



Australian Government

AUSTRAC

***Explanatory note for consultation – proposed draft AML/CTF Rules adding Chapter 79 and Chapter 80, and amending Chapter 21 and Chapter 48.***

*(i) Proposed Chapter 79 - Applicable customer identification procedure after account opening and initial deposit to the account*

Section 33 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) allows a reporting entity to carry out the applicable customer identification procedure (ACIP) in respect of a customer *after* commencing to provide a designated service if the service is specified in the *Anti-Money Laundering and Counter-Terrorism Financing Rules 2007* (AML/CTF Rules) and any conditions set out in the AML/CTF Rules are satisfied.

In July 2020, AUSTRAC released proposed amendments to Chapter 46 of the AML/CTF Rules that added an additional special circumstance to allow a reporting entity to carry out the ACIP in respect of a customer (including any person purporting to act on behalf of the customer and any beneficial owner of the customer) after opening an account.

The proposed amendments also rewrote Chapter 46 to create a simpler, less prescriptive chapter.

Based on feedback received during the public consultation period, AUSTRAC is discontinuing the proposed amendments to Chapter 46, and instead proposes a new Chapter, be added to the AML/CTF Rules.

Proposed Chapter 79 will allow a reporting entity to carry out the ACIP in respect of a customer, including any person purporting to act on behalf of the customer and any beneficial owner of the customer, after opening an account, provided no transaction — other than an initial deposit made at the time of the account opening — is conducted in relation to the account.

Opening, in relation to an account, as defined in section 5 of the AML/CTF Act, means creating the account. It is immaterial whether:

- (1) the account number has been given to the holder of the account; or
- (2) the holder of the account or any other signatory to the account, can conduct a transaction in relation to the account.

A deposit into an account is an item 3 table 1 designated service – “in the capacity of account provider, allowing a transaction to be conducted in relation to the account, where the account provider is an ADI, a bank, a building society, a credit union, or a person specified in the AML/CTF Rules.” Under paragraph 71.4 of the AML/CTF Rules a person undertaking the activity of credit card issuing or credit card acquiring (or both) is specified, if the person:

- (1) is a participant in a payment scheme that is designated to be a payment system under section 11 of the Payments Systems (Regulation) Act 1998; and
- (2) is not an ADI, bank, building society or credit union.

The proposed AML/CTF Rules do not restrict the modes of deposit used to make the initial deposit. For example, an initial deposit transaction conducted in relation to the account in the nature of a deposit could comprise part cash, part cheque.

The reporting entity must:

- (1) determine that opening the account and accepting an initial deposit before completing the ACIP in respect of a customer is essential to avoid interrupting the ordinary course of business;
- (2) implement appropriate risk management procedures and controls to effectively manage the ML/TF risks associated with providing designated services to a customer that has not completed the ACIP; and
- (3) have systems and controls in place to ensure it carries out ACIP as soon as practicable.

The reporting entity's determination that opening an account and accepting an initial deposit is essential to avoid interrupting the ordinary course of business is made on reasonable grounds. This is an objective test, having regard to all the relevant circumstances, including but not limited to:

- the nature and type of customer/s, the relevant circumstances or products;
- the purpose of the account being opened;
- that opening an account in these circumstances makes economic or business sense; and
- ensuring that there is little risk of ML/TF occurring.

The proposed Chapter 79 does not prescribe particular risk management procedures and controls, as a reporting entity must determine these having regard to the money laundering and terrorism financing risks it faces.

The prohibition on conducting a transaction other than an initial deposit is made under section 34 of the AML/CTF Act. That section allows the AML/CTF Rules to specify a period within which a reporting entity must carry out the ACIP. If the ACIP is not completed within that period, then the reporting entity must not commence or continue to provide any designated services until such time as the ACIP is completed.

