



Australian Government

**Australian Transaction Reports
and Analysis Centre**

AUSTRAC GUIDANCE NOTE

**Application of the
*Policy (Civil Penalty Orders) Principles 2006***



Australian Government

**Australian Transaction Reports
and Analysis Centre**

AUSTRAC GUIDANCE NOTE

Application of the *Policy (Civil Penalty Orders) Principles 2006*

Anti-Money Laundering and Counter-Terrorism Financing Act 2006

1. Introduction

- 1.1 The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) is designed to assist in combating money laundering and the financing of terrorism. To achieve these aims, the AML/CTF Act places certain obligations on 'reporting entities' (defined in section 5 of the AML/CTF Act).
- 1.2 Under section 213 of the AML/CTF Act, the Minister for Justice and Customs (the Minister) may give written policy principles to the AUSTRAC Chief Executive Officer (CEO) about the performance of the CEO's functions.
- 1.3 On 31 January 2007, the Minister signed the *Policy (Civil Penalty Orders) Principles 2006* (Policy Principles). The purpose of this guidance note is to provide information to reporting entities about the AUSTRAC CEO's approach to the Policy Principles (including what constitutes 'reasonable steps' – see section 4 below).
- 1.4 A copy of the Policy Principles is attached to this guidance note.

2. Civil penalty order under the Policy Principles

- 2.1 The effect of subsection 3(1) of the Policy Principles is that the AUSTRAC CEO may apply for a civil penalty order under section 176 of the AML/CTF Act in respect of a reporting entity for a contravention of a provision that is enforceable by the imposition of a civil penalty. This may be done if the AUSTRAC CEO is satisfied that the reporting entity has failed to take reasonable steps to comply with the provision during the specified 15-month period as set out in paragraph 3.1 below.
- 2.2 The steps a reporting entity needs to take to comply with the AML/CTF Act are for its own judgment, taking into account risk and commercial practicalities.
- 2.3 The provisions of the AML/CTF Act commence on the various dates set out in section 2 of that Act. However, where circumstances exist that prevent a reporting entity from fully complying by those dates, the Policy

Principles require the AUSTRAC CEO to consider whether 'reasonable steps' have been taken by the reporting entity to comply with its obligations when deciding what, if any, compliance or enforcement action will be taken. If 'reasonable steps' have been taken, the AUSTRAC CEO may not take civil penalty action against the reporting entity.

- 2.4 It is not necessarily the case that failure of a reporting entity to take reasonable steps will result in the institution of civil penalty proceedings by the AUSTRAC CEO. The AUSTRAC CEO may, where appropriate, engage in discussions and/or negotiations with the relevant reporting entity in these circumstances. In other cases, the AUSTRAC CEO may use other legislative powers in accordance with the particular circumstances of the case being examined. Even when 'reasonable steps' have been taken by a reporting entity, the AUSTRAC CEO may take action, other than instituting proceedings in relation to a civil penalty provision, if non-compliance has resulted.

3. Specified 15-month periods

- 3.1 The periods specified in the Policy Principles begin on the commencement of the relevant provisions of the AML/CTF Act as follows:
- (a) the 15-month period commencing on 31 January 2007 and ending on 12 March 2008 applies to civil penalty provisions contained in:
 - (i) Part 5 - electronic funds transfer instructions
 - (ii) Part 6 - Register of Providers of Designated Remittance Services
 - (iii) Part 10 – Division 2 - records of transactions etc
 - (iv) Part 10 – Division 4 - records about electronic funds transfer instructions
 - (v) Part 15 – enforcement
 - (vi) Part 18 – miscellaneous
 - (b) the 15-month period commencing on 12 June 2007 and ending on 11 September 2008 applies to civil penalty provisions contained in:
 - (i) Part 3 – Division 5 – AML/CTF compliance reports
 - (ii) Part 8 – correspondent banking
 - (iii) Part 10 – Division 6 – records about due diligence assessments of correspondent banking relationships
 - (c) the 15-month period commencing on 12 December 2007 and ending on 11 March 2009 applies to civil penalty provisions contained in:
 - (i) Part 2 – Division 2 – identification procedures for certain pre-commencement customers
 - (ii) Part 2 – Division 3 – identification procedures for certain low-risk services

