

Our ref: 16/17-046

7 July 2017

Iain Anderson  
Chair, Sunsetting Review Committee  
c/- Attorney-General's Department  
4 National Circuit  
Barton  
CANBERRA, ACT 2600

By email: [Redacted personal information]

Dear Mr Anderson

### **AUSTRAC Submission - Review of the Operations of the Sunsetting Provisions in the *Legislation Act 2003***

1. AUSTRAC's submission is in response to Question 32 (Are the five policy criteria still appropriate and aligned to the overall objectives of the sunsetting framework?) and Question 33 (Should the criteria for granting specific exemptions from sunsetting be set out in legislation rather than policy?) of the Consultation Paper.
2. In 2012 AUSTRAC successfully applied for an exemption for the Anti-Money Laundering and Counter-terrorism Financing Rules (AML/CTF Rules) which are legislative instruments made under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.<sup>1</sup> The process of applying for the exemption has informed AUSTRAC's comments in response to Question 32 and Question 33.
3. In summary, AUSTRAC submits that:
  - if a legislative instrument is subject to regular review by both government and relevant stakeholders, and there are commercial impacts upon industry through their implementation of that instrument, and a subsequent commercial impact resulting from a periodic review, then that instrument should be exempt from sunsetting.
  - legislative certainty around the criteria for determining an exemption from sunsetting will assist agencies implement the Australian Government policies to reduce red tape, deliver clearer laws and align existing legislation with current government policy. It will be also crucial for the 'users' of such

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<sup>1</sup> *Legislation (Exemptions and Other Matters) Regulation 2015*, section 12, item 6.

legislation (the government agencies and stakeholders) to understand the policy requirements behind making an application and reduce the administrative burden for both the applicant and the decision maker.

**Are the five policy criteria still appropriate and aligned to the overall objectives of the sunseting framework?**

4. The Consultation Paper notes that sunseting is an important mechanism for the Australian Government to implement policies to reduce red tape, deliver clearer laws and align existing legislation with current government policy. The purpose of sunseting is that legislative instruments are kept up to date and only remain in force for so long as they are needed. Legislative instruments should be subject to ongoing review and actively repealed if it is determined that they are no longer required.
5. In 2012, AUSTRAC submitted that the AML/CTF Rules should be exempt from sunseting under three of the policy criteria:
  - The instrument is designed to be enduring and not subject to regular review.
  - Commercial certainty would be undermined by sunseting.
  - The instrument is subject to a more stringent statutory review process than is set out in the Legislation Act, and preserving that process is important.

*Regular review*

6. AUSTRAC does not consider that a review of legislative instruments should take place every ten years, if there is an ongoing review process in place which is undertaken by the relevant agency and stakeholders through both statutory and non-statutory means, that fulfils the objectives of sunseting as specified in the *Legislation Act 2003*. The AUSTRAC's 2012 application provided examples of the ongoing review process of the AML/CTF Rules and how they were instigated.<sup>2</sup>

*As the following table illustrates, the AML/CTF Rules have been constantly reviewed and modified since the principal legislative instrument came into force in 2007.*

<b>Year</b>	<b>Number of Amendment Instruments</b>	<b>Chapters amended or inserted by amendment instruments</b>
2007	5	14
2008	8	15
2009	5	20
2010	3	7
2011	8	26
2012	5	18

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<sup>2</sup> The following text has been updated from the original application.  
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2013	2	4
2014	6	22
2015	2	4
2016	2	7
2017 <sup>3</sup>	3	4

*The AML/CTF Rules undergo a more stringent review process (both statutory and non-statutory) than will otherwise take place every 10 years as part of the sunseting process. AUSTRAC considers that the amendments to the AML/CTF Rules since 2007, show clearly that the policy intention of the AML/CTF Act (and by extension, the sunseting provisions of the Legislation Act) is being fulfilled:*

*Given that industry has a role in the development of the rules, at an operation level it is reasonable to predict that the AML/CTF legislative package will undergo a period of almost continual assessment, with changes made as the need arises.<sup>4</sup>*

### **AML/CTF Act consultation requirements**

*In developing each amendment instrument, AUSTRAC is required to consider the provisions of section 212 of the AML/CTF Act, which include having regard to the integrity of the financial system, crime reduction, avoidance of unnecessary financial and administrative regulatory burdens, the risk-based approach, competitive neutrality and competition, economic efficiency and privacy.*

*In addition, AUSTRAC is required to consult with the Australian Federal Police Commissioner, the Australian Crime Commission CEO, the Commissioner of Taxation, the Australian Customs and Border Protection Service CEO and the Australian Information Commissioner.<sup>5</sup>*

*AML/CTF Rules are published for consultation on the AUSTRAC website for a public consultation period of four weeks. AUSTRAC has also established ongoing consultative forums, such as the Privacy Consultative Committee, which takes into account consumer and civil liberties issues as well as privacy, and industry consultative forums relating to financial services and gambling.*

*AUSTRAC is also required to comply with the Office of Best Practice Regulation requirements, which add a further level of review to the statutory and non-statutory requirements discussed below.*

*The AML/CTF Rules are subject to both statutory and non-statutory reviews.*

#### **Statutory Reviews**

*The AML/CTF Rules are subject to the following statutory review:*

#### **Review of the operation of the AML/CTF Act, Regulations and Rules**

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<sup>3</sup> Until July 2017.

