IN-DEPTH

Anti-Money Laundering

AUSTRALIA

LEXOLOGY

Anti-Money Laundering

EDITION 1

Contributing Editor

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In Depth: Anti-Money Laundering provides an insightful overview of anti-money laundering (AML) law and practice in key jurisdictions worldwide. With a focus on recent developments and their practical implications, it analyses key issues including relevant offences, government policy, enforcement trends, international cooperation and much more.

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Australia

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Summary

Introduction

Australia's current anti-money laundering and counter-terrorism financing framework (the AML/CTF regime) was introduced in 2006 to detect, deter and disrupt money laundering and other financial crimes and meet Australia's international obligations.[2] Almost immediately, in 2007, Parliament commenced the consultation processes for a second tranche of reforms to properly bring Australia in line with international standards set by the Financial Action Task Force (FATF). Despite this initial flurry, the FATF found in 2015 and again in 2018 that there were key areas that remained unaddressed,[3] signalling that Australia may have been falling behind. With parliamentary debate concerning the second tranche ongoing, the modernisation of Australia's regime is well underway, and significant reform to play catch up is once again on the table.

Against this backdrop, in July 2023, the Australian Transaction Reports and Analysis Centre (AUSTRAC) (Australia's primary AML/CTF regime regulator) imposed one of the largest penalties ever issued against a casino, Crown Resorts.[4] This action was commenced in March 2022, and general enforcement actions in 2023 remain steady, if not declining.[5] This may be a reflection of AUSTRAC's preference for collaborative over adversarial processes;[6] yet, its approach in the *Crown Resort* matter was reportedly criticised by the Federal Court as being too lenient and likened to 'getting played'.[7]

Year in review

i Budget

In the May 2023 budget, the government announced funding of A$14.3 million in 2023 and 2024 to support policy and legislative reforms to protect Australia from illicit financing and to evaluate the country's anti-money laundering framework.

ii Tranche 2 and public consultation

Tranche 2 reforms of the Australian AML/CTF regime have continued to progress and remain an ongoing primary focus of lawmakers and regulators in Australia. Tranche 1 comprised the Anti-Money Laundering and Counter Terrorist Financing Act 2006 (Cth) (the AML/CTF Act), which was passed in December 2006, while Tranche 2 comprises a set of regulations that will simplify and modernise the Australian AML/CTF system and bring it in line with the FATF's recommendations and other countries, including the UK, Canada and New Zealand. The regulations include extending the AML/CTF regime to non-financial professions, including real estate and law.

In March 2022, the Senate's Legal and Constitutional Affairs Committee published its report on the adequacy and efficacy of Australia's existing AML law and regulation. The report recommended the acceleration of the implementation of the Tranche 2 reforms.[8]

Between 20 April 2023 and 16 June 2023, the Attorney-General held a public consultation on the Tranche 2 reforms.[9] According to the Attorney-General Department's initial scheduling, a second round of consultation was due to commence in September 2023,

which will likely include draft legislation;[10] however, as at the time of writing, no further details had been provided.

AUSTRAC indicated that feedback from the initial round of reforms would be used to inform subsequent drafting of the reforms over the course of 2023.[11]

iii Enforcement decisions

In the past year, AUSTRAC has taken enforcement actions against several large corporate entities in response to breaches of the AML/CTF Act, demonstrating the regulator's ongoing appetite for enforcement. This includes the following.

1. Crown Resorts: In July 2023, the Federal Court of Australia ordered Crown Melbourne and Crown Perth, two Australian gambling companies, to pay a combined A$450 million penalty for serious breaches of the AML/CTF Act. The Court found that Crown had failed to adequately monitor and report suspicious transactions and had facilitated money transactions involving high-risk customers.-[12]

2. PayPal: In March 2023, AUSTRAC accepted a voluntary enforceable undertaking from PayPal Australia Pty Ltd in relation to its compliance with the AML/CTF Act. In the enforceable undertaking, PayPal agreed to adhered to an 'assurance action plan' and to obtain and provide AUSTRAC with the opinion of an external auditor. Among other things, the assurance action plan required PayPal to demonstrate the 'operation of appropriate systems and controls designed to ensure compliance with PayPal's reporting obligations'.[13] The enforceable undertaking was a result of an investigation that commenced on 17 December 2020, during which AUSTRAC found compliance issues in relation to PayPal's international funds transfer instructions reporting.[14]

Legal framework

i Key AML legislation

Australia's money laundering legal framework operates on both of its federalist levels: federal and state/territory. For the sake of brevity, the primary focus of this chapter is the former.

At the federal level, there are two parallel legal legislative streams relating to anti-money laundering, being:

1. the obligations, civil penalty provisions and compliance-related offences under the AML/CTF Act, which serves as the foundational legislation for establishing compliance requirements; and
2. the money laundering offences, which are set out in the Criminal Code Act 1995 (Cth) (the Criminal Code).