In accordance with paragraph 34(4)(a) of the AML/CTF Act, the period commences at the time when the reporting entity commences to provide the designated service (i.e. providing a designated service of the kind described in item 1 of table 1 in section 6 of the AML/CTF Act—opening an account).

In accordance with paragraph 34(4)(b) of the AML/CTF Act, the period ends on the occurrence of a specified event (i.e. allowing an initial deposit to be made into the account).

The effect of this is that a reporting entity will be prohibited from providing further designated services to a customer following receipt of the initial deposit, until the ACIP is completed.

Neither the closure of a customer account (e.g. in circumstances where ACIP cannot be completed) nor the remittance of funds (either to the customer or to the Commonwealth as unclaimed monies under section 69 of the *Banking Act 1959*) are considered to be designated services, therefore the prohibition in subsection 34(1) of the AML/CTF Act does not apply. However, reporting entities should consider whether the closure of an account in these circumstances would give rise to a suspicious matter reporting obligation under section 41 of the AML/CTF Act.

(ii) *Proposed Chapter 80 – AML/CTF Rules for the purposes of the definition of a stored value card*

These draft AML/CTF Rules propose to add a new chapter for the purposes of paragraph (f) of the definition of a stored value card (SVC) in section 5 of the AML/CTF Act.

The definition of a SVC was amended in 2017 to provide clarity to industry on what constitutes a SVC for the purposes of the AML/CTF Act. The amendments ensured that the definition remained broad, inclusive and flexible to cover virtual cards. Paragraph (f) of the definition allows the AUSTRAC CEO to make AML/CTF Rules to exclude specific things from being SVCs.

Draft Chapter 80 proposes to exempt certain types of products, which are unintentionally captured by the definition of a SVC in the AML/CTF Act.

Proposed paragraph 80.2(1) prescribes that an account is not a SVC for the purposes of the AML/CTF Act. This means that all accounts, including those provided by reporting entities in relation to designated services in Tables 1 and 3 of subsection 6(2) of the AML/CTF Act, will not be captured by the SVC definition. ‘Account’ is defined in section 5 of the AML/CTF Act.

Proposed paragraph 80.2(2) prescribes that a card or other instrument used only for the purposes of purchasing an entry into a lottery, or redeeming winnings in respect of a lottery, is not a SVC.

It is noted that the definition of ‘game’ in section 5 of the AML/CTF Act excludes lotteries from the AML/CTF regime. Furthermore, pages 10 and 34-35 of the Replacement Explanatory Memorandum to the *Anti-Money Laundering and Counter-Terrorism Financing Bill 2006* expressly acknowledged that the AML/CTF Act would exclude lottery type games such as instant scratchies, keno, powerball and lotto. As these products are provided as a gambling service and are designed to be used for the purposes of entering a lottery, this draft rule exempts these products from the SVC definition. However, as the use of technology is transforming the way in which lottery services are provided to customers, AUSTRAC will be assessing the money laundering and terrorism financing risks associated with new and emerging lottery products to understand if and how they should be regulated under the AML/CTF Act.

The AML/CTF Act does not contain a definition of ‘lottery’. The Macquarie Dictionary defines ‘lottery’ as:

1. *a scheme or arrangement for raising money, as for some public, charitable, or private purpose, by the sale of a large number of tickets, certain among which, as determined by chance after the sale, entitle the holders to prizes.*
2. *any scheme for the distribution of prizes by chance.*
3. *any affair of chance.*

The Lexis Nexis Australian Legal Dictionary defines ‘lottery’ as:

*A contest where the outcome is mainly determined through the operation of chance, the disposition of prizes by lot....A contest remains a lottery even though some skill may be involved in the determination of the outcome, so long as the element of skill does not over-balance the element of chance.*

(iii) *Proposed amendment to Chapter 21 – exempting the issuing of an interest in a litigation funding scheme*

These draft AML/CTF Rules set out the amendments to Chapter 21 of the AML/CTF Rules to exempt the issuing of an interest in a litigation funding scheme from the operation of the AML/CTF Act.