<sup>4</sup> Replacement Explanatory Memorandum (REM) to the AML/CTF Act, p 19.

<sup>5</sup> Subsection 212(2), AML/CTF Act.

*Section 251 of the AML/CTF Act requires the Minister to commence a review of the operation of the AML/CTF Act, the regulations and the AML/CTF Rules before 13 December 2013. The Report on the Review was tabled in Parliament in April 2016 with amendments to the AML/CTF Rules expected to continue until 2018-19. As a result of the Review, policy consideration is being given to the possibility of implementing a further statutory review as an amendment to the AML/CTF Act. .*

### **Non-statutory reviews**

*In addition, there are significant ongoing non-statutory reviews of the Australian AML/CTF regime (of which the AML/CTF Rules are a major component) conducted by the Financial Action Task Force (FATF)<sup>6</sup> These reviews occur every five years and also involve reporting to FATF on the Australia's progress in implementing the reviews.*

7. The above examples show the means by which the AML/CTF Rules are subject to 'review'. Similar mechanisms may be in place for other legislative instruments in the Commonwealth. AUSTRAC considers that where possible, the term 'review' be codified to include non-statutory methods of review described above that fulfil the policy intention, without the need for a sunseting process to be undertaken.
8. AUSTRAC submits that the exemption policy criteria should emphasise that if a legislative instrument is subject to regular statutory and/or non – statutory review then that instrument should not be subject to sunseting as the policy objective of legislative instruments being kept up to date and only to remain in force for so long as they are needed, will be achieved through that process.

### *Commercial certainty*

9. AUSTRAC highlighted the issue of commercial certainty in its exemption application as the AML/CTF Rules have a significant impact upon industry in terms of compliance costs by the fulfilment of obligations.
10. AUSTRAC's 2012 application stated:

*If the AML/CTF Rules are not exempt from sunseting, then industry will experience ongoing commercial uncertainty as to whether they will be repealed, in whole or part, every 10 years. This uncertainty will impact on the significant investments which industry has made in fulfilling their compliance with the AML/CTF Act and Rules (including the development of IT systems and procedures), and investments they will make in the future to ensure that those obligations are fulfilled on an ongoing basis.*

*Many chapters of the AML/CTF Rules relate to the exemption powers under the AML/CTF Act which allow for the complete or partial exemption from the obligations of the Act for reporting entities. The possibility that the AML/CTF Rules which implement exemptions may be repealed on a periodic basis, will create significant commercial issues for industry as a result of that regulatory uncertainty.*

*As previously noted, FATF requires its member countries to have AML/CTF regimes in place that are compliant with the FATF Recommendations. If they are not compliant, this will mean greater costs for international financial institutions in*

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<sup>6</sup> FATF is an independent inter-governmental body that develops and promotes policies to protect the global financial system against money-laundering and terrorist-financing. Australia was a founding member of FATF.

*transacting with Australian financial businesses and have an impact on the international competitiveness of reporting entities, including major financial institutions.*

*In addition, the close interest industry has in the AML/CTF Rules means that AUSTRAC is notified by the relevant industry sector of any concerns which they may have, regarding the Rules and their operation. The number of additions and amendments made to the Rules since they commenced in 2007 indicate that the policy intention of the AML/CTF Rules is being fulfilled.*

11. AUSTRAC submits that if a legislative instrument is subject to regular review by both government and relevant stakeholders, and there are commercial impacts upon industry through their implementation of that instrument and a subsequent commercial impact resulting from a periodic review, then that instrument should be exempt from sunseting.
12. It is further submitted that the phrase 'commercial certainty' be expanded to include other impacts that sunseting may entail, such as potential international ramifications as described above in the original AUSTRAC exemption application.

***Should the criteria for granting specific exemptions from sunseting be set out in legislation rather than policy?***

13. AUSTRAC noted in the making of its exemption application the difficulty of establishing the policy intention behind the five principles. Setting out the criteria in legislation will provide legal certainty to applicants, while relevant extrinsic material, such as explanatory memorandums, will further aid agencies in understanding the requirements which must be satisfied for an application to be successful.
14. Key terms should be defined in respect to the current principles (such as 'regular review', 'commercial certainty' and 'stringent') and this should apply to any modification to them which may be legislated.
15. Legislative certainty around the criteria for determining an exemption from sunseting will assist agencies implement the Australian Government policies to reduce red tape, deliver clearer laws and align existing legislation with current government policy. It will be also crucial for the 'users' of such legislation (the government agencies and stakeholders) to understand the policy requirements behind making an application and reduce the administrative burden for both the applicant and the decision maker.
16. Please contact Philip Johns, Director AML/CTF Rules on [Redacted personal information] or [Redacted personal information] in regard to any queries about this submission.

Yours sincerely



**Gavin McCairns**  
*Acting CEO*  
AUSTRAC