



AUSTRALIAN BANKERS' ASSOCIATION INC.

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Senator The Hon Chris Ellison
Minister for Justice and Customs
Parliament House
CANBERRA ACT 2600

Dear Minister,

**Anti-Money Laundering and
Counter-Terrorism Financing Bill 2006: AUSTRAC powers**

AUSTRAC's powers under the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 ("the Bill") are broad reaching and significant yet there appear to be no equivalent accountability measures.

AUSTRAC has broad powers including to act as legislator and enforcer. They are unchecked save in relation to a general power of the Minister to make directions in relation to policy or priorities (clause 228) and the making of Rules (clause 229) as well as policy principles related to the functions of the AUSTRAC CEO (clause 213).

The ABA expresses no criticism of AUSTRAC or its officers, but requests that specific accountability mechanisms for AUSTRAC be included in the Bill. This is a key element of sound regulatory practice.

The ABA's concern about lack of transparent accountability measures is compounded by the structure of the legislative regime, which leaves much of the detail to the Rules, yet many of the Rules have not yet been published and there is no formal Rule consultation process provided for in the Bill.

Potential mechanisms would include:

- (1) An enforcement policy which is subject to a consultation process before implementation.
- (2) Specified consultation processes for the Rules including public draft and notice periods. The commencement of relevant provisions of the Bill should take these development and consultation processes

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into account. For example, the scope of the Bill can be extended significantly by prescribing more Designated Services in the regulations, and again a formal consultation process is sought.

- (3) No action letters and appeals.
- (4) A mechanism such as an advisory council.
- (5) Specified merits review of AUSTRAC powers and consideration of other limitations, such as statutory requirements to take certain matters into account when making a decision. The new legislation should provide for timely access to third party review on the merits of key decisions in accord with the recommendation 7.18 of the Taskforce on Reducing Regulatory Burdens on Business.

The ABA has previously discussed a solution addressing items (4) and (5) above with representatives of your office and AUSTRAC. A revised and updated document is attached, which takes into account feedback from earlier discussions.

We request an opportunity to discuss this proposal and other matters raised above.

Yours faithfully

Tony Burke

CC:

Greg Mole, Office of the Minister for Justice and Customs

Joanne Blackburn, Attorney-General's Department

Neil Jensen, AUSTRAC

Senate Legal and Constitutional Committee

AUSTRAC Functions and Accountability: A Framework Proposal¹

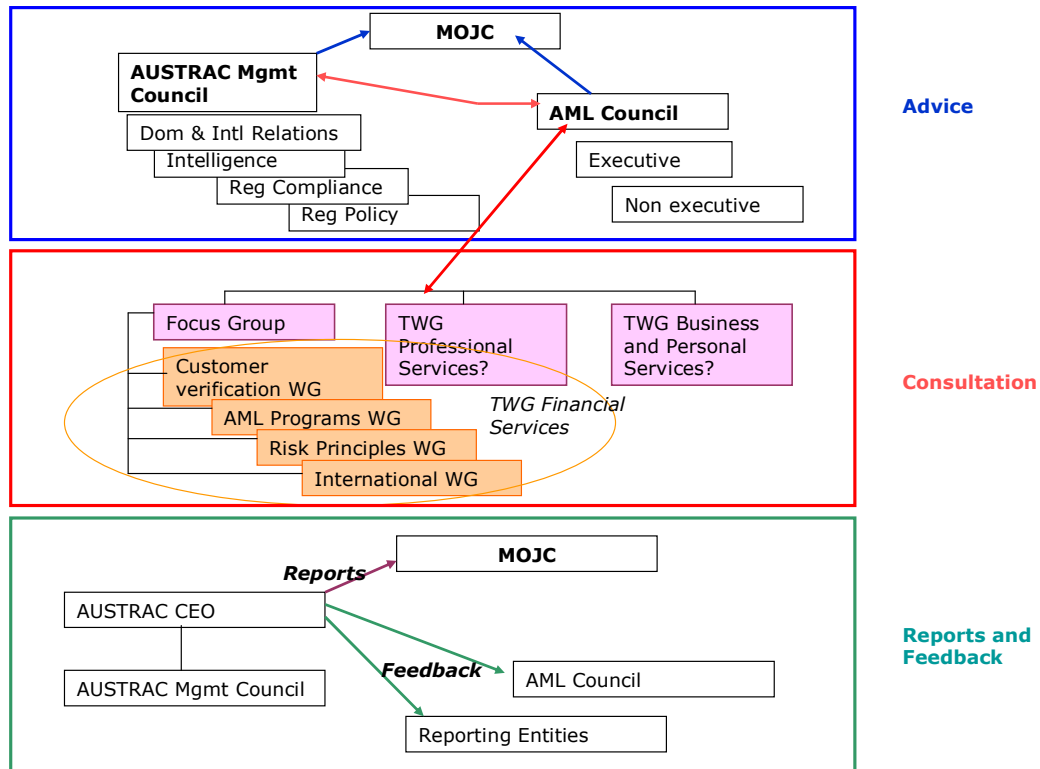
1. Introduction

Under the AML/CTF legislation, AUSTRAC will be given new functions and accountabilities and wide-ranging powers.

The exercise of these new functions, accountabilities and powers requires consideration of the existing mechanisms and framework for advice, industry consultation and reporting and feedback. While industry believes that some changes are needed, there is a sound platform in place, particularly in relation to the new consultative mechanisms established in late 2005.

The following diagram illustrates an overall framework for an advisory structure, and is recommended by industry, for further discussion with the Government.

Each component is described below.



2. Advice

Section 228 of the AML/CTF Bill provides that:

¹ Updated for AML/CTF Bill introduced 1 November 2006

(1) The Minister may give the AUSTRAC CEO a written direction about policies the AUSTRAC CEO should pursue, or priorities the AUSTRAC CEO should follow, in performing any of the AUSTRAC CEO's functions...

(3) The AUSTRAC CEO must comply with a direction under subsection (1).

S213 states that:

(1) The Minister may give written policy principles to the AUSTRAC CEO about the performance of the AUSTRAC CEO's functions...

(3) The AUSTRAC CEO must comply with the policy principles (if any) when performing the AUSTRAC CEO's functions.

Clearly, the existing mechanism of the AUSTRAC CEO and fellow members of the Management Council receiving and implementing policy advice and directions from the Minister will not change.

The proposed AML/CTF legislation is however much broader and deeper in scope and application than the current legislation, and its implementation and ongoing enhancement of the system will be a very large undertaking for both industry and Government.

In order to assist AUSTRAC in carrying out its new functions and fulfilling its accountabilities, industry believes that the mechanism of an AML Council is needed. It would comprise executive members from AUSTRAC and AGD, but the majority of its members would be senior industry representatives, drawn from the institutions and peak industry bodies.

The AML Council could, for example, conduct a post-implementation review process, dealing expediently with the necessary 'refinements' that emerge through the bedding down process.

Reforms or amendments initiated by industry could be referred to the Council.

The Council could also be used to conduct assessments of significant issues that emerge over time, for example if there were a Government proposal to extend the measures or alter liabilities.

Additionally, the functions of the current Ministerial Advisory Group would be absorbed into the AML Council.

3. Consultation

S 212 of the AML/CTF Bill provides that:

(2) In performing the AUSTRAC CEO's functions, the AUSTRAC CEO must:

(a) consult with the following:

- (i) reporting entities or the representatives of reporting entities;
 - (ii) the Commissioner of the Australian Federal Police;
 - (iii) the Chief Executive Officer of the Australian Crime Commission;
 - (iv) the Commissioner of Taxation;
 - (v) the Chief Executive Officer of Customs;
 - (vi) the Privacy Commissioner; and
- (b) take into account any comments made in the course of those consultations.

A very effective consultation framework of industry working groups, established by the Government, has been operating over the last 12 months, and has supported AUSTRAC in fulfilling consultation obligations.

