or technology to make meaningful use of the overwhelming majority of these reports (we note, however, that AUSTRAC may be able to offer evidence to the contrary since the full use of these reports is not necessarily public knowledge). We submit that the regulatory burden on reporting entities is **not** justifiable by the view that certain information may conceivably be useful for an investigation at some time in the future. If the actual utility of IFTI and TTR reporting is not apparent after 15 years of operation - when assessed against the burdens and costs these reporting obligations place upon reporting entities - the underlying need for these reporting obligations should be critically reviewed. This submission is consistent with an important general principle that was supported by the Statutory Review: that is, regulatory, intelligence, national security and law enforcement and other relevant government agencies should have access to the information they need to detect, deter and disrupt ML/TF activities. To the extent that IFTIs and TTRs are not actually being used for these purposes there is a real question as to whether the regime needs some refinement. This refinement would align with another general principle suggested by the Statutory Review: that is, a reporting entity's obligations should be proportionate to the ML/TF risks faced by it.



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2.2 SMRs

As noted in the Attorney-General's Department *Industry Consultation Paper* of December 2016 (at p 20) in addressing a recommendation of the Statutory Review that was accepted by the Government, there should be "an information-sharing model that allows AUSTRAC to disclose AUSTRAC information to reporting entities and private sector bodies to assist them to understand their risks and comply with AML/CTF obligations". This would assist in helping reporting entities to navigate the very expansive scope of the SMR reporting obligation under the Act. In particular, this may assist reporting entities in deciding what activity ought to be reported as an SMR. The broad wording in section 41, combined with AUSTRAC's inability to engage with industry participants to offer reassurance and feedback on SMR's that AUSTRAC does **not** want to receive, results in an ever-increasing number and decreasing overall quality of SMR's submitted to AUSTRAC each year. It is well known in industry that many reporting entities engage in 'defensive filing', where they submit SMR's which they believe AUSTRAC and law enforcement will have no interest in, not to help combat financial crime but rather to protect themselves from breaching the Act. This detracts from AUSTRAC's capability to distil meaningful intelligence in the fight against financial crime, and severely limits the overall effectiveness of the SMR requirement.

3. Implementing Recommendations of the Statutory Review

3.1 Introduction

In this section, FinTech Australia flags certain recommendations from the Statutory Review that the Government had previously indicated that it would implement but which have not yet been implemented fully. The implementation of these measures will assist FinTech Australia members which are AML/CTF reporting entities.

Broadly, these are recommendations that go to:

- simplifying the AML/CTF Act to enable reporting entities to better understand and comply with their reporting obligations – Statutory Review recommendation 2.1
- simplifying and rationalising the AML/CTF Rules – Statutory Review recommendation 2.2
- simplifying, streamlining and clarifying AML/CTF Program obligations – Statutory review recommendation 6.4
- simplifying and streamlining the application process for exemptions and AUSTRAC adopting a more pro-active approach to considering potential exemptions – Statutory Review recommendation 17.1 and 17.3



3.2 Simplifying the Act, Rules and AML/CTF Program Requirements

The existing list of designated services – general

As the Committee is aware, the designated services (the providers of which are regulated as reporting entities) are listed in Section 6 of the Act, in three separate tables containing some 75 items. We submit that many of these items are phrased in confusing language which has not kept pace with technology and business in Australia. As a result, there is considerable uncertainty about whether or not the designated services list covers various activities/business models which have emerged in the 15 years since the Act's inception. For example, it is not clear whether or not businesses which provide services in connection with card payments and online ordering of food and other goods and services are performing a designated service.

Designated remittance services

The definitions relevant to the designated services specified in items 31 and 32 of section 6(2) of the Act are extremely broad on their face. This causes considerable uncertainty for those offering innovative FinTech products. We suggest that the definitions should be made more specific so as to limit the scope of these items to the types of money services businesses that are the subject of the FATF Recommendations.

Section 41- suspicious matter reports

This section requires reporting entities to file SMR's not just for significant financial crimes but in relation to very expansive criteria, including the breach of the law of any State, Territory or the Commonwealth, which are numerous. The width of this obligation is such that fraud-related offences are subject to SMRs. This is different from New Zealand and the UK. One of our members in the "buy now pay later" (BNPL) sector notes that central to its functions is the management of BNPL fraud: this can be managed appropriately even if it does not trigger an SMR. The requirement to submit an SMR is overly burdensome and out of step with comparable jurisdictions.

Clarification of section 174 to address banks' concerns which lead to "de-banking" and the inability of some FinTechs to obtain banking services

We accept that there needs to be appropriate oversight by banks of all their customers, including those providing designated services of their own. As the Committee is aware, this requirement is backed by section 174 imposes a civil penalty for a person (e.g. a bank) which aids, abets, counsels or procures a contravention of a civil penalty provision.

However, FinTechs sometimes find themselves 'debanked', with accounts closed and banking services revoked, when banks form a view that there is AML/CTF risk



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in a particular industry or business model. This presents a significant threat to these businesses and detracts greatly from their resilience and ability to focus on mitigating financial crime risks, since their legal and compliance staff are diverted into giving banks comfort or helping them apply for new banking services from those banks.

FinTech Australia believe that banks' responsibility under section 174 should be clarified where they are providing banking services to a customer which is itself providing a designated service. Otherwise, banks will continue to "derisk" their business by "unbanking" FinTechs. This stifles innovation and damages many legitimate businesses.

IFTI reporting protocol

One of our members has noted that the current IFTI reporting protocol is not suitable for modern international payments and too focussed on traditional SWIFT and bank payments. There may be opportunities for AUSTRAC to identify new macro trends and themes by adapting more to new methods of international payments. In addition, the way the IFTI reporting regime is implemented in Australia is not replicated in overseas jurisdictions in which that member operates.

Exemptions

In line with the accepted recommendations of the Statutory Review, we request that the Act be amended to facilitate AUSTRAC taking a more proactive approach to considering potential exemptions

4. Conclusion

FinTech Australia thanks the Committee for the opportunity to make this submission. We would be pleased to discuss any aspect of the submission with the Committee further if that would assist.