



# Submission to the Senate Standing Committee on Legal and Constitutional Affairs– The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter Terrorism Financing Regime

**Dr Lynda Crowley-Cyr, School of Law and Justice USQ  
and Ms Carole Caple, Solicitor.**



## USQ School of Law and Justice

The University of Southern Queensland (USQ) was established in 1992 and is a regional university with a global perspective, expert in distance and online education. It provides higher education to one of Australia's most diverse student cohorts and has a strong reputation for maximising student potential, academic and personal.

The USQ School of Law and Justice was established in 2007. It is the second-biggest law school in Queensland, with students enrolled in Bachelors of Laws, Bachelor of Laws with Honours, Juris Doctor, Masters of Laws and Doctor of Philosophy programs.

Academics in the School of Law and Justice are located on both Toowoomba and Springfield campuses. A very high proportion have doctoral qualifications and the School has a strong commitment to quality legal research and publication and to retaining a close research-teaching nexus.

### Submission by Dr Lynda Crowley-Cyr and Ms Carole Caple

Dr Lynda Crowley-Cyr, PhD (USyd), LLM (JCU), LLB (QUT), is a lawyer and Associate Professor at the School of Law and Justice at the University of Southern Queensland.

Ms Carole Caple, LLB (Hon) and LLM, is an Australian legal practitioner and accredited anti-money laundering specialist.

## Contact details

Email:

Email:

*This submission represents solely the individual views of the authors, and should not be taken to represent the views of any persons, employers, or organisations that she is affiliated with.*

## Part 1 Background Introduction

The authors welcome the Legal and Constitutional Affairs Committee's inquiry into the Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing Regime. This submission relates to term of reference a):

**The extent to which the Australian Transaction Reports and Analysis Centre:**

- i. responds to and relies upon reporting by designated services, and
- ii. identifies emerging problems based on this reporting.

- i. The extent to which AUSTRAC responds to and relies upon providers of designated services

### i. The Extent to Which AUSTRAC Responds to and Relies upon Providers of Designated Services

The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (AML/CTF Act) defines the providers of *designated services*<sup>1</sup> as *reporting entities*<sup>2</sup>. *Reporting entities* are the primary source of transaction reports that the Australian Transaction Reports and Analysis Centre (AUSTRAC) collects and analyses.

In determining the extent to which AUSTRAC responds to reporting entities, it is useful to consider the relevant statutory requirements. One of the objects of the AML/CTF Act<sup>3</sup> is that the AML regime gives effect to the 40 Recommendations of the Financial Action Task Force (FATF).<sup>4</sup> Recommendation 34 states that regulatory authorities,

---

<sup>1</sup> See section 6 of the AML/CTF Act.

<sup>2</sup> See section 5 of the AML/CTF Act.

<sup>3</sup> See section 3(3) of the AML/CTF Act.

<sup>4</sup> Financial Action Task Force *International Standards on Combatting Money Laundering and the Financing of Terrorism and Proliferation; the FATF Recommendations 2012*

such as AUSTRAC, should provide feedback to assist financial institutions and designated non-financial businesses and professions (DNFBPs) in applying national measures to combat money laundering and terrorist financing, and, in particular, in detecting and reporting suspicious transactions.<sup>5</sup> Hence, the recommendations establish the standards.

In 2015 the FATF provided the latest Mutual Evaluation Report (MER) on Australia. These reports assess compliance with the standards. The FATF comprehensively assessed Australia's AML regime including AUSTRAC's compliance with Recommendation 34 and the quality of its regulatory supervision. The FATF found that AUSTRAC's feedback to reporting entities is mainly general. The feedback is published annually in AUSTRAC's Typologies and Case Studies' reports. FATF described these reports as containing "sanitised examples of actual cases... as well as general areas of deficiency (e.g., late reporting, insufficient detail in certain fields)..."

Further, and more importantly, the FATF noted the limited guidance AUSTRAC makes available for identifying high risk customers or situations. Moreover, it stated that "none of the guidance applies to DNFBPs".<sup>6</sup> In response, the FATF recommended that AUSTRAC "Enhance the utility and timeliness of feedback provided to reporting entities" to enable the entities to better understand the real ML/TF risks of their activities.<sup>7</sup>

Improving the timeliness of feedback is likely to be problematic for AUSTRAC. AUSTRAC explains that feedback is annual because of production timeframe. It refers to its review and clearance processes from within the organisation and of those of the

---

updated June 2021 [https://www.fatf-](https://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html)

[gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html](https://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html)  
<sup>5</sup> Financial Action Task Force *International Standards on Combatting Money Laundering and the Financing of Terrorism and Proliferation; the FATF Recommendations* 2012

updated June 2021 see page 26 [https://www.fatf-](https://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html)

[gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html](https://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html).

<sup>6</sup> Financial Action Task Force and Asia Pacific Group 2015 *Mutual Evaluation Report; Anti-Money Laundering Measures in Australia* p 174 at paragraphs a6.25 and a6.26

<sup>7</sup> Financial Action Task Force and Asia Pacific Group 2015 *Mutual Evaluation Report; Anti-Money Laundering Measures in Australia* p 103 at paragraph 6.33.

partner agencies mentioned in the sanitised cases. The sanitisation of case studies by AUSTRAC further reduces the effectiveness of the feedback because it strips it of meaningful context and useful details.<sup>8</sup>

In terms of the FATF's criticism of AUSTRAC's failure to provide guidance to DNFBPs, AUSTRAC began releasing a series of publications called Strategic Analysis Briefs. In developing the Briefs, AUSTRAC is assisted by the Department of Home Affairs (DHS), previously the Transnational Crime Branch of the Attorney-General's Department. The DHA provides research and policy support. The Briefs refer to cases of DNFBP involvement in serious and organised crime. One such Brief is entitled, *Money Laundering through Legal Practitioners*. This Brief provides limited guidance because of the cases referred to.

