

To: Attorney-General's Department  
3/5 National Circuit  
Barton ACT 2600  
Australia

15 June 2023

Dear Sir/Madam,

# SUBMISSION

## MODERNISING AUSTRALIA'S ANTI-MONEY LAUNDERING AND COUNTER-TERRORISM FINANCING REGIME

Part 1, Questions 1, 11, 12 and 18 and Part 2, Question 23.

Improving financial intelligence and enforcement outcomes by modernising  
Australia's AML/CTF regime



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## ABOUT THE SUBMITTER

The **Financial Integrity Hub at Macquarie University Law School** drives transformative change through interdisciplinary and future-focused research that provides cutting-edge solutions to the global challenge of financial crime. The Financial Integrity Hub is independent and focuses exclusively on the integrity of financial systems and compliance with the domestic and global regimes for anti-money laundering (AML) and counter-terrorist financing (CTF). There is currently no other research centre of this nature in Australia. The Hub is distinguished by its exceptional attributes, including a well-established track record and comprehensive interdisciplinary coverage across diverse fields, including law, business, security and cyber.

This submission was prepared by **Ben Scott** and **Dr Alex Simpson**.<sup>1</sup>

Ben Scott has worked in financial crime compliance in banking and as a financial intelligence analyst in law enforcement. He has degrees in history and law. His articles on financial crime intelligence and enforcement have appeared in the *Journal of Money Laundering Control* and the *Journal of Financial Crime*.

Alex Simpson is a Senior Lecturer in Criminology and an expert on the harms of financial and corporate crime. He is the author of *Harm Production and the Moral Dislocation of Finance in the City of London* (Emerald, 2021) and is a regular contributor to *The Conversation*, writing on issues connected to financial responsibility and gambling regulations.

The Australian Government's proposed AML/CTF reforms are intended to simplify and streamline the operation of the existing regime and to extend it to high-risk professions such as lawyers, accountants and real estate agents. This submission focuses on changes to the regime that would support the objectives of detecting, deterring and disrupting money laundering and supporting collaboration between AUSTRAC, reporting entities and other government agencies.<sup>2</sup>

The submission focuses on four main issues: (1) the absence of guidance on customer terminations in the AML/CTF regime; (2) the proposed changes to the process for obtaining exemptions from due diligence obligations to assist an investigation; (3) the scope of the tipping-off offence; and (4) guidance for tranche 2 entities in managing their AML/CTF obligations.



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<sup>2</sup> *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act), ss 3(1)(aa), 3(1)(ac).

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## 1. The termination of customer relationships is a matter of concern to AUSTRAC, law enforcement and reporting entities but the regime provides no guidance on this subject.

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- The termination of customer relationships is a measure that reporting entities take to mitigate financial crime risk, but the AML/CTF Act and Rules do not provide specific guidance on considerations relevant to termination.
- Failure to consider terminating customer relationships has been used as evidence of non-compliance with AML/CTF obligations in AUSTRAC litigation.<sup>3</sup>
- Risks of termination include the displacement of criminal behaviour and crime groups to other reporting entities, including those who are less capable of acting as responsible reporting entities.
- Reporting entities need to be responsible – morally, ethically and legally – for reporting suspicious behaviour once discovered rather than simply terminating customer relationships, which risks passing the problem along to another reporting entity.
- AUSTRAC has issued draft guidance and communication indicating that large-scale de-risking through customer terminations is detrimental to the intelligence and enforcement activities it is intended to support.<sup>4</sup>
- However, in the absence of legislative support for maintaining customers with related financial crime concerns, it is likely that reporting entities will continue to take a risk-averse approach to customer terminations.
- The termination of customer relationships in this manner only increases the risk that suspicious activity is not reported and is displaced onto other institutions within the sector.

### Recommendation

*The Government should consider amending the Act and Rules to formally incorporate AUSTRAC's position on customer terminations at appropriate points, including the sections of the Act relating to ongoing customer due diligence and the exemption process (see Point 2 below). This would be with the aim of supporting reporting entities to achieve a better balance between risk mitigation, community expectations, and enforcement and intelligence outcomes.*

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<sup>3</sup> *Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v Commonwealth Bank of Australia Ltd* [2018] FCA 930 at [7].