The Commonwealth Department of Public Prosecution is responsible for the prosecution of money laundering offences at the federal level.[15] Other government agencies, such as AUSTRAC, the Australian Federal Police and the Australian Border Force, are involved in the identification, investigation and litigation of federal money laundering matters.[16]

For completeness, supplementary criminal money laundering offences exist within each Australian state's and territory's criminal code.[17] Enforcement is conducted in a similar manner to the federal level with state prosecutors pursuing criminal charges and state police performing investigations.[18]

ii Primary AML offences

The primary division addressing anti-money laundering offences under the Criminal Code is in Part 10.2.[19] 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, ranging from any value to A$10 million.[20]

There are physical elements to each offence, with an accompanying fault element (the state of mind of the alleged offender). Broadly, the elements of many of the money laundering offences are as follows:

1. the existence of money or property;
2. 'dealing' in the money or property. Under the Criminal Code, 'dealing' occurs when a person receives, possesses, conceals or disposes, imports, exports or engages in a banking transaction relating to the money or other property;[21] and
3. the person believed that the money or property was the proceeds of a crime or intended the money or property to be an instrument of crime (or was reckless or negligent about that fact).

The precise state of mind varies, depending on the offence; however, certain physical elements of an offence attract absolute liability (e.g., total money or value of the property).-[22]

Further, Part 12 of the AML/CTF Act includes regulations that specify compliance-related offences.[23] These are set out further in Section IV.

iii Predicate offences

Although the Criminal Code does not enumerate specific offences that serve as predicates to money laundering offences,[24] Australia does not adopt an 'all crimes approach'. The money laundering offences are predicated on offences that amount to 'conduct' that 'may be dealt with as an indictable offence'.[25] 'Conduct' is referred to here because the prosecution does not have to establish the predicate offence, and the 'conduct' can be a violation of federal, state, territory or foreign law, as long as it may be dealt with as an indictable offence.[26] These predicate offences often encompass a range of activities, such as drug-related crimes, fraud, tax evasion, people smuggling, theft, arms trafficking and corruption.[27]

iv International aspects

The money laundering offences in the Criminal Code apply extraterritorially. In certain circumstances, individuals can be charged with money laundering offences even when the predicate offence occurs entirely outside Australia.[28]

Where the conduct does not occur 'wholly or partly in Australia' or 'wholly or partly on board an Australian aircraft or ship', the money laundering offences may still apply where:

1. the money or property is, is likely to become or is at risk of becoming proceeds of crime in relation to violations of Australian indictable offences;[29]
2. the person is an Australian citizen, resident or corporation;[30] and
3. 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.[31]

Under Australian law, if the underlying criminal activity, known as the predicate offence, takes place outside Australia, the application of money laundering laws depends on specific conditions outlined in Section 400.15 of the Criminal Code.

v Covered assets

In terms of compliance, the AML/CTF Act expressly covers digital currency, which is broadly defined to capture many contemporary forms of digital assets. Part 6A of the AML/CTF Act imposes AML/CTF obligations on digital currency service providers when they engage in the exchange of digital currencies to fiat currencies and vice versa.

In terms of criminal law, Australian money laundering offences apply to a broad range of 'money' and 'property'. Assets covered by the offences include:

1. all forms of real or personal property (whether located in Australia or elsewhere, tangible or intangible);[32]
2. interests in the same;[33] and
3. financial instruments, cards and other objects that either represent money or can be exchanged for money, regardless of whether they have intrinsic value.[34]

On the basis of the above, it is likely that cryptoassets and other digital assets are covered, particularly those that exhibit the potential for conversion into monetary forms.

vi Prohibited acts

As mentioned in Section III.ii, money laundering offences are defined in relation to 'dealing', which can include receipt or possession.[35] However, receipt or possession must be accompanied by the requisite fault element.

vii Defences

Putting aside the criminal defences generally available under Australian criminal law, there is a partial defence under the Criminal Code for money laundering offences, which involves a mistake of fact as to the value of the money or property. This partial defence is available if the person considered the value of the money or property and was under a mistaken (but reasonable) belief about that value. Importantly, it is a 'partial' defence because it does not absolve the defendant of complete guilt; rather, it involves pleading to a lesser charge.

Under the AML/CTF Act, there is a defence only in relation to proceedings that:

1. concern an offence against the AML/CTF regulations;
2. concern a contravention of a civil penalty provision under the AML/CTF Act; or
3. are under the Proceeds of Crime Act 2002 (Cth) and related to the AML/CTF Act.[36]

This defence is available where a defendant took appropriate precautions and exercised due diligence to prevent the contravention for which the proceedings have been initiated.-[37]

viii Corporate liability

The Criminal Code applies to both individuals and corporations. Specific principles relating to how the elements of Australian offences are made out in respect of corporations are set out in Part 2.5 of the Criminal Code.

Generally speaking, physical elements can be attributed to the corporation if committed by an employee, agent or officer within the actual or apparent scope of their employment or authority,[38] whereas, fault elements of intention, knowledge or recklessness can be attributed to a corporation if it authorised or permitted the commission of the offence[39] (for example, where a corporate culture exists that 'directed, encouraged, tolerated or led to non-compliance' or where the company failed to create and maintain a corporate culture that required compliance).[40]

ix Penalties

Penalties for individuals and corporations found in violation of money laundering offences under the Criminal Code will vary depending on the specific criminal offence, the value of money or property involved, and the offender's level of knowledge.[41] Specifically:

