



Australian Government
AUSTRAC

Senate Legal and Constitutional Affairs
Legislation Committee
Inquiry into the Crimes and Other Legislation
Amendment (Omnibus) Bill 2023

May 2023

AUSTRAC submission

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Outline of submission

The Australian Transaction Reports and Analysis Centre (AUSTRAC) welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the Crimes and Other Legislation Amendment (Omnibus) Bill 2023.

AUSTRAC supports the amendments to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act), as proposed in the Bill, and considers that the amendments provide operational benefit to AUSTRAC's work.

The submission is in two parts:

- Part 1 provides an overview of AUSTRAC and our regulatory function
- Part 2 addresses the three amendments to the AML/CTF Act in the Bill.

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Part 1: Overview

About AUSTRAC

AUSTRAC is Australia's financial intelligence unit (FIU) and AML/CTF regulator. As Australia's FIU, AUSTRAC provides financial transaction data and actionable financial intelligence to law enforcement, national security, regulatory, human services and revenue agencies (AUSTRAC's partner agencies), as well as international counterparts. Partner agencies use this information to assist them to detect, prevent and disrupt money laundering and terrorism financing (ML/TF) and other serious crimes.

As a regulator, AUSTRAC oversees the compliance of more than 17,000 Australian businesses with the AML/CTF Act and associated Rules. AUSTRAC's regulated population ('reporting entities') includes a broad range of businesses from across the financial services, gambling, bullion, remittance and digital currency exchange sectors. These businesses range from major banks and casinos to single-operator businesses, but all must comply with applicable obligations in the AML/CTF Act, and implement effective AML/CTF systems and controls to identify, mitigate and manage ML/TF risk.

AUSTRAC uses our knowledge of reporting entities, industry trends and ML/TF risks to direct our regulatory efforts towards vulnerabilities and high-risk entities, which increases resilience to criminal abuse in the financial sector. Our regulatory work and engagement with reporting entities improves the volume and value of financial intelligence provided to us, and subsequently disseminated to our partner agencies.

AUSTRAC may take enforcement action against a reporting entity for non-compliance with the AML/CTF Act. In instances where reporting entities fail to meet their obligations, well-targeted and proportionate enforcement action can benefit reporting entities and the wider community, by contributing to the broader integrity of the financial system.

AUSTRAC regulation of designated services

Businesses that provide a 'designated service' listed in section 6 of the AML/CTF Act are reporting entities and have certain regulatory obligations.

Reporting entities must:

- enrol and where required, also register with AUSTRAC
- establish and maintain an AML/CTF program to help identify, mitigate and manage the ML/TF risks the business faces
- conduct initial and ongoing customer due diligence
- report certain transactions to AUSTRAC, including suspicious matters, threshold transactions and international fund transfer instructions, and submit compliance reports
- keep records.

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Part 2: Proposed AML/CTF Act amendments

Clarifying the obligation to enrol with AUSTRAC

The AML/CTF Act was amended in 2011 to make it mandatory for reporting entities to enrol with AUSTRAC. Businesses are required to enrol with AUSTRAC within 28 days of providing, or commencing to provide, a designated service regulated under the AML/CTF Act. The enrolment requirement is in section 51B of the AML/CTF Act.

The benefit of mandatory enrolment is two-fold. Firstly, it allows AUSTRAC to more easily determine our regulatory perimeter and perform our educative, supervisory and enforcement functions. Secondly, it is an essential component that underpins the transparency, accuracy and accountability of AUSTRAC's funding model.

Reporting entities are required to update their enrolment details if those details change. They may request the AUSTRAC CEO remove their details from the Reporting Entities Roll when they cease to provide any form of designated service. The AUSTRAC CEO must remove their details if the CEO is satisfied that it is appropriate to do so.

The Bill clarifies the requirement to enrol on the Reporting Entities Roll as a 'continuing obligation', rather than a static obligation. The amendment also clarifies that a separate contravention occurs each day that a person provides designated services while failing to enrol in the period between the enrolment deadline and the day the obligation to apply for enrolment ends.

At present, the AUSTRAC CEO may only give an infringement notice (under section 184 of the AML/CTF Act) for contravention of the requirement to enrol in the first 12 months of a person commencing to provide designated services. However, AUSTRAC will often only become aware of an entity's failure to enrol more than 12 months after the entity first commenced to provide designated services. The AUSTRAC CEO has no ability to issue infringement notices to the entity in these circumstances, as the enrolment obligation in its current form is not expressly clear in imposing a continuing obligation. This is continuously contravened where the entity continues to provide designated services while not enrolled. This means if the AUSTRAC CEO is considering enforcement action in relation to a failure to enrol where the contravention dates back more than 12 months, then the AUSTRAC CEO must use one of the alternative enforcement tools, such as civil penalty, which is disproportionate to the nature of the contravention and inappropriate.

The amendment that the Bill will make, puts the intended operation of section 51B beyond doubt and allows the AUSTRAC CEO to issue an infringement notice for contraventions that occurred in the preceding 12 months, even if the contraventions were only discovered more than 12 months after the entity *first* commenced to provide designated services.

AUSTRAC supports the amendment as it will allow the AUSTRAC CEO to more effectively enforce contraventions of the obligation to enrol on the Reporting Entities Roll, and create a stronger deterrence for failure to enrol.

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Reinstating protections for certain types of AUSTRAC information

The Bill will reinstate protections on the use and disclosure of sensitive types of AUSTRAC information, giving a statutory basis to resist production of that AUSTRAC information for the purposes of, or in connection with, court or tribunal proceedings.