- (iii) Part 2 – Division 4 – identification procedures, etc
 - (iv) Part 2 – Division 5 – verification of identity, etc
 - (v) Part 7 – anti-money laundering and counter-terrorism financing programs
 - (vi) Part 10 – Division 3 – records of identification procedures
 - (vii) Part 10 – Division 5 – records about anti-money laundering and counter-terrorism financing programs
- (d) the 15-month period commencing on 12 December 2008 and ending on 11 March 2010 applies to civil penalty provisions contained in:
- (i) Part 2 – Division 6 – ongoing customer due diligence
 - (ii) Part 3 – Division 2 – suspicious matters
 - (iii) Part 3 – Division 3 – threshold transactions
 - (iv) Part 3 – Division 4 – international funds transfer instructions
 - (v) Part 3 – Division 6 – general provisions.
- 3.2 During these periods the AUSTRAC CEO may institute proceedings in relation to the contravention of a civil penalty provision only if the CEO is satisfied that a reporting entity has failed to take reasonable steps to comply with these provisions.
- 3.3 After the periods specified in the Policy Principles have ended, the AUSTRAC CEO will not institute proceedings in relation to a contravention of a civil penalty provision that occurred during the period, unless the AUSTRAC CEO is satisfied that the reporting entity has not taken reasonable steps to comply with the respective provisions of the AML/CTF Act during that 15-month period.

4. AUSTRAC's approach to 'reasonable steps' and consideration of relevant matters

- 4.1 The Policy Principles cover provisions in the AML/CTF Act which fall into two categories:
- (a) prescriptive legal requirements that do not require a reporting entity to implement a risk-based approach in discharging the requirement(s); for example, reporting obligations under Division 3 of Part 3 of the AML/CTF Act
 - (b) risk-based legal obligations that require the reporting entity to implement appropriate risk-based systems and controls resulting from the reporting entity's assessment of its ML/TF risk.
- 4.2 The AUSTRAC CEO will consider all relevant matters when determining whether a reporting entity has failed to take reasonable steps, including:
- (a) whether the entity has previously failed to take such steps

- (b) any steps taken and the extent to which the entity has taken action to comply with its statutory obligations under the AML/CTF Act
 - (c) whether the entity complied with any obligations it may have had under the *Financial Transaction Reports Act 1988* (FTR Act)
 - (d) any discussions and agreements that the reporting entity has had with AUSTRAC
 - (e) any explanation given by the reporting entity to AUSTRAC
 - (f) level of the reporting entity's knowledge and understanding of AML/CTF Act obligations
 - (g) whether there has been serious or persistent non-compliance including under the FTR Act.
- 4.3 Whether steps taken by a reporting entity are reasonable will depend on that entity's particular circumstances. Determining whether a reporting entity has taken reasonable steps will involve consideration of two key questions:
- (a) What civil penalty order provision applies to the reporting entity at a given time?
 - (b) Are the steps taken by the reporting entity to comply with that provision reasonable?
- 4.4 The AUSTRAC CEO will also have regard to the matters set out in subsections 212(3) and 212(4) of the AML/CTF Act. These include:
- (a) the integrity of the financial system
 - (b) crime reduction
 - (c) the desirability of ensuring that regulatory considerations are addressed in a way that does not impose unnecessary financial and administrative burdens on reporting entities
 - (d) the desirability of adopting a risk-based approach
 - (e) competitive neutrality
 - (f) competition
 - (g) economic efficiency
 - (h) such other matters as the AUSTRAC CEO considers relevant.
- 4.5 Other relevant matters are detailed in AUSTRAC's Education Policy, Enforcement Policy, Monitoring Policy and the Supervisory Framework (available on the AUSTRAC website: www.austrac.gov.au).
- 4.6 Generally, 'reasonable steps' comprises steady progression towards compliance. This does not mean no progression or minimal progression. In assessing whether a reporting entity has taken reasonable steps towards its compliance with relevant provisions of the AML/CTF Act, the AUSTRAC

CEO may consider the following general matters, where applicable, to be relevant within the context of the AUSTRAC policies referred to in paragraph 4.5 above.