Litigation funders partly or wholly fund the costs of litigation in return for a portion of the proceeds if the action is successful.

A litigation funding scheme is an arrangement where a group of plaintiffs, a law firm and a litigation funder collaborate to pursue a class action. Since 2009, this type of arrangement has been understood to constitute a managed investment scheme (MIS).

Until recently, the *Corporations Regulations 2001* (**Corporations Regulations**) specified that:

- a person providing financial services for litigation funding schemes was exempt from the requirement to hold an Australian Financial Services Licence (AFSL) (if they maintain and apply adequate practices for managing conflicts of interest), and
- litigation funding schemes were exempt from being a MIS or a credit facility.

Amendments to the Corporations Regulations have removed these exemptions. Consequently, litigation funding schemes entered into on or after 22 August 2020 must be registered as managed investment schemes under the *Corporations Act 2001*.

As a MIS, the issuing of an interest in a litigation funding scheme will be a designated service for the purposes of Item 35 of Table 1 in subsection 6(2) of the AML/CTF Act (issuing or selling a security or derivative).

The regulation of litigation funding schemes under the AML/CTF framework is an unintended consequence of the changes made to the Corporations Regulations.

AUSTRAC has assessed the money laundering and terrorism financing (ML/TF) risks associated with issuing an interest in a litigation funding scheme to be low. Accordingly, AUSTRAC is proposing changes to the AML/CTF Rules to exempt the

issue of an interest in a litigation funding scheme from the operation of the AML/CTF Act.

The proposed amendment to Chapter 21 inserts an additional specified designated service to be exempted from the operation of the AML/CTF Act.

Section 247(3) of the AML/CTF Act allows the AML/CTF Rules to specify circumstances in which the AML/CTF Act does not apply to the provision of a designated service. Chapter 21 currently specifies four circumstances in which the issue or sale of securities or derivatives, which includes interests in managed investment schemes, are exempt from the operation of the AML/CTF Act. The amendments will add the issue of an interest in a litigation funding scheme where the person issuing the interest holds an AFSL and the litigation funding scheme is registered with the Australian Securities and Investments Commission.

For the purposes of the AML/CTF Rules, 'litigation funding scheme' has the meaning given by regulation 7.1.04N(3) of the Corporations Regulations.

*(iv) Proposed amendment to Chapter 48 – exempting the provision of payroll and superannuation clearance services*

When an employer pays salaries, wages, superannuation and other benefits directly to their employees, the employer is not regulated under the AML/CTF Act. When such a payment is made by an employer, these activities are considered a direct transfer from a payer to a payee, where the bank is providing the designated service.

For reasons of efficiency and convenience, an employer may outsource payroll functions to specialist payroll services businesses. These businesses are non-financiers and are technically providing a designated service under a designated remittance arrangement.

When such a business accepts and processes an instruction from its client to make payroll-related payments to the client's employees, it may be providing designated services under items 31 and 32 of table 1 of section 6(2) of the AML/CTF Act.

Similarly, when businesses providing superannuation clearing house services accept and execute instructions from a client relating to the payment of superannuation contributions, they may provide designated services under item 31 of table 1 of section 6(2) of the AML/CTF Act.

AUSTRAC has assessed that the ML/TF risks associated with the provision of payroll and superannuation clearance services to be low. Accordingly, AUSTRAC is proposing changes to the AML/CTF Rules to exempt these services from the operation of the AML/CTF Act.

Chapter 48 of the AML/CTF Rules includes exemptions of salary packaging administration services from the AML/CTF Act. The proposed amendment to Chapter 48 expands the current exemption for providing salary packaging services to also include payroll and superannuation clearance services. These services will be exempt from the operation of the AML/CTF Act, pursuant to subsection 247(3) of the AML/CTF Act. The proposed amendment does not change the existing definition of salary packaging in Chapter 48.