<sup>4</sup> See AUSTRAC, 'AUSTRAC Statement 2021: De-Banking' (media release, 29 October 2021), [www.austrac.gov.au/news-and-media/media-release/austrac-statement-2021-de-banking](http://www.austrac.gov.au/news-and-media/media-release/austrac-statement-2021-de-banking); AUSTRAC, 'Financial Services for Customers That Financial Institutions Assess to Be Higher Risk – Draft Guidance' (12 December 2022), [www.austrac.gov.au/sites/default/files/2022-11/Financial%20services%20for%20customers%20that%20financial%20institutions%20assess%20to%20be%20higher%20risk.pdf](http://www.austrac.gov.au/sites/default/files/2022-11/Financial%20services%20for%20customers%20that%20financial%20institutions%20assess%20to%20be%20higher%20risk.pdf).

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## 2. Limiting AUSTRAC's role in the process of obtaining exemptions for assisting an investigation as proposed risks reducing confidence in the exemption process.

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- The proposed process for obtaining exemptions is for eligible agencies to provide a 'keep open' notice directly to reporting entities, copying AUSTRAC. AUSTRAC would require periodic reporting from agencies and reporting entities on notices issued and relied upon.
- Neither the current nor the proposed process addresses the issue of customer exits discussed in Point 1 above. The exemption provisions relate only to due diligence obligations and not to customer exit decisions.
- The provisions do not provide explicit support for entities to defer a customer exit decision to support a law enforcement investigation. However, in practice, that is how exemptions are currently used by agencies and reporting entities.
- Agencies need a mechanism within the AML/CTF Act to enable reporting entities to defer a decision to exit a customer in order to assist in a law enforcement investigation, thereby making the reporting entity responsible for reporting suspicious behaviour.
- AUSTRAC's role in the exemption process needs to go beyond a limited oversight and assurance role, because reporting entities are relying on exemptions from AML/CTF obligations that AUSTRAC enforces. Due diligence obligations are matters of regulatory concern to AUSTRAC, with penalties attached.
- To give agencies and reporting entities confidence in AUSTRAC's oversight of the process, it is important that AUSTRAC maintains a centralised record of exemptions and that it reports on notices issued and relied on, rather than requiring agencies and reporting entities to do this.

### **Recommendation**

*The provisions in the Act and Rules relating to exemptions should be amended to make clear that a reporting entity can be exempted from obligations relating to the decision to terminate or maintain a customer. The proposed approach to exemptions is supported, but AUSTRAC should retain responsibility for maintaining a centralised register of exemption requests and responses.*

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### 3. The tipping-off offence is broad in scope and seldom if ever enforced, and it creates barriers to collaboration and information-sharing.

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- The current tipping-off offence encompasses the disclosure of suspicious matter report (SMR) information, or information from which it could be inferred that an SMR has been submitted.
- The offence does not distinguish between deliberate, accidental and reckless or negligent disclosure, and does not take into account the likely impact of the disclosure. The equivalent provision in UK legislation makes it an offence for a person to disclose information that is likely to prejudice an investigation.<sup>5</sup>
- Open-source searches have identified no Australian prosecutions or convictions for tipping off and only one UK prosecution for an equivalent offence, dating from 2011.<sup>6</sup>
- Guidance material provided by AUSTRAC indicates that the purpose of the tipping-off offence is to criminalise deliberate or reckless disclosure of specific information to a customer in a way that could compromise a law enforcement investigation.<sup>7</sup>
- The sharing of sensitive information between reporting entities with appropriate safeguards is often beneficial, yet the current scope of the offence risks creating blocks and barriers for such knowledge sharing.
- For example, institutions should be encouraged to share information about employees who are suspected of facilitating money laundering or internal fraud to aid a more interconnected and industry-wide, rather than individual, approach.
- However, the current tipping-off provisions make this kind of collaboration difficult. The current lack of prosecution and enforcement indicate the potential benefits of collaborative enforcement, with formal abilities to share information and knowledge – particularly in relation to customer networks and insider threats.