The types of information that will be afforded protection are suspicious matter reports (SMRs), information obtained under section 49 of the AML/CTF Act in connection with SMRs, and suspect transaction reports given to AUSTRAC under the *Financial Transaction Reports Act 1988* (FTR Act) (collectively referred to as SMR-related information).

SMR-related information was previously protected from production for, or in connection with, court and tribunal proceedings, under the AML/CTF Act as it stood before June 2021. However, the protection was inadvertently removed by the *Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Act 2020*.

SMR-related information requires protection as it contains information relating to reporting entities' subjective and unsubstantiated suspicions of wrongdoing. It is intended to be used only as intelligence to prompt further investigation. Further, protecting this information from disclosure in connection with court or tribunal proceedings reduces the risk of tipping-off persons who are the subject of the SMR-related information (and who may themselves be the accused or litigant in the court or tribunal proceeding). Finally, it helps to protect the reporting entities and their employees from possible legal claims or reprisal.

Preventing tipping-off and protecting the reporting entities and their employees who are the sources of SMR-related information is important in maintaining the overall integrity and efficacy of the SMR regime. It also ensures alignment and congruence with other existing provisions in the AML/CTF Act, which are similarly designed to protect SMR-related information—for example, section 124 prohibiting the admission of SMR-related information as evidence, and section 134 protecting against disclosure to the court or tribunal except where necessary to give effect to the AML/CTF Act or FTR Act.

In the time that the protection of SMR-related information has been absent from the AML/CTF Act, AUSTRAC has had to rely on making public interest immunity claims where SMR-related information is involved in law enforcement or national security agencies' prosecution disclosure obligations, or in party-party disclosure. This is resource intensive, time consuming and costly for AUSTRAC and the courts and tribunals, and is not aligned with the fact that SMR-related information is not admissible in evidence under section 124 of the AML/CTF Act. For these reasons, AUSTRAC supports the amendments to reinstate these protections.

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Computer-assisted decision making

AUSTRAC supports amendments the Bill will make to the AML/CTF Act to explicitly authorise the AUSTRAC CEO to arrange for a computer program to take administrative action on the CEO's behalf. These amendments are desirable to create efficiencies for AUSTRAC, government and reporting entities, and will specifically reduce waiting times for routine, low-risk processes that are currently conducted manually.

The AML/CTF Act does not currently explicitly authorise the AUSTRAC CEO to use computer programs (including automated programs) to execute any of the CEO's administrative decision-making functions, or to assist with doing so. This requires all decisions to be made by the AUSTRAC CEO.

The Bill provides for administrative decisions that can be made with computer assistance relating to:

- maintaining the Reporting Entities Roll (Part 3A of the AML/CTF Act)
- maintaining the Remittance Sector Register (Part 6 of the AML/CTF Act)
- maintaining the Digital Currency Exchange Register (Part 6A of the AML/CTF Act).

The Bill also provides that the specific administrative decisions that can be made with computer assistance, under the three areas specified above, are to be prescribed in the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)* (AML/CTF Rules). The AML/CTF Rules are legislative instruments that are made under the AML/CTF Act, must be registered on the Federal Register of Legislative Instruments and are disallowable instruments.

The rule-making power to prescribe decisions in the AML/CTF Rules will streamline the administration of routine approvals. The ability to prescribe decisions for which a computer program can be used to take administrative action in the Rules, will ensure the decisions and relevant criteria remain consistent with emerging ML/TF threats, while still being subject to parliamentary scrutiny and oversight.

AUSTRAC supports the inclusion of other safeguards for the use of computer programs for administrative actions. The Bill allows the AUSTRAC CEO to override a computer-assisted decision if the CEO is satisfied that it is not the correct or preferable decision. This could occur in the unlikely event of a computer system error or failure, and requires the AUSTRAC CEO to ensure that any computer-assisted decision is consistent with the objects of the AML/CTF Act. The AUSTRAC CEO will continue to be ultimately responsible for the actions and decisions made using computer assistance.

Types of administrative decisions

There are basic administrative decisions made by the AUSTRAC CEO that are well suited to computer-assisted decision making, which relate to the Reporting Entities Roll, Remittance Sector Register and the Digital Currency Exchange Register. The Bill will not allow adverse decisions to be made by a computer program. Adverse decisions that are subject to the Reviewable Decision framework in Part 17A of the AML/CTF Act will continue to be subject to human scrutiny and processed manually.

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Reporting Entities Roll

A person that provides a designated service under the AML/CTF Act must enrol with AUSTRAC within 28 days of providing or commencing to provide that service.

Where a person applies for enrolment, the AUSTRAC CEO has an obligation to enter the person's name and enrolment details on the Reporting Entities Roll. The AUSTRAC CEO can only consider removing a person's name and enrolment details from the Roll if the person makes a written request for the AUSTRAC CEO to do so. This makes the enrolment process suited to automation.

Remittance Sector Register and Digital Currency Exchange Register

Renewal of registrations on the Remittance Sector Register and the Digital Currency Exchange Register are administrative decisions also suitable for automation under a computer program.

Decisions on renewal could be automated where an applicant is seeking a renewal of registration where there is no change in circumstances, and no red flags are raised in the application—such as a history of non-compliance with regulatory obligations—since the applicant was last registered.

However, where there is a change in circumstances or a red flag raised, a delegated decision maker of the AUSTRAC CEO will be required to intervene to consider the application and give 'procedural fairness' notice of any proposed negative decision. This is to afford the applicant an opportunity to make submissions (as required by the AML/CTF Act), and provide notice of any adverse decision that is finally made that includes reasons for the decision. This means that computer-assisted administrative decisions for renewal of registrations will be limited to 'positive' decisions that are made in favour of the applicant only.