

EXPLANATORY STATEMENT

Select Legislative Instrument 2018 No.

Issued by the authority of the Minister for Law Enforcement and Cybersecurity

Anti-Money Laundering and Counter-Terrorism Financing Act 2006

*Anti-Money Laundering and Counter-Terrorism Financing (Prescribed Foreign Countries)
Regulations 2018*

Section 252 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Act.

Section 5 of the Act provides that a *prescribed foreign country* means a foreign country declared by the regulations to be a prescribed foreign country for the purposes of the Act. The definition of *prescribed foreign country* is relevant for the purposes of:

- Chapter 15 of the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)*, which provides that reporting entities in Australia must apply enhanced customer due diligence when entering into a transaction and a party to the transaction is present in, or is a corporation incorporated in, a prescribed foreign country, and
- Section 102 in Part 9 of the Act, which provides that the regulations may prohibit or regulate the entering into of transactions with residents of prescribed foreign countries.

The Regulations continue to declare Iran and the Democratic People's Republic of Korea (DPRK) to be prescribed foreign countries for the purpose of the Act.

The regulations also repeal the *Anti-Money Laundering and Counter-Terrorism Financing (Prescribed Foreign Countries) Regulation 2016*, which is due to sunset on 1 April 2018.

By declaring each of Iran and the DPRK to be a prescribed foreign country, the Regulations implement recommendations of the Financial Action Task Force (FATF). The FATF requires member jurisdictions to apply effective counter-measures in order to protect their financial sectors from the ongoing and substantial money laundering, terrorism financing and proliferation financing risks emanating from the DPRK. The FATF has also called on its members and other jurisdictions to apply enhanced due diligence measures proportionate to the risks arising from Iran. The Regulations ensure that reporting entities in Australia continue to be required to apply enhanced customer due diligence to all transactions that involve persons or corporations in Iran or the DPRK. The Regulations are part of a broader suite of measures applying to dealings with DPRK and Iran, including measures under United Nations and Australian autonomous sanctions regimes.

The Department of Home Affairs consulted the Office of Best Practice Regulation in the preparation of these Regulations, who advised that a Regulatory Impact Statement was not required (reference ID 23516). Home Affairs also consulted the Australian Transaction Reports and Analysis Centre (AUSTRAC) and the Department of Foreign Affairs and Trade (DFAT), who support continuing to declare Iran and DPRK as prescribed foreign countries.

As the Regulations are made under the authority of section 252 of the Act, the 10 yearly sunset rule applies as provided for under the *Legislation Act 2003*.

Details of the Regulations are set out in Attachment A.

The Statement of Compatibility with Human Rights set out in Attachment B is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

The Act specifies no conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulations commence on the day after it is registered on the Federal Register of Legislative Instruments.

ATTACHMENT A

Details of the *Anti-Money Laundering and Counter-Terrorism Financing (Prescribed Foreign Countries) Regulations 2018*

Section 1 – Name

This section provides that the title of the Regulations is the *Anti-Money Laundering and Counter-Terrorism Financing (Prescribed Foreign Countries) Regulations 2018*.

Section 2 – Commencement

This section provides for the Regulations to commence on the day after they are registered on the Federal Register of Legislative Instruments.

Section 3 – Authority

This section provides that the Regulations are made under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the Act).

Section 4 – Schedules

This section provides that the instrument specified in the Schedule is repealed.

Section 5 – Prescribed foreign countries

This section declares each of Iran and the Democratic People's Republic of Korea to be a *prescribed foreign country* for the purposes of the Act.

Schedule 1 - Repeals

This section provides that the whole of the *Anti-Money Laundering and Counter-Terrorism Financing (Prescribed Foreign Countries) Regulation 2016* is repealed.

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 (Prescribed Foreign Countries) Regulations 2018

This legislative 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

Section 5 of *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the AML/CTF Act) provides that a *prescribed foreign country* means a foreign country declared by the regulations to be a prescribed foreign country for the purposes of the AML/CTF Act. The definition of *prescribed foreign country* is relevant for the purposes of:

- Chapter 15 of the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)*, which provides that reporting entities in Australia must apply enhanced customer due diligence when entering into a transaction and a party to the transaction is present in, or is a corporation incorporated in, a prescribed foreign country, and
- Section 102 in Part 9 of the Act, which provides that the regulations may prohibit or regulate the entering into of transactions with residents of prescribed foreign countries.

The Regulations continue to declare Iran and the Democratic People's Republic of Korea (DPRK) to be prescribed foreign countries. This requires reporting entities (such as financial institutions) in Australia to apply enhanced customer due diligence to all transactions that involve persons or corporations in Iran or the DPRK. The Regulations also repeal the *Anti-Money Laundering and Counter-Terrorism Financing (Prescribed Foreign Countries) Regulation 2016*, which is listed to sunset on 1 April 2018.

Human rights implications

This legislative instrument engages the protection against unlawful and arbitrary interference with privacy under Article 17 of the International Covenant on Civil and Political Rights (ICCPR).

The measures in the legislative instrument impact on privacy by requiring reporting entities in Australia to use enhanced customer due diligence when a party to a relevant transaction is present in Iran or the DPRK. The particular enhanced procedures are set out in paragraph 15.10 of the Rules. The enhanced procedures may involve obtaining more detailed information or documentation relating to the proposed transaction or the customer's identity or financial circumstances.

Division 2 of Part 10 of the AML/CTF Act provides that if a reporting entity creates a transaction record in relation to the provision of a designated service, or a customer provides a document to the reporting entity in relation to the provision of a designated service, the reporting entity must retain a copy of the record for seven years.

Reporting entities have a range of reporting obligations under Part 3 of the AML/CTF Act, which include making reports to Australian Transaction Reports and Analysis Centre (AUSTRAC) about international funds transfers, suspicious transactions, and transactions over a specified threshold. Under section 49 of the AML/CTF Act, AUSTRAC and certain other Commonwealth agencies may request further information from reporting entities in relation to such reports. In addition, under Part 14 of the AML/CTF Act, authorised officers of government agencies may require reporting entities to provide information or documents relevant to the operation of the Act. This may include information obtained by reporting entities from or about customers under enhanced customer due diligence requirements.

The right in Article 17 may be subject to permissible limitations, where the limitations are lawful and not arbitrary. In order for an interference with the right to privacy to be permissible, the interference must be authorised by law, be for a reason consistent with the ICCPR and be reasonable in the particular circumstances. The United Nations Human Rights Committee has interpreted the requirement of reasonableness to mean that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

In this case, the limitations on Article 17 are reasonable, necessary, proportionate and not arbitrary, as they implement recommendations from the Financial Action Task Force for all member jurisdictions to apply effective countermeasures (in the case of DPRK) and enhanced due diligence (in the case of Iran) to protect their financial sectors from the ongoing and substantial money laundering, terrorism financing and proliferation financing risks emanating from those countries.

Reporting entities are bound by the Australian Privacy Principles (APPs) in the *Privacy Act 1988* in relation to actions they take to comply with their obligations under the AML/CTF Act. The APPs prohibit reporting entities from disclosing information they collect from or about customers except for lawful purposes.

Government agencies that obtain information from reporting entities under the AML/CTF Act are bound by the secrecy and access provisions of that Act. Agencies may only disclose such information for lawful purposes set out in the AML/CTF Act.

Conclusion

This legislative instrument is compatible with human rights as to the extent that while it may limit human rights, those limitations are reasonable, necessary and proportionate.

The Hon Angus Taylor MP
Minister for Law Enforcement and Cybersecurity