1. for individuals, the maximum penalty is life imprisonment[42] or a fine of 2,000 penalty units (approximately A$626,000).[43] However, this is only for money or property worth A$10 million or more.[44] For money or property worth less than A$1,000, the maximum penalty is 12 months' imprisonment or 60 penalty units (approximately A$18,780), or both;[45] and
2. for corporations, the maximum penalty is a fine of 10,000 penalty units (approximately A$3.13 million), for money or property worth A$10 million or more,-[46] and 300 penalty units (approximately A$93,900), where the value is less than A$1,000.[47]

Under the AML/CTF Act, there are a range of remedies and penalties that can be used by regulators, including infringement notices, injunctions, enforceable undertakings and civil penalty proceedings. Further details are set out in Section VII. The maximum penalty for breach of a civil penalty provision under the AML/CTF Act is:

1. for individuals, 20,000 penalty units (approximately A$6.26 million) per breach;[48] and
2. for corporations, 100,000 penalty units (approximately A$31.3 million) per breach.-[49]

Associated offences

i Terrorism financing

Australia's counter-terrorism financing regime is also regulated by AUSTRAC and detected and deterred under the AML/CTF Act and associated regulations.

AUSTRAC considers terrorism financing to be 'the financial support, in any form, of terrorism or of those who encourage, plan, or engage in terrorism'.[50] Terrorism financing is also a criminal offence under Divisions 102 and 103 of the Criminal Code. Under Section 103.1, a person 'finances terrorism' if they:

1. intentionally collect or provide funds; and
2. are reckless about 'whether the funds will be used to facilitate or engage in a terrorist act'.[51]

A terrorist act has an extensive definition under Section 100.1 of the Criminal Code, but broadly encompasses an act or threat to act that 'intends to coerce or influence the public or any government by intimidation to advance a political, religious or ideological cause' and causes death, serious harm or danger to a person, serious damage to property, a serious risk to the health or safety of the public, or serious interference with critical infrastructure.[52]

Other terrorism financing offences criminalised under the Criminal Code include financing a terrorist (Section 103.2) and getting funds to, from or for a terrorist organisation (Section 102.6).

The penalties for these offences range from 15 years' to life imprisonment.

The AML/CTF Act adopts a broader definition of 'financing of terrorism', which encompasses both the offences as defined in Section 102.6 and Division 103 of the Criminal Code, as well as state and territory offences, foreign offences and offences against Section 20 or 21 of the Charter of the United Nations Act 1945 (Cth).

The relationship between money laundering and terrorism financing

The most relevant distinction between the definitions of money laundering and terrorism financing relates to the source of the funds. While money laundering involves the use

of funds or property obtained from a criminal offence, terrorism financing can involve funds from both legal and illegal sources, utilised for a prohibited purpose, namely the financial support of terrorism. Despite this distinction, both crimes' typologies adopt similar techniques to conceal and effect financial transactions.[53] As such, the AML/CTF compliance regime is designed to detect and deter both types of offences.

ii Financial sanctions

Financial sanctions are another mechanism by which Australia seeks to disrupt the flow of funds resulting from, and being provided to, prohibited individuals, organisations and activities.

Australia implements sanctions under the United Nations Security Council sanctions regimes and under its own autonomous sanctions regimes. The autonomous sanctions regimes are imposed by the Australian government pursuant to foreign policy objectives and administered under the Autonomous Sanctions Act 2011 (Cth) and the Autonomous Sanctions Regulations 2011 (Cth) (the Sanctions Regulations).

Under the Sanctions Regulations, the Minister for Foreign Affairs can designate a person or entity for targeted financial sanctions. Targeted financial sanctions prohibit directly or indirectly making an asset available to, or for the benefit of, a designated person or entity or an asset holder using or dealing with an asset that is owned or controlled by a designated person or entity.[54]

Freezing of assets

A person or entity that holds the asset has the responsibility of freezing an asset subject to targeted financial sanctions; for example, the financial institution that holds the funds of a designated person or entity is required to freeze the relevant account. The Australian government can also seek to freeze the assets of a party that is alleged to hold or deal with an asset controlled or owned by a designated person or entity. Separately, the Minister for Foreign Affairs may also freeze certain funds or other assets, the consequence of which is that persons and entities are prohibited from dealing with the funds or assets, as doing so would constitute an offence.

Contraventions

Contravention of sanctions law under the autonomous regimes or a condition of authorisation under sanctions law are criminal offences that attract a maximum term of imprisonment of 10 years or a fine, or both.[55]

Anti-money laundering regulation

i Covered entities

The AML/CTF Act and regulations impose obligations on entities that provide designated services and have the required connection to Australia. There are at least 70 designated

services, covering the financial, bullion and gambling sectors. Specifically, these service providers include (but are not limited to) authorised deposit-taking institutions, banks, building societies, credit unions, and money or digital currency exchange operators.[56] For a comprehensive list of designated services, see Tables 1 to 4 of Section 6 in the AML/CTF Act.[57]

The AML/CTF Act and regulations only apply if the designated service is provided at or through a permanent establishment in Australia or outside Australia if the provider has a certain Australian connection.

If a business or person provides one or more designated services, they are considered a reporting entity.[58]

ii Registration

All designated service providers must enrol with AUSTRAC.[59]

To do this, AUSTRAC offers an enrolment portal on its website, allowing individuals and entities to complete the AUSTRAC Business Profile Form.[60] The processing time for these applications can take up to 90 days, and it is important to note that AUSTRAC may request additional information during the enrolment process.[61]

iii Reporting requirements

As a reporting entity, there are obligations to report certain transactions and suspicious activities to detect and prevent money laundering.[62] Below are types of reports that must be provided to AUSTRAC.

