GIR KNOW HOW ANTI-MONEY LAUNDERING

Australia

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Money laundering

1. What laws in your jurisdiction prohibit money laundering?

The Criminal Code Act 1995(Criminal Code), which applies to federal and commonwealth offences, includes several offences for money laundering. Chapter 10, Part 10.2, Division 400 of the Code currently defines 19 money laundering offences. These can be classified into two types: offences linked to the proceeds of crime (funds generated by an illegal activity) and those linked to the instruments of crime (funds used to conduct an illegal activity).

The federal Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (AML/CTF Act) and its related Anti-Money Laundering and Counter-Terrorism Financing Rules 2007 (AML/CTF Rules) also include money laundering offences.

Australian state and territory criminal legislation also contain money laundering offence provisions, as below:

- New South Wales: Crimes Act 1900, Part 4AC;
- Victoria: Crimes Act 1958, Part I, Division 2A;
- Queensland: Criminal Proceeds Confiscation Act 2002, Chapter 9;
- South Australia: Criminal Law Consolidation Act 1935, Part 5, Division 4;
- Western Australia: Criminal Code Act 1913, Part VII, Chapter LIX;
- Tasmania: Crime (Confiscation of Profits) Act 1993, Part 6A;
- Australian Capital Territory: Crimes Act 1900, Part 6, Division 6.2A; and
- Northern Territory: Criminal Code Act 1982 (NT): Part VII, Division 3A.

2. What must the government prove to establish a criminal violation of the money laundering laws?

The federal Criminal Code defines money laundering offences in terms of "dealing" with "money or other property" reasonably believed to be the proceeds of crime. There are different tiers of money laundering offence depending on the value of the money or property in question. Under the code, "dealing" occurs when a person receives, possesses, conceals or disposes, imports, exports or engages in a banking transaction relating to money or other property.

The Commonwealth Director of Public Prosecutions (CDPP) must firstly prove the existence of physical elements that create the offence, relevant to establishing guilt. Secondly, in respect of each physical element for which a fault element is required, one of the fault elements for the physical element must also be proven.

3. What are the predicate offences to money laundering? Do they include foreign crimes and tax offences?

While the Criminal Code does not specify offences that predicate money laundering offences, predicate offences in Australia usually involve drugs and narcotics trafficking, fraud, theft and identity theft, tax evasion, people smuggling, arms trafficking and corruption offences. Criminal breaches of state and territory laws as well as foreign laws can also be predicate offences.

4. Is there extraterritorial jurisdiction for violations of your jurisdiction's money laundering laws?

Yes. The money laundering offences defined by the Criminal Code apply extraterritorially where the conduct occurs "wholly or partly in Australia" or "wholly or partly on board an Australian aircraft or ship".

For conduct occurring wholly outside Australia, this applies where:

- the money or property is, is likely to become, or is at risk of becoming proceeds of crime as a result of violations of Commonwealth, state or territory indictable offences;
- the person is an Australian citizen, resident or corporation; and
- the offence is an ancillary offence, and the primary offence relevant to the ancillary offence occurred, or was intended to occur, wholly or partly in Australia or wholly or partly on board an Australian aircraft or ship.

5. Is there corporate criminal liability for money laundering offences, or is liability limited to individuals?

Yes. The Criminal Code applies equally to bodies corporate as well as individuals and includes 19 offences related to money laundering.The Australian Parliament has also attempted to introduce the Crimes Legislation Amendment (Combatting Corporate Crimes) Bill 2019 a number of times. The Bill's aim was to increase corporate accountability by heightening liability for corruption related offences such as failing to prevent foreign bribery, and Deferred Prosecution Agreements for various offences including money laundering. The Bill lapsed on 25 July 2022.

6. Which government authorities are responsible for investigating violations of the money laundering laws?

Agencies tasked with investigating money laundering include the Australian Criminal Intelligence Commission (ACIC), the Australian Federal Police (AFP), the Australian Taxation Office (ATO), the Australian Transaction Reports and Analysis Centre (AUSTRAC) and the Australian Securities and Investments Commission (ASIC). State and territory law enforcement agencies and police may also investigate violations of money laundering laws.

7. Which government agencies are responsible for the prosecution of money laundering offences?

At the national level, the CDPP is the primary government agency that is responsible for the prosecution of money laundering offences. The CDPP's remit includes prosecuting money laundering offences that are criminalised under the Criminal Code.

The CDPP is assisted by AUSTRAC, the AFP and the Department of Home Affairs in prosecuting money laundering offences.

