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**Explanatory Statement – *Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2017 (No. 1)* amending the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)***

**Purpose and operation of Anti-Money Laundering/Counter‑Terrorism Financing Rules (AML/CTF Rules) amending Chapter 59 and adding Chapter 74.**

1. Section 229 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) provides that the AUSTRAC Chief Executive Officer (AUSTRAC CEO) may, by writing, make AML/CTF Rules prescribing matters required or permitted by any other provision of the AML/CTF Act.

***Amendments to Chapter 59***

2. Chapter 59 specifies the grounds on which a remittance dealer’s registration can be suspended by the AUSTRAC CEO from the Remittance Sector Register. The amendments to Chapter 59 were prompted by the following key factors.

**Post-Implementation Review recommendation**

3. During 2014 and 2015, Chapters 58 and 59 of the AML/CTF Rules were subject to a ‘Post-Implementation Review’ (PIR) as required by the Office of Best Practice Regulation. A PIR is conducted after a regulatory policy decision is made (in this case the registration of the two chapters), in order to test whether the regulation is performing as intended and is still relevant and needed. The final PIR report is available on the Draft AML/CTF Rules page of the AUSTRAC website.

4. The PIR recommended that Chapter 59 should be amended to clarify the range of matters which the AUSTRAC CEO may consider in deciding whether to suspend the registration of a remittance service provider.

**Allowing the AUSTRAC CEO to suspend a remitter’s registration without prior notice**

5. There may be circumstances where it is appropriate for the AUSTRAC CEO to suspend a remittance dealer’s registration without prior notice and this is now expressly stated in the chapter. These circumstances relate to high money laundering, financing of terrorism or people smuggling risk. The affected remitter will have the opportunity to apply for an internal review of the delegate’s decision.

6. A ‘suspension’ decision is not a ‘reviewable decision’ under the AML/CTF Act and therefore the remitter is not able to appeal to the Administrative Appeals Tribunal (AAT). However, a suspension decision may result in cancellation of the remitter’s registration on the Remittance Sector Register, and such a decision is reviewable by the Tribunal.

**Legally delegating the AUSTRAC CEO’s responsibility for making a suspension of registration decision**

7. To facilitate the internal review process for suspension of registration decisions, the chapter has been amended to expressly state that the AUSTRAC CEO is a delegate for the purpose of considering whether a person has contravened a civil penalty provision of the AML/CTF Act, whether there are reasonable grounds to commence an action to cancel a registration, whether a person has contravened an imposed condition or a provision of the AML/CTF Act or Rules, whether a person may contravene a provision of the AML/CTF Act and whether information provided by the person was not true or correct or was misleading.

**Aligning the grounds for suspending remitter registrations with those for cancelling remitter registrations**

8. ‘Significant money laundering, financing of terrorism or people smuggling risk’ is already a factor which the AUSTRAC CEO may consider in deciding whether or not to cancel a remittance dealer’s registration. To ensure consistency between decisions to suspend or cancel a remittance dealer’s registration, amendments have been made to ensure that the ‘suspension grounds’ are substantially similar to the grounds for ‘cancellation’.

**9.** Section 14(1)(b) of the *Legislation Act 2003* provides that if enabling legislation authorises provision to be made in relation to any matter by a legislative instrument, the instrument may, unless the contrary intention appears, make provision in relation to that matter (subject to s 14(2)), by incorporating any matter contained in any other writing existing at the time the instrument commences.

**10.** The definition of ‘people smuggling’ in Chapter 59, which incorporates a reference to the Protocol, was first introduced into the AML/CTF Rules in 2011 by the *Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2011 (No.7)* (Instrument No. 7). Instrument No. 7 was registered on 28 October 2011 and commenced on 1 November 2011.

**11.** However, as Instrument No. 1 will repeal and substitute Chapter 59 of the AML/CTF Rules, the definition in the new Chapter 59 will now incorporate the Protocol as it exists at the time of the commencement of Instrument No. 1. This is despite the fact that the amendments to Chapter 59 made by Instrument No. 1 did not include any changes to the definition of people smuggling.

12. The Protocol seeks to ‘prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants’[[1]](#footnote-1) and is available at: www.treaties.un.org.

***Addition of Chapter 74***

13. Chapter 74 exempts licensed trustees from specified provisions of the AML/CTF Act when they provide designated services in specified circumstances. A licensed trustee is an entity which holds an Australian Financial Services Licence authorising them to provide traditional trustee company services, under section 601RAA of the *Corporations Act 2001*. This is in contrast with public trustees which are established under legislation – such trustees are already exempted under the AML/CTF Act via several section 248 (Exemptions and modifications by the AUSTRAC CEO) exemptions.

14. Chapter 74 does not provide an exemption for licensed trustees in respect to the management of inter vivos trusts (trusts that commence when the settlor is alive). Exemptions for public trustees are currently in place under section 248 (Exemptions and modifications by the AUSTRAC CEO) of the AML/CTF Act, because it is considered that the governance, due diligence and clientele who use inter vivos trusts in the public trustee context are of lower money laundering and terrorism financing risk than those who use licensed trustees.

**Statement of Compatibility with the *Human Rights (Parliamentary Scrutiny) Act 2011***

15. The *Human Rights (Parliamentary Scrutiny) Act 2011* requires a Statement of Compatibility declaring that the relevant instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act.

16. The Statement of Compatibility for the *Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2017 (No. 1)* is included in this Explanatory Statement at page 7. The AUSTRAC CEO, as the rule-maker of this legislative instrument, has stated that it is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

**Notes on sections**

**Section 1**

This section sets out the name of the Instrument, i.e. the *Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2017 (No. 1).*

**Section 2**

This section specifies that the Instrument commences on the day after it is registered.