Report type	Requirement scenario	Deadline
Threshold transaction reports*	Cash transfers of A$10,000 or more (or foreign currency equivalent)	Within 10 business days of the transaction
International funds transfer instruction reports†	Fund transfers, regardless of value, into or out of Australia, conducted electronically or through designated remittance arrangements	Within 10 business days of sending or receiving the transfer instruction
Suspicious matter reports‡	The entity suspects a customer or transaction is linked to criminal activity	With 24 hours for suspicions of terrorism financing or within three business days for other suspicions
AUSTRAC compliance reports§	Each annual reporting period.¶ These reports demonstrate adherence to the AML/CTF Act and regulations and the AML/CTF Rules‖	
Cross-border movement reports**	Cross-border movement of physical currency	Generally before the cash departs or arrives,-

	exceeding A$10,000 (or foreign currency equivalent) when carrying, posting or shipping money into or out of Australia	†† otherwise within five business days of receipt from overseas

* AML/CTF Act, Section 43
† id., Section 45
‡ id., Section 41
§ id., Section 47
¶ Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1) (Cth) (AML/CTF Rules), Chapter 11, Rules 11.2–11.4
|| id., Part 4.13
** AML/CTF Act, Sections 53–56
†† See, e.g., AML/CTF Rules, Chapter 24, Rule 24.1(3)

iv Tipping-off rules

Once a report or the obligation to submit one is established, it is strictly prohibited to inform the customer about the report's submission or impending submission.[63] This constitutes a criminal offence and can result in penalties of up to two years imprisonment' or 120 penalty units (approximately A$37,560), or both.[64]

There are some exceptions to the tipping-off prohibition, including limited disclosures to law enforcement bodies, legal practitioners and other members of the reporting entity's designated business group.

v Following reporting

After a reporting entity reports a transaction, AUSTRAC will inform the entity of the outcome of that report. There are no obligations to immediately block the transaction.

vi Obligations on reporting entities

Reporting entities are required to conduct know-your-customer checks, risk assessments, due diligence and ongoing monitoring of their customers as part of their mandatory AML/CTF programme.[65] The precise procedure will depend on the customer that is being onboarded, and their respective risks of money laundering or terrorism financing.[66]

Generally, the procedure will involve collecting and verifying customer identity information before offering designated services to the customer, irrespective of whether they are an individual, company, partnership, trust or otherwise.[67] This will also include verifying the details of any beneficial owners for non-individual customers.[68]

vii Specific requirements

For domestic and international politically exposed persons (PEPs) categorised as medium or low risk, standard customer identification procedures for individuals are to be applied.[69]

However, for high-risk or foreign PEPs (whether customers themselves or beneficial owners of a customer), more rigorous measures are required. In addition to standard customer identification procedures, enhanced due diligence (EDD) must be conducted.[70]

Furthermore, if a customer's circumstances change, it is essential to assess the risk associated with that change. For high-risk or foreign PEPs, EDD should be performed and transaction monitoring processes must be adjusted to account for any altered money laundering or terrorism financing risk.[71] This ensures that due diligence measures align with the evolving risk profile of the customer, especially when dealing with PEPs or individuals associated with high-risk jurisdictions.

viii Additional obligations

There are several other obligations in the AML/CTF Act and the Anti-Money Laundering and Counter-Terrorism Financing Rules that require compliance attention, including:

1. firm-wide risk assessments: reporting entities and individuals must conduct firm-wide risk assessments to identify and evaluate the money laundering and terrorism financing risks faced by the business or organisation.[72] This assessment helps tailor the AML/CTF programme to the specific risks the business may reasonably encounter;[73]
2. controls for risk mitigation: once risks are identified, reporting entities must implement controls to mitigate and manage these risks effectively.[74] These controls are designed to prevent products or services from being exploited by criminals for money laundering or terrorism financing purposes;
3. written AML/CTF programme: reporting entities are required to have a written AML/CTF programme that outlines how they comply with AML/CTF legislation.[75] This programme should detail the measures taken to identify, mitigate and manage the associated risks. The programme's level of detail should be appropriate to the perceived risk level; and
4. employee AML/CTF risk awareness training: businesses must provide AML/CTF risk awareness training for employees in money laundering or terrorism financing risk roles.[76] The training should cover obligations, consequences of non-compliance, money laundering or terrorism financing risks, and business processes.[77] The training should be regularly reviewed and updated to reflect changes in risk and the legal framework.

ix Breaches and penalties

Breaches of the AML/CTF Act and regulations are investigated by AUSTRAC, which has a variety of enforcement and remedial actions at its disposal.[78] See Section VII for further details.

How AUSTRAC deals with a breach depends on a range of factors, including severity, number of breaches, consequences of breaches and cooperation of the reporting entity.[79] These actions may include warnings, directions, enforceable undertakings, suspension or cancellation of AML/CTF registrations or licences.[80] However, as set out in Section III, there are both civil and criminal penalties that may arise in these circumstances.