At the state and territory level, the respective state or territories public prosecutions office is responsible for prosecuting money laundering offences that breach state or territory laws.

8. What is the statute of limitations for money laundering offences?

The Criminal Code does not provide a specific time limit for prosecutions of money laundering offences. However, there is a time limit for the CDPP to bring proceedings, one year after the commission of a money laundering offence, if the penalty for an individual is a maximum term of six months' imprisonment or for a body corporate is 150 penalty units or less.

At the state and territory level, the prosecution of money laundering offences also has time limits. For example, in New South Wales (NSW), there are summary offences of dealing with property suspected of being the proceeds of crime that require proceedings to be commenced no later than six and 12 months, respectively, after the offence was alleged to have been committed.

9. What are the penalties for a criminal violation of the money laundering laws?

The Criminal Code provides varying penalties for money laundering offences, with the penalty that is applicable for a criminal violation depending on the value of the money or property that has been dealt with and the offender's degree of knowledge.

For individuals, the maximum penalty is life imprisonment, or a fine of 2000 penalty units (A$444,0000). However, this is only for money or property worth A$10 million or more. At the lower range of value, for money or property worth less than A$1,0000, the maximum penalty is either 12 or 6 months' imprisonment or 30 penalty units (A$6,6600), or both (the maximum penalty of imprisonment will depend on the offender's knowledge).

For corporations, the maximum penalty is a fine of 1000 penalty units (A$2,220,000). The Criminal Code does not provide a specific fine, therefore as stated by the Crimes Act 1914 section 4B, the fine would be an amount not exceeding an amount equal to five times the amount of the maximum penalty unit that would be imposed by the court on a natural person convicted of the same offence.

One penalty unit is currently $222, from 1 July 2020 to 30 June 2023 (Crimes Act 1914 section 4AA).

10. Are there civil penalties for violations of the money laundering laws? What are they?

The AML/CTF Act contains the civil penalties for violations of money laundering laws. Under the AML/CTF Act, individuals can face penalties up to A$4,440,000 for breaches of a civil penalty provision, while corporations can face penalties up to A$22 million for breaches of these provisions.

11. Is asset forfeiture possible under the money laundering laws? Is it part of the criminal prosecution? What property is subject to forfeiture?

Australia's anti-money laundering regime includes legislation that seeks to recover assets that were obtained through money laundering. At the Commonwealth level, the Proceeds of Crime Act 2002 (POC Act) enables law enforcement to pursue the recovery of assets linked to offences after a conviction. The POC Act contains the unexplained wealth provisions at Part 2-6, where targets of these orders must prove on the balance of probabilities that their wealth was not derived from an offence against a law of the Commonwealth, a foreign indictable offence or a state offence that has a federal aspect. This legislation has a broad definition of asset which includes any money, real property and personal property, tangible or intangible, located in Australia or elsewhere.

Further, each Australian state and territory also has asset recovery legislation for funds generated by offences at a state or territory level.

In 2018, the National Cooperative Scheme on Unexplained Wealth was created. This scheme aimed to enhance the ability of the Commonwealth, state and territory law enforcement agencies to trace, identify and seize assets that cannot be connected to a lawful source. The scheme currently applies to New South Wales, the Australian Capital Territory and the Northern Territory.

12. Is civil or non-conviction-based asset forfeiture permitted under the money laundering laws? What property is subject to forfeiture?

The POC Act enables law enforcement to pursue restraint and recovery of assets suspected of criminal origins without the necessity of securing a criminal conviction. This form of recovery is labelled as a "forfeiture order".

Anti-money laundering

13. Which laws or regulations in your jurisdiction impose anti-money laundering compliance requirements on financial institutions and other businesses?

The Australian anti-money laundering compliance regime is imposed by AML/CTF Act. This Act also enables the following AML rules and regulations:

- Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No 1); and
- Anti-Money Laundering and Counter-Terrorism Financing (Prescribed Foreign Countries) Regulation 2016.

14. What types of institutions are subject to the AML rules?

The AML rules apply to "reporting entities". A reporting entity is a person or institution that provides a "designated service".

Section 6 of the AML/CTF Act contains a long list of designated services, divided into financial, bullion and gambling services. Financial services include, for example, accepting money on deposit and making loans.

In effect, the institutions subject to the AML rules are authorised deposit-taking instructions, banks, building societies, credit unions, superannuation funds, casinos and any other body that provides one or more of the services listed in section 6.

15. Must payment services and money transmitters be licensed in your jurisdiction? Are payment services and money transmitters subject to the AML rules and compliance requirements?