- (a) The consideration, on a case-by-case basis, of the circumstances of a particular reporting entity including the size, nature and complexity of its business (among other factors) and relevant provisions with which the entity is required to comply. Consideration of these factors will guide AUSTRAC's response to the identified non-compliance.
- (b) Whether reporting entities can show that they take responsibility for ensuring they understand and comply with their obligations under the AML/CTF legislation seriously and adequately.
- (c) Whether reporting entities can show a commitment to fostering a culture of voluntary compliance with the AML/CTF legislation. If it is considered necessary and appropriate, AUSTRAC will provide guidance and education services to aid reporting entities to gain the appropriate knowledge and understanding of their obligations under the AML/CTF Act.

4.7 In the context of reasonable steps, the AUSTRAC CEO may consider the following matters, where applicable, to be relevant when assessing a reporting entity's action in addressing any identified non-compliance with the AML/CTF Act:

- (a) Are the ML/TF risks identified and assessed by the reporting entity realistic, given the reporting entity's business (including its size, nature and complexity) and its risk profile?
- (b) Has the reporting entity taken preparatory steps to implement systems and controls relevant to its identified AML/CTF risks?
- (c) To what extent have those systems and controls been implemented?
- (d) Has the reporting entity demonstrated good faith in assessing, preparing and implementing its ML/TF systems and controls?
- (e) Has the reporting entity clearly considered the likelihood of any circumstances which may prevent it from complying with relevant AML/CTF legislative obligations?
- (f) Has the reporting entity rectified, in a timely and full manner, any identified ML/TF matters (whether identified by the reporting entity or indicated to the reporting entity by AUSTRAC), which may affect the reporting entity's compliance with relevant AML/CTF Act obligations?
- (g) Is the reporting entity monitoring its exposure to ML/TF risk(s) on a continual basis?
- (h) Is the reporting entity's position or ability to comply with relevant civil penalty order provisions different, compared with industry sector peers?

- (i) Has the reporting entity taken into account relevant publicly available materials, including those issued by AUSTRAC regarding the ML/TF risks the entity faces?
- 4.8 Where AUSTRAC identifies cases of serious or persistent non-compliance with the AML/CTF legislation, enforcement action may be taken in accordance with the Policy Principles. The AUSTRAC CEO would have regard to (but is not limited to) the following:
- (a) the nature and severity of the detected or suspected breach, including its potential impact on the overall integrity of the financial system
 - (b) the reporting entity's compliance and enforcement history, the degree of honesty, cooperation and candour in its relationship with AUSTRAC and how responsive it is to requests for rectification action from AUSTRAC
 - (c) the level of sophistication and/or complexity of the reporting entity's business or structure
 - (d) whether the reporting entity has put into place AML/CTF systems and procedures which are proportionate to the ML/TF risk(s) identified.
- 4.9 In the first instance, AUSTRAC will seek to resolve any identified compliance issues in a cooperative manner.
- 4.10 If a reporting entity has attempted to take steps which fulfil its obligations under the AML/CTF Act, but there is still non-compliance with those obligations, AUSTRAC will assess on a case-by-case basis whether it should exercise its powers with regard to individual breaches or assess those breaches in the context of the reporting entity's overall attempts to comply with its obligations.

5. Examples of the practical application of the Policy Principles to a civil penalty order provision

Example relevant to prescriptive legal requirements

- 5.1 If a reporting entity has taken no steps to identify any customer, when it is required to do so under the relevant AML/CTF Act provisions which attract civil penalties, it may be irrelevant whether the reporting entity is large or small or the level of ML/TF risk is low or significant, as the nature of the breach is fundamental to the prescriptive legal obligations the reporting entity must observe under the AML/CTF legislation.

Example relevant to risk-based legal requirements

- 5.2 Regarding the provisions of the AML/CTF Act relating to AML/CTF programs, the question of whether or not a reporting entity has taken reasonable steps to adopt and maintain an AML/CTF program is a separate question from what should be covered by an AML/CTF program and how. Under the Policy Principles the AUSTRAC CEO may institute proceedings if a reporting entity has failed to take reasonable steps to adopt and maintain an AML/CTF program that complies with the AML/CTF Rules and AML/CTF Act. In determining whether or not the reporting entity has complied with the requirements in the AML/CTF Rules relating to its

AML/CTF program, it will be necessary to consider the question of what is an appropriate risk-based system or control in the context of that reporting entity's circumstances. In answering this question, it is necessary under the AML/CTF Rules for the reporting entity to consider what is appropriate, having regard to the size, nature and complexity of its business and the type of ML/TF risks it faces. This consideration is relevant to the content and substance of what must be covered by the AML/CTF program and how it should be adopted, maintained and implemented.