Anti-money laundering in practice

Reporting entities under the AML/CTF regime face several challenges with the implementation, monitoring and uplift of AML/CTF programmes. These issues predominately relate to the increasing cost of AML/CTF compliance for businesses and the overall complexity of the AML/CTF regime. It is estimated that financial crime compliance has already cost firms in the wider Asia-Pacific region A$50.1 billion in 2022 alone.[81]

As discussed in Section II.ii, one proposed result of the Tranche 2 reforms is increasing the number of regulated entities, which is estimated to grow from approximately 17,000 to more than 100,000, with most newly regulated entities being small businesses.[82] Consequently, notwithstanding the fact that one of the purposes of the proposed Tranche 2 reforms is to simplify and modernise the AML/CTF regime, the reforms will impose new burdens on a range of businesses, which will need to substantially redesign their systems and find ways to cover the new costs.[83]

Comparing banks and financial institutions with smaller regulated entities and professionals reveals disparities in AML/CTF implementation. Large financial institutions generally possess more resources and expertise, making it easier for them to meet compliance standards. In contrast, smaller businesses and professionals may face challenges in establishing comprehensive AML/CTF programmes, including because of increased costs of employing risk-based professionals, knowledge gaps or the complex nature of the regime.

With significant reform and disparities on the horizon, AUSTRAC's enforcement approach will need to strike an appropriate balance between collaboration and punishment to pursue compliance within the expanded set of industries that will be covered.

Enforcement

To pursue compliance with the AML/CTF regime, AUSTRAC has a range of enforcement actions at its disposal, including the following.

1. Civil penalty orders (a court-imposed fine): AUSTRAC can apply for a civil penalty order from the Federal Court for certain breaches of the regime. The maximum penalties are set out in Section III.ix.[84]
2. Enforceable undertakings: This is a written document in which a person or company commits to taking, or refraining from taking, specific actions in compliance with the AML/CTF Act. It is a binding promise, which can be enforced by the courts if not complied with.[85]
3. Infringement notices: This is a document notifying a person or company that they are in breach of the AML/CTF Act. A fine usually accompanies the infringement notice, which can range from A$3,300 for an individual to A$16,200 for a corporation.[86]
4. Remedial directions: These are formal instructions by AUSTRAC directing an entity to take a specific action to avoid contravening the AML/CTF Act, which could include ordering an entity to undertake an AML/CTF risk assessment.[87]
5. Appoint an external auditor: AUSTRAC can require a reporting entity to appoint an external auditor as part of an infringement notice, remedial direction or enforceable undertaking. AUSTRAC will specify what must be audited and what information must be included in the final report.[88]

International organisations and agreements

Australia plays an active role in regional and global AML/CTF forums such as the Asia Pacific Group on Money Laundering, the FATF and the Egmont Group of Financial Intelligence Units.

Through AUSTRAC, Australia has collaborated with other national agencies in the Indo-Pacific region, such as in Indonesia and the Philippines. AUSTRAC has assisted in delivering capability uplifts and enhancement of existing AML/CTF frameworks.[89]

Australia has joined the Pacific Financial Intelligence Community (PFIC), a 15-nation group that brings together financial intelligence agencies from across the region. The PFIC aims to identify opportunities to pool intelligence and resources to combat money laundering, including through joint operations, research and capacity building.[90]

AUSTRAC co-chairs the Financial Intelligence Consultative Group (FICG), which comprises representatives from financial intelligence agencies across South East Asia, as well as Australia and New Zealand. The FICG seeks to promote and strengthen operational collaboration on significant financial crime threats in the region, including money laundering and terrorist financing.[91]

Other laws affecting the response to money laundering

i Privacy Act data protection and sharing

The Australian government is proposing significant changes to the Privacy Act 1988 (Cth), which could have implications for businesses that are also subject to the AML/CTF Act. The proposed changes include the following.

1. Increased requirements for businesses obtaining consent to disclose personal information overseas, by requiring them to consider the risks of disclosing the information and informing individuals that privacy protections may no longer apply after disclosure.[92]
2. Increased obligations for entities handling employee records, by requiring employers to provide their employees with 'enhanced transparency' in relation to what information is being collected, and to ensure that their information is protected from misuse and is deleted when no longer required.[93]

These changes could create tension with the existing obligations and practices of reporting entities under the AML/CTF Act, which requires companies to gather certain personal information from customers, such as name, date of birth and address, to authenticate identity and scrutinise transactions for suspicious activity.[94]

ii Whistle-blowing

In 2019, the Australian government expanded and consolidated the whistle-blower protections in the Corporations Act 2001 (Cth)[95] to provide greater protection for individuals who report misconduct about companies and company officers. The reforms came into effect on 1 July 2019 and were contained in the Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019 (Cth).

The expanded whistle-blower protections include the following.