Yes. Payment services and money transmitters are subject to the AML rules and compliance requirements. Under section 6 of the AML/CTF Act, "carrying on a business of giving effect to remittance arrangements" is a designated service. Exchanging foreign currencies as a currency exchange business is also a designated service. As providers of one or more of these services, payment services and money transmitters are reporting entities and must comply with the AML rules and requirements.

Payment services and money transmitters must be registered with AUSTRAC, the principal anti-money laundering Australian agency. An entity or person who conducts an unregistered money remittance business can be liable for a civil penalty section 51B of the AML/CTF Act.

16. Are digital assets subject to the AML rules and compliance requirements?

Digital currency exchange providers are subject to the AML rules and compliance requirements. Part 6A of the AML/CTF Act imposes unique registration and reporting obligations providers of digital currency exchange services.

Under the AML/CTF Act, digital currency is a digital representation of value that:

- functions as a medium of exchange, a store of economic value, or a unit of account;
- is not government-issued;
- is interchangeable with money; and
- is generally available to members of the public.

All reporting entities are obliged to report to AUSTRAC if they observe any suspicious transactions involving digital currencies.

17. What are the specific AML compliance requirements for covered institutions?

AML compliance under Australian law falls under three categories: an AML/CTF programme, ongoing reporting and record-keeping.

Reporting entities are required to implement an AML/CTF program identifying and mitigating the money laundering and terrorism financing risks faced by the business. Although the content will vary depending on the nature of the business and its designated service, each AML/CTF programme must include the following:

- a comprehensive assessment of money laundering and terrorism financing (ML/TF) risks;
- the appointment of an AML/CTF compliance officer;
- independent review of the programme;
- an employee due diligence programme;
- AML/CTF training for employees;
- an enhanced customer due diligence programme for when the ML/TF risk is high;
- a transaction monitoring programme; and
- know your customer procedures.

After preparing and implementing an AML/CTF program, reporting entities have ongoing compliance obligations. The key compliance obligations are to submit:

- threshold transaction reports for transfers of A$10,0000 or more;
- international funds transfer instruction reports for fund transfers into or out of Australia made electronically or under a designated remittance arrangement; and
- suspicious matter reports when suspicious that a customer or transaction is related to criminal activity.

Entities must also submit compliance reports when requested by AUSTRAC, providing details of the entity's compliance efforts to under the AML regime.

Reporting entities are also obliged to keep records about transactions, customer identification procedures and their AML/CTF programme. The specific record-keeping obligations depend on the reporting entity's particular designated services.

18. Are there different AML compliance requirements for different types of institutions?

The precise AML compliance requirements for a reporting entity will depend on the designated service that it provides. The content of an AML/CTF programme may vary substantially between entities that provide different designated services.

Money remittance and digital currency exchange institutions have unique additional compliance requirements. Both types of institution must register with AUSTRAC and renew their registration every three years. Both types of institution must also keep an original or certified copy of a national police certificate for all key personnel and details of the institution's business structure.

19. Which government authorities are responsible for the examination and enforcement of compliance with the AML rules?

The government authority responsible for the examination, administration and enforcement of Australian AML law is AUSTRAC.

20. Are there requirements to monitor and report suspicious activity? What are the factors that trigger the requirement to report suspicious activity? What is the process for reporting suspicious activity?

Reporting entities are obliged under Australian AML law to monitor and report suspicious activity. Activity is suspicious and must be reported when the RE suspects that a person using their services is not who they claim to be, or that information concerning the activity may be relevant to investigate or prosecute a criminal offence.

Suspicious activity must be reported to the AUSTRAC CEO within either 24 hours or three days of the RE forming the relevant suspicion, depending on the nature of the activity. The report must be in an approved form and contain specific information about the suspicious activity and a statement outlining the grounds on which the RE has formed the suspicion.

A suspicious matter report can be lodged online through the AUSTRAC portal.

21. Are there confidentiality requirements associated with the reporting of suspicious activity? What are the requirements? Who do the confidentiality requirements apply to? Are there penalties for violations of the confidentiality requirements?

Yes. A reporting entity must not disclose that they have given or are required to give AUSTRAC a suspicious matter report. This confidentiality requirement applies to the financial institution reporting the suspicious entity. However, information can be disclosed in certain circumstances, such as for the purpose of seeking legal advice. Breaching this confidentiality requirement is a criminal offence, known as "tipping off". The offence of "tipping off' is punishable by imprisonment for up to two years or a fine of up to A$25,200.

It is an offence for government officials to disclose information that they have obtained through AUSTRAC, except as authorised under AML law. This includes reports of suspicious activity. This offence is also punishable by imprisonment for up to two years or a fine of up to A$25,200.