#### Recommendation

*The current tipping-off provisions should be amended to narrow the focus of the offence to the disclosure of information which is likely to prejudice an investigation, in line with the equivalent offence under UK law. The aim should be to create and facilitate a more formal capability for reporting entities to share information with each other in order to manage financial crime risk.*

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<sup>5</sup> *Proceeds of Crime Act 2002* (UK), ss 333A, 342.

<sup>6</sup> *R v Doshi* [2011] EWCA Crim 1975.

<sup>7</sup> See AUSTRAC, 'Tipping Off Examples', [www.austrac.gov.au/business/how-comply-and-report-guidance-and-resources/reporting/suspicious-matter-reports-smrs/tipping-examples](http://www.austrac.gov.au/business/how-comply-and-report-guidance-and-resources/reporting/suspicious-matter-reports-smrs/tipping-examples).

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#### 4. The addition of tranche 2 entities will deliver financial intelligence benefits to government only if those entities have access to up-to-date guidance on relevant red flags and indicators of financial crime risk, so that they can identify and report on suspicious activity.

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- AUSTRAC currently supervises approximately 17,000 Australian reporting entities.<sup>8</sup> With the addition of approximately 16,000 law firms, 37,000 accounting firms, 46,000 real estate businesses,<sup>9</sup> and other tranche 2 entities, this number will rapidly increase.
- The addition of tranche 2 entities does not guarantee positive financial intelligence and enforcement outcomes. The gambling sector, for example, has been subject to AML/CTF regulation since the Act was passed. Recent state-level inquiries, enforcement action, and news coverage highlight persistent financial crime concerns in that sector.<sup>10</sup>
- Tranche 2 industries are heterogeneous. They include large corporate entities and small and medium-sized businesses, with divergent financial crime risk profiles and compliance resources. Tranche 2 entities will need specific up-to-date AUSTRAC guidance on red flags and indicators of financial crime risk in order to implement high-quality reporting and due diligence processes.
- Within financial services, as larger banks develop more mature control and detection systems, the financial crime risk is displaced to smaller banks. The Government should anticipate the same displacement effect within tranche 2 industries and will need to counteract this to ensure that small and medium-sized tranche 2 entities have the information they need to develop effective AML/CTF programs.

#### Recommendation

*In implementing tranche 2, the government should place a high priority on developing and maintaining sector-specific guidance on relevant financial red flags and typologies for tranche 2 industries. This will reduce the risk of displacement by ensuring that all reporting entities are equally informed about emerging risks and typologies in their industry and clearly understand AUSTRAC's expectations regarding financial crime risks that must be managed and reported.*

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<sup>8</sup> AUSTRAC, 'Regulation' (updated 5 April 2023), [www.austrac.gov.au/about-us/regulation](http://www.austrac.gov.au/about-us/regulation).

<sup>9</sup> Information sourced from Urbis, *2020 National Profile of Solicitors* (prepared for the Law Society of NSW, 1 July 2021), [www.lawsociety.com.au/sites/default/files/2021-07/2020\\_National\\_Profile\\_of\\_Solicitors\\_-\\_Final\\_-\\_1\\_July\\_2021.pdf](http://www.lawsociety.com.au/sites/default/files/2021-07/2020_National_Profile_of_Solicitors_-_Final_-_1_July_2021.pdf); IBIS World, *2023 Accounting Services in Australia – Market Research Report* (updated 18 May 2023), [www.ibisworld.com/au/industry/accounting-services/561/](http://www.ibisworld.com/au/industry/accounting-services/561/); Real Estate Institute of Australia, *Pre-Budget Submission 2022* (28 January 2022), [https://treasury.gov.au/sites/default/files/2022-03/258735\\_real\\_estate\\_institute\\_of\\_australia.pdf](https://treasury.gov.au/sites/default/files/2022-03/258735_real_estate_institute_of_australia.pdf).

<sup>10</sup> See, for example, 'Crown Unmasked', *Sydney Morning Herald*, <https://www.smh.com.au/crown-unmasked>.

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