It is proposed that this continue in its current form, with the Focus Group serving as the key channel for financial services consultation on Rules development and amendment issues.

The consultation focus will shift over time from the design and interpretation of the law and Rules to issues that arise in relation to implementation. The framework will accommodate this natural evolution in the consultation process.

4. Reports and Feedback

Part 16, Division 5 of the AML/CTF Bill specifies AUSTRAC's reporting obligations:

Division 5—Reports and information

226 Annual report

(1) The AUSTRAC CEO must, as soon as practicable after 30 June in each year, prepare and give to the Minister a report of the AUSTRAC CEO's operations during the year ending on that 30 June.

Note: See also section 34C of the Acts Interpretation Act 1901.

(2) The Minister must cause a copy of each report under this section to be tabled in each House of the Parliament within 15 sitting days of that House after receiving the report.

227 Minister may require the AUSTRAC CEO to prepare reports or give information

Reports

(1) The Minister may, by written notice given to the AUSTRAC CEO, require the AUSTRAC CEO:

(a) to prepare a report about one or more specified matters relating to the performance of the AUSTRAC CEO's functions; and

(b) give a copy of the report to the Minister within the period specified in the notice.

Information

(2) The Minister may, by written notice given to the AUSTRAC CEO, require the AUSTRAC CEO to:

(a) prepare a document setting out specified information relating to the performance of the AUSTRAC CEO's functions; and

(b) give a copy of the document to the Minister within the period specified in the notice.

Compliance

(3) The AUSTRAC CEO must comply with a requirement under subsection (1) or (2).

The consultation component of the framework would provide AUSTRAC with a mechanism for gaining additional information from industry, and for material and analysis to be tested prior to its inclusion in reports to the Minister.

S212(1) should be specifically amended to include a further obligation on AUSTRAC - to provide appropriate feedback and information to industry, particularly in relation to reports made to AUSTRAC by reporting entities, and on other matters necessary to inform industry, including but not limited to, regulatory developments in other jurisdictions and issues with politically exposed persons (PEPs).

It would also be necessary under the framework proposed by industry for feedback and information to be provided to the AML Council, and for the Council to report to the Minister, annually, and additionally as required.

5. Example: Amendment to Existing Rule

The framework proposal will need to be supported by protocols and process detail, and would probably be specified in Rules.

In this paper, a particular example is considered for the purposes of illustration of how the framework could work.

Let us assume that a group of finance sector entities has formed the view that an aspect of a particular customer ID rule has unintended consequences for a large group of customers. They could choose to raise this concern to either:

- Customer ID WG or Focus Group;
- AUSTRAC; or
- Directly to the AML Council

They would probably choose one of the first two options, as the AML Council may not meet more than 2 or 3 times annually.

In this case, the issue is raised with the Focus Group. The Focus Group prepares a recommendation for a Rule change for AUSTRAC, which is also referred to the AML Council. While supported by AUSTRAC, the change appears to require a reconsideration of the underlying policy, and AUSTRAC prepares a paper for advice of the Minister (with AGD).

6. Guidelines

It is also recommended that the above framework be used for the development of Industry Guidelines.

For example, for financial services, the Focus Group would do a first draft and then issue to the Technical Working Group (TWG). Following a period of say one month for consideration, comments would then go back to the Focus Group, which would consider any comments, prepare a final draft and send to AUSTRAC for endorsement and issuance.

7. Third party merits review

The Taskforce on Reducing Regulatory Burdens on Business reported in January 2006 that there should be provision for merit review of any administrative decisions that can significantly affect the interests of individuals or enterprises (Recommendation 7.18). The Government agreed in principle with that recommendation.

Industry notes that the Administrative Appeals Tribunal is commonly accepted as providing a simple, non-technical and principled mode of third party review of Commonwealth Government decisions and industry seeks the empowerment of the Tribunal to review decisions by the regulator under the AML/CTF legislation.

In the same vein, the ABA requests that the amendment to the Administrative Decisions (Judicial Review) Act in the Transitional Provisions and Consequential Amendments Bill be reconsidered.