22. Are there requirements for reporting large currency transactions? Who must file the reports, and what is the threshold?

Yes. Part 3 of the AML/CTF Act imposes reporting obligations on reporting entities. Section 43 of the Act requires that entities providing designated services (such as banks, credit unions and other relevant financial companies) to report threshold transactions. The threshold is the transfer of physical currency (cash) of A$10,000 or more (or the foreign currency equivalent) as part of providing a designated service.

In addition, affiliates of remittance network providers, motor vehicle dealers who act as insurers or insurance intermediaries and solicitors must also report threshold and significant cash transactions.

23. Are there reporting requirements for cross-border transactions? Who is subject to the requirements and what must be reported?

Yes. Part 4 of the AML/CTF Act requires financial institutions to report cross-border movements of monetary instruments.

Cross-border transactions are defined as international funds transfer instructions (IFTI). This is either:

- an instruction that is accepted in Australia for money or property to be made available in another country; or
- an instruction that is accepted in another country for money or property to be made available in Australia. financial institutions and apply to transfers of money

Businesses, organisations or individuals who are not financial institutions such as remittance service providers and casinos, are also required to report transfers of money, as well as property.

24. Is there a financial intelligence unit (FIU) or other government agency responsible for analysing the information reported under the AML rules?

Yes. AUSTRAC functions as Australia's Financial Intelligence Unit and AML/CTF regulator. It is responsible for analysing information reported under Australia's AML rules.

25. What are the penalties for failing to comply with your jurisdiction's AML rules, and are they civil or criminal?

Penalties for failure to comply with the Australian AML/CTF regime are outlined at Parts 12 and 15 of the AML/CTF Act. The Act imposes both criminal and civil penalties

Criminal penalties apply to the most serious failures to comply with AML rules. The maximum penalties range from two to 10 years' imprisonment and/or 120 to 10,000 penalty units (A$26,640 to $2,220,000).

Division 2 of Part 15 outlines the civil penalties applicable to a broader range of AML rule breaches. The pecuniary penalty payable is determined by the Federal Court of Australia having regard to factors listed at sub-section 175(3) of the Act. The maximum penalty is 100,000 penalty units (A$22,200,000) for a body corporate and 20,000 penalty units (A$4,440,000) for a natural person.

In some cases, failure to comply with AML rules can be penalised by the issue of an infringement notice. An infringement notice carries a penalty of 60 penalty units ($13,320) for a body corporate and 12 penalty units (A$2,664) for natural persons.

26. Are compliance personnel subject to the AML rules? Can an enforcement action be brought against an individual for violations?

The AML/CTF Act requires reporting entities to appoint compliance officers who are at management level. However, compliance officers are not specifically subject to the AML rules in the same manner as reporting entities. Compliance obligations are placed on the reporting entity, and not on its individual employees. A failure to comply with AML rules and provisions will be enforced by a fine against the company, and not the individual responsible. However, the offence provisions at Part 12 of the AML/CTF Act apply to any person, legal or natural. Therefore, if compliance officers make a false and misleading statement, civil or criminal enforcement action can be brought against them.

Section 235 of the AML/CTF Act provides protection to employees of a reporting entity from civil or criminal liability for acts or omissions carried out in good faith in some circumstances.

27. What is the statute of limitations for violations of the AML rules?

Civil penalty proceedings under the AML/CTF Act and its rules can be commenced no later than six years after the contravention.

28. Does your jurisdiction have a beneficial ownership registry or an entity or office that collects information on the beneficial ownership of legal entities?

No. Australia does not currently have a beneficial ownership registry. However, the Department of Prime Minister and Cabinet has put forward a proposal for such a register through the Open Government Forum. In August 2022, the Australian Department of the Treasury announced that it will implement a public registry of beneficial legal owners of corporations as part of its commitment to greater transparency, with details to be announced in future.

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Dennis Miralis is a leading Australian defence lawyer who acts and advises in complex domestic and international criminal law matters in the following areas: white-collar and corporate crime; money laundering; serious fraud; cybercrime; international asset forfeiture; international proceeds of crime law; bribery and corruption law; transnational crime law; extradition law; mutual assistance in criminal law matters; anti-terrorism law; national security law; criminal intelligence law; and encryption law.

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Nyman Gibson Miralis is an international award-winning criminal defence law firm based in Sydney, Australia. For over 50 years it has been leading the market in all aspects of general, complex and international crime, and is widely recognised for its involvement in some of Australia's most significant criminal cases.

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