1. A wider definition of whistle-blower: The definition of whistle-blower has been expanded to include most individuals with a connection to a company or organisation, who may be in a position to observe or be affected by the misconduct. This could include a third-party supplier to the company. Further, a qualifying disclosure now exists that when the whistle-blower had 'reasonable grounds to believe' that the information concerned misconduct or an improper state of affairs or circumstances, there is no longer a requirement that the disclosure be made in good faith to qualify.[96]
2. Protection from retaliation: Whistle-blowers are now protected from retaliation, such as dismissal, demotion or harassment, for making a protected disclosure. Further, the amendments ensure that information that is part of a protected disclosure is not admissible as evidence against that whistle-blower in a prosecution for an offence.-[97]
3. Confidentiality: Whistle-blowers are no longer required to identify themselves when making a disclosure – they are entitled to remain anonymous unless they consent to being identified.[98]
4. Right to make a disclosure to a regulator: Whistle-blowers can now make a protected disclosure to a regulator, such as the Australian Securities and Investments Commission (ASIC), without first having to raise the matter internally with their employer.[99]

The expansion of whistle-blower protections is a significant step forward in protecting individuals who report misconduct. The reforms are expected to encourage more people to come forward with information about wrongdoing, which will help to improve corporate governance and protect public interest. In February 2023, ASIC commenced its first enforcement action for breaches of whistle-blower protections. ASIC alleges that the directors of a mining resource company, TerraCom Limited, harmed a whistle-blower who revealed alleged falsifications of coal quality certificates. ASIC is asking the Federal Court to impose penalties and disqualification orders against the directors. The matter is scheduled for hearing in February 2024.[100]

Outlook and conclusions

With significant reforms on the horizon that considerably expand the AML/CTF regime's net from 17,000 to 100,000 entities, questions of balance in AUSTRAC's enforcement approach will become ever more pertinent, and any changes will have reverberations that will be felt throughout critical industries, by businesses big and small. The legislative instruments must be implemented with thorough consultation processes and accompanied

by regulatory guidance and regulator policies to not only guide new actors in this space, but to also maintain consistency in AUSTRAC's approach.

Endnotes

1 Dennis Miralis is a partner, Kartia Zappavigna is an associate and Jack Dennis is a defence lawyer at Nyman Gibson Miralis. ^ Back to section

2 Anti-Money Laundering and Counter Terrorist Financing Act 2006 (Cth) (AML/CTF Act), Section 3(1)(aa) and (a). ^ Back to section

3 Financial Action Task Force (FATF), 'Anti-money laundering and counter-terrorist financing measures: Australia: Mutual Evaluation Report: April 2015', www.fatf-gafi.org/en/publications/Mutualevaluations/Mer-australia-2015.html; FATF, 'Anti-money laundering and counter-terrorist financing measures: Australia: 3rd Enhanced Follow-up Report & Technical Compliance Re-Rating', November 2018, www.fatf-gafi.org/content/dam/fatf-gafi/fur/FUR-Australia-2018.pdf.coredownload.pdf. ^ Back to section

4 Australian Transaction Reports and Analysis Centre (AUSTRAC) press release, 'Federal Court makes ruling in Crown matter', 11 July 2023, www.austrac.gov.au/news-and-media/media-release/federal-court-makes-ruling-crown-matter. ^ Back to section

5 AUSTRAC, Lists of enforcement actions taken, www.austrac.gov.au/lists-enforcement-actions-taken (accessed 12 September 2023).- ^ Back to section

6 See, for further information on this preference, AUSTRAC, 'AUSTRAC's Approach to Regulation', www.austrac.gov.au/sites/default/files/2019-05/AUSTRAC_ApproachRegulation1811_v2WEB.pdf; The Senate Legal and Constitutional Affairs References Committee, 'The adequacy and efficacy of Australia's anti-money laundering and counter-terrorism financing (AML/CTF) regime', March 2022, https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024754/toc_pdf/TheadequacyandefficacyofAustralia'santi-moneylaunderingandcounter-terrorismfinancing(AMLCTF)regime.pdf [2.105]. For a discussion on regulatory enforcement theory in a financial crime context, see Michael Legg, *Regulation, Litigation and Enforcement* (Thomson Reuters, 2011), Chapter 1. ^ Back to section

7 See, e.g., Elizabeth Knight, '"Fine now, pay later": Crown, AUSTRAC bait and switch blown apart',*The Sydney Morning Herald*, 11 July 2023, www.smh.com.au/business/companies/fine-now-pay-later-crown-austrac-bait-and-switch-blown-apart-20230711-p5dnf3.html. ^ Back to section

8 The Senate Legal and Constitutional Affairs References Committee (footnote 6), p. 4. ^ Back to section

9 https://consultations.ag.gov.au/crime/aml-ctf/. ^ Back to section

10 Attorney-General's Department Consultation Paper, 'Modernising Australia's anti-money laundering and counter-terrorism financing regime', April 2023, p. 4, https://consultations.ag.gov.au/crime/aml-ctf. ^ Back to section

11 AUSTRAC press release, 'Consultation commences on AML/CTF reforms', 20 April 2023, www.austrac.gov.au/consultation-commences-amlctf-reforms. ^ Back to section

12 *Crown Melbourne and Crown Perth v. AUSTRAC* [2023] FCA 1028. ^ Back to section

13 'Enforceable Undertaking to the Chief Executive Officer of the Australian Transaction Reports and Analysis Centre, for the purpose of Section 197 of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 by PayPal Australia Pty Ltd', www.austrac.gov.au/sites/default/files/2023-03/Enforceable%20Undertaking%20-%20PayPal%20Australia.pdf. ^ Back to section

14 ibid. ^ Back to section

15 Commonwealth Department of Public Prosecution, 'Money Laundering', www.cdpp.gov.au/crimes-we-prosecute/money-laundering. ^ Back to section