Further information

AUSTRAC officers are able to assist reporting entities, their staff and the public in providing general information relating to the AML/CTF Act. Enquiries can be directed to the AUSTRAC Help Desk via:

- email to help_desk@austrac.gov.au
- telephone 02 9950 0827 or 1300 021 037 (a local call within Australia).

The information contained in this document is intended only to provide a summary and general overview on these matters. It is not intended to be comprehensive. It does not constitute, nor should it be treated as, legal advice or opinions. This document may contain statements of policy which reflect AUSTRAC's administration of the legislation in carrying out its statutory functions. The Commonwealth accepts no liability for any loss suffered as a result of reliance on this publication. AUSTRAC recommends that independent professional advice be sought.

The information contained herein is current as at the date of this document.

Reporting entities should note that in relation to activities they undertake to comply with the AML/CTF Act, they will have obligations under the *Privacy Act 1988*, including the requirement to comply with the National Privacy Principles, even if they would otherwise be exempt from the Privacy Act. For further information about these obligations, please go to <http://www.privacy.gov.au> or call 1300 363 992.

December 2007
© Commonwealth of Australia

Australian Transaction Reports and Analysis Centre (AUSTRAC)
PO Box 5516
West Chatswood, NSW 1515

Telephone: 1300 021 037
Facsimile: 02 9950 0071
Website: www.austrac.gov.au
Email: help_desk@austrac.gov.au



Policy (Civil Penalty Orders) Principles 2006

Anti-Money Laundering and Counter-Terrorism Financing Act 2006

I, CHRISTOPHER MARTIN ELLISON, Minister for Justice and Customs, give these Principles under section 213 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the *Act*).

Dated 31st JANUARY 2007



Minister for Justice and Customs

1 Name of Principles

These Principles are the *Policy (Civil Penalty Orders) Principles 2006*.

2 Commencement

These Principles commence on the day they are given.

3 Applying for civil penalty orders (Act s 176)

- (1) During the period set out in subsection (2) for a civil penalty provision, the AUSTRAC CEO may apply for a civil penalty order against a reporting entity for a contravention of the provision only if the AUSTRAC CEO is satisfied that the reporting entity has failed to take reasonable steps to comply with the provision.

- (2) For subsection (1), the period is:
- (a) for a civil penalty provision in Part 5, 6, 15 or 18 of the Act or Division 2 or 4 of Part 10 of the Act — the period beginning on the day these Principles are given and ending at the end of 12 March 2008; or
 - (b) for a civil penalty provision in Division 5 of Part 3 of the Act, Part 8 of the Act or Division 6 of Part 10 of the Act — the period beginning on 12 June 2007 and ending at the end of 11 September 2008; or
 - (c) for a civil penalty provision in Division 2, 3, 4 or 5 of Part 2 of the Act, Part 7 of the Act or Division 3 or 5 of Part 10 of the Act — the period beginning on 12 December 2007 and ending at the end of 11 March 2009; or
 - (d) for a civil penalty provision in Division 6 of Part 2 of the Act or Division 2, 3, 4 or 6 of Part 3 of the Act — the period beginning on 12 December 2008 and ending at the end of 11 March 2010.

4 Matters that must be considered

In determining whether a reporting entity has failed to take reasonable steps to comply with a civil penalty provision, the AUSTRAC CEO must have regard to all relevant matters, including:

- (a) whether the entity has previously failed to take such steps; and
- (b) any steps that the entity has taken to comply with its obligations under the Act; and
- (c) whether the entity complied with any obligations it may have had under the *Financial Transaction Reports Act 1988*; and
- (d) any discussions and agreements that the reporting entity has had with staff of AUSTRAC; and
- (e) any explanation given by the reporting entity to AUSTRAC.