For the purposes of the AML/CTF Rules,

- ‘payroll services’ is defined to include the payment of salary, wages, and other benefits to an employee on behalf of an employer client. It also includes making deductions and payments on behalf of the employee for matters such as superannuation contributions, taxation and professional and union membership fees, and
- ‘superannuation clearance services’ is defined to include the payment of superannuation contributions to an employee’s nominated superannuation fund on behalf of an employer client.

### ***Human Rights (Parliamentary Scrutiny) Act 2011 requirements***

The *Human Rights (Parliamentary Scrutiny) Act 2011* requires that Statements of Compatibility must be made by the rule-maker with regard to disallowable legislative instruments, and must contain an assessment of whether the legislative instrument is compatible with the rights and freedoms recognised in the seven core international human rights treaties that Australia has ratified.

It is considered that the proposed Chapters 79 and 80 do not engage any of the human rights and freedoms recognised or declared in the international instruments listed in the definition of ‘human rights’ in subsection 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### *Right to Privacy*

It is considered that the proposed amendments to Chapters 21 and 48 engage the right to privacy in Article 17 of the International Covenant on Civil and Political Rights (ICCPR) by excluding customers of litigation funding schemes and employees of companies utilising external payroll and superannuation clearance services from the customer due diligence, record keeping and reporting obligations of the AML/CTF Act.

Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence. The use of the term ‘arbitrary’ means that any interference with privacy must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances. The United Nations Human Rights Committee has interpreted ‘reasonableness’ to imply that any limitation must be proportionate and necessary in the circumstances. The right to privacy can be limited by necessity in a democratic society in the interests of national security or public order.

As a result of the amendments, customers of litigation funding schemes and employees of companies utilising external payroll and superannuation clearance services will no longer be required to undergo an applicable customer identification procedure under the AML/CTF Act. In doing so, the amendments preserve the right to privacy by ensuring that personal information is only collected when a designated service, that is not the subject of an exemption, is being provided. This ensures that the required collection of personal information under the AML/CTF Act remains reasonable, necessary and proportionate.

### *Rights at Work*

It is considered that the proposed amendments to Chapter 48 engage the right of everyone to the enjoyment of just and favourable conditions of work as set out in Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The right to just and favourable conditions of work in article 7 of ICESCR encompasses a number of elements, including remuneration which provides all workers, as a minimum, with fair wages.

The amendments preserve the right of just and favourable conditions of work by facilitating the ease in which employees can be paid their salary, wages and superannuation contributions.

### **Calculation of Regulatory Costs**

These draft amendments may result in regulatory savings if implemented. The Australian Government has implemented an annual \$1 billion red tape reduction target to which agencies such as AUSTRAC are required to contribute if regulatory action by an agency results in a cost reduction to businesses, community organisations or individuals. Any identified savings may also be used by an agency to ‘offset’ regulatory action which may impose regulatory costs.

Further details on the Australian Government policy are available at [Cutting Red Tape](http://www.cuttingredtape.gov.au) ([www.cuttingredtape.gov.au](http://www.cuttingredtape.gov.au)).

AUSTRAC requests that industry provide, in any submission on these draft amendments, an estimate of any savings that may result from their implementation. It is preferred that such estimates use the Regulatory Burden Measure (RBM) as a basis for the calculation, as the RBM has been mandated by the Australian Government for use by agencies. Further details on the RBM are available at Commonwealth Regulatory Burden Measure (<https://rbm.obpr.gov.au>).

## **CHAPTER 79      Applicable customer identification procedure—special circumstances—account opening and initial deposit**

79.1 These Anti-Money Laundering and Counter-Terrorism Financing Rules are made under section 229 for the purposes of paragraphs 33(a) and 33(b) and subparagraph 34(1)(d)(i) of the *Anti-Money Laundering and Counter Terrorism Financing Act 2006*.