16 AUSTRAC, 'What we do', www.austrac.gov.au/about-us/what-we-do- ; Australian Federal Police, 'Our services', www.afp.gov.au/what-we-do- ; Australian Border Force, 'Serious Financial Crime Taskforce', www.abf.gov.au/about-us/taskforces/serious-financial-crime. ^ Back to section

17 New South Wales (Crimes Act 1900 (NSW), Part 4AC); Victoria (Crimes Act 1958 (Vic), Part I, Division 2A); Queensland (Criminal Proceeds Confiscation Act 2002 (Qld), Chapter 9); South Australia (Criminal Law Consolidation Act 1935 (SA), Part 5, Division 4); Western Australia (Criminal Code Act 1913 (WA), Part VII, Chapter LIX); Tasmania (Crime (Confiscation of Profits) Act 1993 (Tas), Part 6A); Australian Capital Territory (Crimes Act 1900 (ACT), Part 6, Division 6.2A); and Northern Territory (Criminal Code Act 1982 (NT), Part VII, Division 3A). ^ Back to section

18 Georgina Willcock and Peter Reeves, 'In brief: money laundering offences in Australia', Lexology, 2 June 2023, www.lexology.com/library/detail.aspx?g=a4e6caa8-0ed7-44ae-9006-2403b70d5b54. ^ Back to section

19 Criminal Code Act 1995 (Cth), Division 400. ^ Back to section

20 id., Sections 400.2B and 400.9(1A) (A$10 million or more), 400.3 and 400.9(1AB) (A$1 million or more), 400.4 (A$100,000 or more) or 400.9(1A) (less than A$100,000), 400.5 (A$50,000 or more), 400.6 ($10,000 or more), 400.7 ($A1,000 or more) and 400.8 (any value). ^ Back to section

21 id., Section 400.2. ^ Back to section

22 See, e.g., id., Sections 400.2A(5) (circumstances where money or other property is taken to be 'intended to become, or at risk of becoming, an instrument of crime', and where 'dealing with the money or other property' is taken to have occurred), 400.2B(10) (i.e., the value of the property and assets) and 400.11. ^ Back to section

23 AML/CTF Act, Part 12. ^ Back to section

24 Dennis Miralis, Jasmina Ceic, Lara Khider and Mohamed Naleemudeen, 'Anti-Money Laundering: Australia', Global Investigations Review, www.globalinvestigationsreview.com/insight/know-how/anti-money-laundering/report/australia (last verified 13 November 2023). ^ Back to section

25 Criminal Code Act 1995 (Cth), Section 400.1(1) (definition of 'instrument of crime' and definition of 'proceeds of an indictable offence'). See also, each offence provision; e.g., Section 400.2B(1)(b)(i). ^ Back to section

26 id., Section 400.13. ^ Back to section

27 Dennis Miralis, Jasmina Ceic, Lara Khider and Mohamed Naleemudeen (footnote 24). ^ Back to section

28 Criminal Code Act 1995 (Cth), Section 400.15. ^ Back to section

29 id., Section 400.15(1)(b). ^ Back to section

30 id., Section 400.15(1)(c). ^ Back to section

31 id., Section 400.15(1)(d). ^ Back to section

32 id., Section 400.1. ^ Back to section

33 ibid. ^ Back to section

34 ibid. ^ Back to section

35 id., Section 400.2. ^ Back to section

36 AML/CTF Act, Section 236. ^ Back to section

37 id., Section 236(2). ^ Back to section

38 Criminal Code Act 1995 (Cth), Section 12.2. ^ Back to section

39 id., Section 12.3. ^ Back to section

40 id., Section 12.3(2)(c)–(d). ^ Back to section

41 Dennis Miralis, Jasmina Ceic, Lara Khider and Mohamed Naleemudeen (footnote 24). ^ Back to section

42 Criminal Code Act 1995 (Cth), Section 400.2B(1)–(3). ^ Back to section

43 Crimes Act 1914 (Cth), Section 4B(2A). ^ Back to section

44 Criminal Code Act 1995 (Cth), Section 400.2B. ^ Back to section

45 id., Section 400.8(1). ^ Back to section

46 The Criminal Code does not provide a specific fine, therefore, as stated by the Crimes Act 1914, Section 4B(3), the fine would not exceed an amount equal to five times the maximum penalty units that would be imposed by the court on a natural person convicted of the same offence. ^ Back to section

47 Crimes Act 1914 (Cth), Section 4B(3). ^ Back to section

48 AML/CTF Act, Section 175(5). ^ Back to section

49 id., Section 175(4). ^ Back to section

50 AUSTRAC, 'Terrorism financing in Australia 2014', www.austrac.gov.au/sites/default/files/2019-07/terrorism-financing-in-australia-2014.pdf, p. 13. ^ Back to section

51 Criminal Code Act 1995 (Cth), Section 103.1. ^ Back to section

52 id., Section 100.1; Attorney-General's Department, Australia's counter-terrorism law, www.ag.gov.au/national-security/australias-counter-terrorism-laws. ^ Back to section