**Section 3**

This section contains the details of the amendment:

Schedules 1 and 2 amend the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)*.

**Schedule 1**

This schedule amends Chapter 59.

**Schedule 2**

This schedule adds Chapter 74.

**Notes on Paragraphs**

**Schedule 1**

**Chapter 59**

**Item 1**

This item repeals the existing Chapter 59 and substitutes a new Chapter 59.

**Paragraph 59.1**

This paragraph specifies that these AML/CTF Rules have been made under section 229 of the AML/CTF Act for the purposes of subsection 75H(1) of the AML/CTF Act.

**Paragraph 59.2**

This paragraph specifies that a suspension is subject to the circumstances specified in paragraphs 59.3, 59.4 and 59.5 and has been amended to state that the AUSTRAC CEO can suspend a person’s registration with or without prior written notice.

**Paragraph 59.3**

This paragraph now specifies that the AUSTRAC CEO may suspend a person’s registration without prior notice. The ‘Note’ to this paragraph states that a person may request an internal review of the decision.

**Paragraph 59.4**

This paragraph specifies the matters to which the AUSTRAC CEO may have regard in considering whether a person’s registration should be suspended. The language has been amended to provide clarity and certainty in regard to the delegable powers of the AUSTRAC CEO.

**Paragraph 59.5**

This paragraph sets out the notice and review provisions which must be followed if the AUSTRAC CEO decides to suspend a person’s registration. In circumstances where the person being suspended is a remittance affiliate of a registered network provider, the chapter now requires that the network provider must be notified by the AUSTRAC CEO, in addition to the remittance affiliate, within seven days of the decision being made.

**Paragraph 59.6**

This paragraph specifies that a suspension cannot commence before the date specified in the notice.

**Paragraph 59.7**

This paragraph specifies that the AUSTRAC CEO may publish the notice or extracts from the notice on the AUSTRAC website or in any other manner.

**Paragraph 59.8**

Due to the amendments to subparagraph 59.5(1), this paragraph has been amended to remove the now redundant wording relating to the AUSTRAC CEO informing the registered network provider of the remitter affiliate’s suspension.

**Paragraph 59.9**

This paragraph specifies that the entry for the suspended registration may be removed from the Remittance Sector Register for the period of the suspension.

**Paragraph 59.10**

This paragraph specifies that conviction of an offence includes orders relating to a person which have been made under section 19B of the *Crimes Act 1914*.

**Paragraph 59.11**

This paragraph specifies definitions for ‘beneficial owner’, ‘enforcement action’, ‘fraud’, ‘key personnel’, ‘people smuggling’, ‘person’, ‘serious offence’ and ‘terrorism’.

The definition of ‘people smuggling’ incorporates the *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime* (the Protocol). The Protocol is available at: www.treaties.un.org.

**Schedule 2**

**Item 1**

**Paragraph 74.1**

This paragraph specifies that these AML/CTF Rules have been made under section 229 of the AML/CTF Act for the purposes of subsection 247(4) of the AML/CTF Act.

**Paragraph 74.2**

This paragraph sets out the designated services to which the exemption applies and the provisions of the AML/CTF Act from which licensed trustee companies are exempted.

**Paragraph 74.3**

This paragraph lists the conditions that must be satisfied for the exemption to apply.

**Paragraph 74.4**

This paragraph specifies that the exemption does not apply where the person is acting in the capacity of a trustee of an inter vivos trust.

**Paragraph 74.5**

This paragraph defines the terms for ‘licensed trustee company’, ‘statutory office holder’ and ‘inter vivos trust’.

**Legislative instruments**

These AML/CTF Rules are legislative instruments as defined in section 8 of the *Legislation Act 2003*.

**Likely impact**

The amendments to Chapter 59 and the addition of Chapter 74 will have impacts on reporting entities.

**Assessment of benefits**

The amendments to Chapter 59 will provide greater clarity and certainty for industry in knowing and understanding the basis on which the relevant AUSTRAC CEO powers are applied. Costings were not undertaken for the amendments to Chapter 59 as they are of a minor nature and do not substantially alter existing regulatory arrangements.

The addition of Chapter 74 will provide regulatory relief to licensed trustees from complying with certain provisions of the AML/CTF Act while leaving in place obligations which will identify, mitigate and manage ML/TF risk.

**Consultation**

The amendments to Chapter 59 were published on the AUSTRAC website from 12 January 2017 to 9 February 2017. Chapter 74 was published on the AUSTRAC website from 7 September 2016 to 5 October 2016.

AUSTRAC has consulted with the Australian Taxation Office, the Department of Immigration and Border Protection, the Australian Federal Police, the Australian Criminal Intelligence Commission and the Office of the Australian Information Commissioner.

**Ongoing consultation**

AUSTRAC will conduct ongoing consultation with stakeholders on the operation of these AML/CTF Rules.

**Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

***Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2017 (No. 1)***

This Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

**Overview of the legislative instrument**

The Instrument amends Chapter 59 and will provide greater clarity and certainty for industry in knowing and understanding the basis on which the AUSTRAC CEO can suspend a remittance dealers’ registration.

The Instrument also adds Chapter 74 to the AML/CTF Rules, which exempts licensed trustees from specified provisions of the AML/CTF Act when they provide certain designated services in prescribed circumstances.

**Human rights implications**

It is considered that this Instrument does not engage any of the applicable rights or freedoms.

**Conclusion**

This Instrument is, therefore, compatible with human rights as it does not raise any human rights issues.

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1. Article 2, *Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the United Nations Convention against Transnational Organised Crime*, United Nations Treaty Collection*, Treaty Series*, www.treaties.un.org (accessed 22 June 2017). [↑](#footnote-ref-1)