

EXPLANATORY STATEMENT

Issued by authority of the AUSTRAC CEO

Anti-Money Laundering and Counter-Terrorism Financing Act 2006

*Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment
Instrument 2021 (No. 3)*

AUTHORITY

Section 229 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) provides that the AUSTRAC CEO may, by legislative instrument, make Anti-Money Laundering and Counter-Terrorism Financing Rules (AML/CTF Rules). The AML/CTF Rules are set out in the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)*.

PURPOSE AND OPERATION OF THE INSTRUMENT

The *Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2021 (No. 3)* (the **Amendment Instrument**) is a legislative instrument for the purposes of the *Legislation Act 2003*.

Details of the Amendment Instrument are set out in [Attachment A](#).

A Statement of Compatibility with Human Rights (the **Statement**) is at [Attachment B](#). The Statement was completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The overall assessment is that the Amendment Instrument promotes the realisation of human rights, and as such, is compatible with them.

Background

Addition of Chapter 79

1. 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.
2. Chapter 79 of the AML/CTF Rules sets out the special circumstances in which a reporting entity may 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 (collectively, the customer), after commencing to provide a designated service described in item 1 of table 1 in subsection 6(2) of the AML/CTF Act (opening an account).
3. The reporting entity, for a period of 15 business days after commencing to open the account, may accept deposits to the account and provide a designated service described in an item of table 1 in subsection 6(2) of the Act, other than item 1 or

item 3, which is incidental to the account opening or deposit. No other designated services can be provided by the reporting entity to the customer until the ACIP has been completed. Furthermore, after the end of the 15-business day period no deposits can be accepted and no other designated services provided until ACIP is completed.

4. The reporting entity may carry out ACIP on the customer after commencing to provide this designated service if it:
 - has determined on reasonable grounds that doing so is essential to avoid interrupting the ordinary course of business
 - has determined on reasonable grounds that any additional ML/TF risk arising from carrying out the ACIP after commencing to open the account is low
 - has implemented appropriate risk-based systems and controls to effectively manage the overall ML/TF risks
 - has appropriate risk-based systems and controls in place to ensure the reporting entity carries out ACIP on the customer as soon as practicable, and
 - does not commence to provide to the customer any other designated service other than a deposit or deposits to the account (item 3 of table 1 in subsection 6(2) of the AML/CTF Act), or another designated service incidental to opening the account or allowing the deposit. The reporting entity should have appropriate systems and controls to ensure this does not occur.

Addition of Chapter 80

5. This Instrument amends the AML/CTF Rules by adding a new chapter, Chapter 80, for the purposes of paragraph (f) of the definition of a stored value card (SVC) in section 5 of the AML/CTF Act.
6. In 2017, the definition of a SVC was amended 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.
7. Chapter 80 excludes certain types of products, unintentionally caught by the definition of a SVC in the AML/CTF Act.
8. 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.
9. 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.
10. 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, Chapter 80 exempts these products from the SVC definition.

11. 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.*

12. 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.

Amendment to Chapter 48

13. 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.
14. For reasons of efficiency and convenience, an employer may outsource payroll functions to specialist payroll services businesses. These businesses are non-financiers and technically providing a designated service under a designated remittance arrangement.
15. 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.
16. 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.
17. Chapter 48 of the AML/CTF Rules includes exemptions of specified designated services relating to salary packaging administration services from the AML/CTF Act. This Instrument amends Chapter 48 by expanding the current exemption relating to salary packaging services to include the specified designated services when they relate to payroll and superannuation clearance services. The

amendment does not change the existing definition of salary packaging in Chapter 48.

18. For the purposes of Chapter 48 of the AML/CTF Rules,

- ‘payroll’ 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’ is defined to include the payment of superannuation contributions to an employee’s nominated superannuation fund on behalf of an employer client.

CONSULTATION

19. Draft AML/CTF Rules were released on 30 July 2021 for a four-week period of public consultation. Ongoing consultation with industry was undertaken following the public consultation period.

REGULATION IMPACT STATEMENT

20. The Office of Best Practice and Regulation has advised that a Regulatory Impact Statement is not required as the amendments to the AML/CTF Rules are unlikely to have a more than minor regulatory impact.

Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2021 (No. 3)

Section 1—Name

This section provides that the name of the Instrument is the *Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2021 (No. 3)*.

Section 2—Commencement

This section provides for the commencement of each provision in the Instrument, as set out in the table in subsection 2(1).

The amendments in Schedule 1 commence on the day after registration.

Section 3—Authority

This section provides that the Instrument is made under section 229 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.

Section 4—Schedules

This section provides that the instrument specified in Schedule 1 is amended as set out in the applicable items in that Schedule.

Schedule 1—Amendments

Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)

Notes on items

Item 1—Chapter 79

This item inserts a new Chapter, Chapter 79 in the AML/CTF Rules.

Paragraph 79.1 provides that Chapter 79 is made 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*.

Paragraph 79.2 sets out the conditions that a reporting entity must meet to allow it to commence to provide a specified designated service to a customer, including the beneficial owner of the customer or any person purporting to act on behalf of the customer (collectively, **the customer**), before carrying out the applicable customer identification procedure (**ACIP**).

Paragraph 79.3 sets out that for the purposes of subparagraph 34(1)(d)(i) of the Act, the relevant period is 15 days after the reporting entity commences to provide the designated service to the customer. After the relevant period ends, the reporting entity may no longer provide a designated service to the customer until it has completed the ACIP on the customer.

Item 2—Chapter 80

This item inserts a new chapter, Chapter 80 of the AML/CTF Rules.

Paragraph 80.1 provides that Chapter 80 is made for the purposes of paragraph (f) of the definition of ‘stored value card’ in section 5 of the AML/CTF Act.

Paragraph 80.2 specifies for the purposes of the definition of stored value card, things that are not a stored value card.

Item 3—Chapter 48

This item substitutes a new subparagraph 48.3(1) of the AML/CTF Rules.

Subparagraph 48.3(1) extends the application of the existing exemption in paragraph 48.2 to administrative services relevant to payroll or superannuation clearing.

Item 4—Chapter 48

This item substitutes a new paragraph 48.4 of the AML/CTF Rules.

Paragraph 48.4 adds definitions of ‘payroll’ and ‘superannuation clearance’ to the existing definition of ‘salary packaging’.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Australian Human Rights Commission Regulations 2019

This Disallowable Legislative Instrument (the **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 Instrument

The Instrument amends the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1) (AML/CTF Rules)* by setting out the special circumstances in which a reporting entity may carry out the applicable customer identification procedures in respect of a customer, after commencing to provide a designated service described in item 1 of table 1 in subsection 6(2) of the AML/CTF Act (opening an account) to the customer.

The Instrument also amends the AML/CTF Rules to exclude things from the definition of ‘stored value card’ in section 5 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.

The Instrument amends Chapter 48 of the AML/CTF Rules by expanding the current exemption relating to salary packaging services to include the specified designated services when they relate to payroll and superannuation clearance services.

Human rights implications

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 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 amendments to Chapter 48 engage the right to privacy in Article 17 of the International Covenant on Civil and Political Rights (**ICCPR**) by excluding 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, 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 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.

[signed]
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