*Conditions for carrying out the applicable customer identification procedure after opening and allowing an initial transaction to be conducted on an account*

79.2 A reporting entity that provides a designated services described in items 1 or 3 of table 1 in subsection 6(2) of the Act, may carry out the applicable customer identification procedure in respect of a customer (including any beneficial owner of the customer or any person purporting to act on behalf of the customer), after commencing to provide a designated service if:

- (1) it has determined on reasonable grounds that doing so is essential to avoid interrupting the ordinary course of its business; and
- (2) has implemented appropriate risk-based systems and controls to effectively manage the associated ML/TF risks; and
- (3) has systems and controls in place to ensure it carries out the applicable customer identification procedure as soon as practicable; and
- (4) does not commence to provide to the customer a designated service described in item 3 of table 1 in subsection 6(2) of the Act—other than an initial deposit made at the time of the account opening—until the applicable customer identification procedure is completed.

79.3 For the purposes of subparagraph 34(1)(d)(i) of the Act, the relevant period ends immediately after the reporting entity opens the account and allows the initial deposit to be made into the account.



## **CHAPTER 80      AML/CTF Rules relating to certain definitions under the AML/CTF Act – stored value card**

80.1      These Anti-Money Laundering and Counter-Terrorism Financing Rules are made under section 229 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) for the purposes of paragraph (f) of the definition of ‘stored value card’ in section 5 of the AML/CTF Act.

### *Definition of a stored value card*

80.2      For the purposes of paragraph (f) of the definition of ‘stored value card’ in section 5 of the AML/CTF Act, each of the following is prescribed as a thing that is taken not to be a stored value card:

- (1)      an account;
- (2)      a card or other instrument that is only used for the purposes of storing monetary value, or accessing monetary value, in relation to:
  - (a) purchasing an entry into a lottery; or
  - (b) redeeming winnings in respect of a lottery.

## **Draft AML/CTF Rules amending Chapter 21 of the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)**

1. These Anti-Money Laundering and Counter-Terrorism Financing Rules are made under section 229 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) for the purposes of section 247(3) of the Act.

### *Litigation Funding Schemes*

2. After paragraph 21.3(4)(e) of Chapter 21: *insert*:
  - (5) an issue of an interest in a litigation funding scheme in circumstances where:
    - (a) the person issuing the interest holds an Australian Financial Services Licence; and
    - (b) the litigation funding scheme is registered with the Australian Securities and Investments Commission.
3. After paragraph 21.4(4) of Chapter 21: *insert*:
  - (4A) 'litigation funding scheme' has the meaning given by Regulation 7.1.04N(3) of the *Corporations Regulations 2001*.

# **Draft AML/CTF Rules amending Chapter 48 of the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)**

1. These Anti-Money Laundering and Counter-Terrorism Financing Rules are made under section 229 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) for the purposes of subsection 247(3) of the Act.

## *Title of Chapter 48*

2. For the title of Chapter 48, *substitute*:

## **CHAPTER 48        Exemption of salary packaging and payroll administration services from the AML/CTF Act**

### *Payroll services*

3. For paragraph 48.3(1) of Chapter 48, *substitute*:
  - (1) is carrying on a business of providing administrative services relevant to salary packaging, payroll, or superannuation clearance for an employer client, and
4. For paragraph 48.4 of Chapter 48: *substitute*:
  - 48.4 In this Chapter:
    - (1) ‘payroll’ refers to the payment of salary, wages, and other benefits to an employee on behalf of an employer client. It also includes making deductions and payments on behalf of the employee for matters such as superannuation contributions, taxation and professional and union membership fees.
    - (2) ‘salary packaging’ refers to an arrangement between an employer and an employee, whereby the employee agrees to forgo part of their future entitlement to salary or wages in return for the employer providing them with benefits of a similar cost.
    - (3) ‘superannuation clearance’ refers to the payment of superannuation contributions to an employee’s nominated superannuation fund on behalf of an employer client.