53 AUSTRAC, 'Terrorism Financing in Australia 2014' (footnote 50), p. 2. ^ Back to section

54 Autonomous Sanctions Regulations 2011 (Cth), Regulation 14. ^ Back to section

55 For individuals, the fine is calculated as 2,500 penalty units or, where a transaction is involved, the greater of three times the value of the transaction or 2,500 penalty units. For corporations, a contravention of sanctions law under the autonomous regimes or contravention of a condition of an authorisation are offences of strict liability and attract a fine of 10,000 penalty units or, where a transaction is involved, the greater of three times the value of the transaction or 10,000 penalty units. ^ Back to section

56 AML/CTF Act, Section 6. ^ Back to section

57 ibid. ^ Back to section

58 ibid. ^ Back to section

59 id., Part 3A. See also Parts 6 and 6A in relation to entities providing services related to remittance services and digital currency exchange services. ^ Back to section

60 AUSTRAC, 'Enrol or Register', 29 June 2023, www.austrac.gov.au/business/new-to-austrac/enrol-or-register. ^ Back to section

61 ibid. ^ Back to section

62 AUSTRAC, 'Customer identification: Know your customer (KYC)', 14 December 2022, www.austrac.gov.au/business/core-guidance/customer-identification-and-verification/customer-identification-know-your-customer-kyc. ^ Back to section

63 AUSTRAC, 'Tipping off', 14 December 2022, www.austrac.gov.au/business/core-guidance/reporting/suspicious-matter-reports-smrs/tipping. ^ Back to section

64 AML/CTF Act, Section 123(11). ^ Back to section

65 AUSTRAC, 'AML/CTF Programs', 14 December 2022, www.austrac.gov.au/business/core-guidance/amlctf-programs. ^ Back to section

66 ibid. ^ Back to section

67 ibid. ^ Back to section

68 ibid. ^ Back to section

69 Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1) (Cth), Part 4.13 (AML/CTF Rules). ^ Back to section

70 AUSTRAC, Regulatory Quick Guide, 'Politically exposed persons', www.austrac.gov.au/sites/default/files/2022-02/AUSTRAC_2022_PEPQuickGuide_web.pdf, pp. 1–3. ^ Back to section

71 ibid. ^ Back to section

72 AUSTRAC, 'Money laundering/terrorism financing risk assessment', 14 December 2022, www.austrac.gov.au/business/core-guidance/amlctf-programs/money-launderingterrorism-financing-risk-assessment. ^ Back to section

73 ibid. ^ Back to section

74 AUSTRAC, 'AML/CTF Programs' (footnote 65). ^ Back to section

75 ibid. ^ Back to section

76 AUSTRAC, 'Employee AML/CTF Risk Awareness Training', 23 March 2023, www.austrac.gov.au/business/core-guidance/amlctf-programs/employee-amlctf-risk-awareness-training. ^ Back to section

77 AML/CTF Rules, Parts 8.2 and 9.2. ^ Back to section

78 AUSTRAC, 'Consequences of not complying', 9 March 2023, www.austrac.gov.au/business/core-guidance/consequences-not-complying. ^ Back to section

79 See, e.g., AML/CTF Act, Part 15, Division 2. ^ Back to section

80 id., Sections 173–207. ^ Back to section

81 'Financial crime compliance costs in APAC to Top $50 billion this year',*Disruptive Asia*, 17 June 2022, https://disruptive.asia/financial-crime-compliance-costs-in-apac-to-top-50-billion-this-year. ^ Back to section

82 Peter Jones, 'Tranche two: A massive leap – consultation timetable, finally (AML/CTF)', Lexology, 26 April 2023, www.lexology.com/library/detail.aspx?g=909262e5-fef5-494d-a7ad-7b1ce41d8079. ^ Back to section

83 ibid. ^ Back to section

84 AML/CTF Act, Part 15, Division 2. ^ Back to section

85 id., Division 7. ^ Back to section

86 id., Division 3. ^ Back to section

87 id., Division 5. ^ Back to section

88 id., Division 7. ^ Back to section

89 AUSTRAC, 'AUSTRAC Annual Report 2021–2022', www.austrac.gov.au/sites/default/files/2022-11/AUSTRAC_AnnualReport_2021-22_web.pdf, p. 93. ^ Back to section

90 id., p. 46. ^ Back to section

91 id., p. 42. ^ Back to section

92 Attorney-General's Department, 'Privacy Act Review: Report 2022', www.ag.gov.au/sites/default/files/2023-02/privacy-act-review-report_0.pdf, p. 20. ^ Back to section

93 id., p. 6. ^ Back to section

94 Rajaee Rouhani, Ross Phillipson and Jeremy Moller, 'Proposed changes to Australian Privacy Laws and their impact on AML/CTF compliance', April 2023, www.nortonrosefulbright.com/en-au/knowledge/publications/36eaad03/proposed-changes-to-australian-privacy-laws-and-their-impact-on-amlctf-compliance. ^ Back to section

95 Corporation Act 2001 (Cth), Part 9.4AAA. ^ Back to section

96 id., Section 1317AAA. ^ Back to section

97 id., Section 1317AB. ^ Back to section

98 id., Section 1317AAE. ^ Back to section

99 id., Section 1317AA. ^ Back to section

100 Australian Securities and Investments Commission press release, 'ASIC sues TerraCom Limited, its managing director, chief commercial officer, former Chair and a former director', 1 March 2023. ^ Back to section

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