The cases are problematic for several reasons. All the cases had crucial details omitted. For instance, some were not Australian, while others were dated, that is, they preceded the creation of the AML/CTF Act. Another case was a hypothetical construct, but it was also presented as an actual case. In all these cases, the omitted details obscured their identification as incongruous, unsuitable, and not fit for purpose.

The central problem with AUSTRAC's failure to provide a single case in the domestic context is that this is inconsistent with its claim that DNFBPs pose a high risk of involvement in money laundering. The Law Council of Australia communicated its concerns about this inconsistency to AUSTRAC's senior management soon after the publication of the Brief in 2016. Some five years later, in 2021, the Brief disappeared from AUSTRAC's website. However, AUSTRAC has not made a statement acknowledging the withdrawal of the Brief or given reasons for its disappearance.

This is relevant for several reasons. While the now discredited Brief is absent from the AUSTRAC website, it continues to be relied upon by unwitting 3<sup>rd</sup> parties in Australia and beyond. This is problematic because the failure to disclose its removal, means the

---

<sup>8</sup> Australian National Audit Office, Report No 47 2012-13 *AUSTRAC's Administration of Its Financial Intelligence Function* page 76-77.

Brief continues to provide credibility and underpin other research publications, such as those generated by the Australian Institute of Criminology.<sup>9</sup> Where such publications build on other 'research findings', such as with the weak evidence produced by perception surveys<sup>10</sup>, the result creates a house of cards effect. This distorts the factual reality available to advance effective policy. Like 'fake news', the risk is that the misinformation affects further discussion in this area by distorting subsequent perspectives on the issues.

## ii. The Extent to Which AUSTRAC Identifies Emerging Problems

AUSTRAC has dual functions. These are to regulate reporting entities and ensure their compliance with the AML/CTF Act and to operate as Australia's financial intelligence unit. In 2013, the Australian National Audit Office (ANAO) conducted an audit of AUSTRAC's financial intelligence function.<sup>11</sup> One aspect of this function involves receiving financial transaction reports from reporting entities and analysing them to identify patterns and trends. The audit assessed the effectiveness with which AUSTRAC processes such reports.<sup>12</sup>

At the time, AUSTRAC's TRAQ database contained all the financial transaction reports provided to the organisation. The monitoring system of the TRAQ database used an automated TargIT system. The TargIT applied 'rules' that generated 'hits' to make initial determinations about triaging and the suggested priority by which hits relating to transaction reports should be processed by human analysts.

---

<sup>9</sup> See for instance the Australian Government's Australian Institute of Criminology Research Report 10; Organised Crime Research in Australia 2018-in particular Chapter 14 [https://www.aic.gov.au/sites/default/files/2020-05/rr10\\_for\\_online\\_0.pdf](https://www.aic.gov.au/sites/default/files/2020-05/rr10_for_online_0.pdf)

<sup>10</sup> See for e.g., [Perceptions of money laundering and financing of terrorism in a sample of the Australian legal profession in 2008-09 \(aic.gov.au\)](https://www.aic.gov.au/sites/default/files/2020-05/perceptions_of_money_laundering_and_financing_of_terrorism_in_a_sample_of_the_australian_legal_profession_in_2008-09.pdf)

<sup>11</sup> Australian National Audit Office, *AUSTRAC's Administration Of Its Financial Intelligence Function; Audit Report No 47 2012-2013* available at <https://www.anao.gov.au/sites/g/files/net616/f/201213%20Audit%20Report%20No%2047.pdf>

<sup>12</sup> ANAO [13].

The ANAO found that a significant number of hits remained unassessed for too long. AUSTRAC was unable to process the volume of hits being generated. This was the case despite the 'rules' having been redefined in February 2012, which significantly reduced the hits. Nevertheless, ANAO found that 95% of hits remained unassessed for more than two months. Paradoxically, AUSTRAC requires reporting entities to submit certain financial reports within 24 hours.

The more urgent Suspicious Matter Reports (SMR) also went into the TRAQ database. These were categorised based on specific risk classifications defined in business rules. Incoming SMRs were triaged as received. However, the ANAO found that the volume of SMRs was such that they could not all be evaluated daily as intended. The backlogs of SMRs/SUSTRs created, persisted the entire audit period (from July 2011 to February 2013). The ANAO found the backlog included 6385 unassessed SMRs/SUSTRs that had been classified as of a very high or high significance. Statistically, it is likely that at least some of these reports would have concerned terrorism financing offences, child exploitation, or other matters of such gravity. A further 7247 unassessed records were rated as being of moderate significance.<sup>13</sup> Together these constituted around 19% of the unassessed SMRs. The report does not mention the overall number of unassessed SMRs that were awaiting evaluation.

The AUSTRAC aimed to process 90% of the SMRs it received within five days. Despite this, the ANAO found that over the eighteen-month audit period, on average, only 57.7% of SMRs were processed within five days. At times, the actual processing rate fell as low as 44%. The 90% within five days target was never met. Apart from not meeting its target times, AUSTRAC did not escalate these backlogs to management in a systematic way.

The ANAO report made three recommendations. One recommendation (Recommendation 2) was that AUSTRAC establishes and monitors its performance against processing times, and that it monitors and reports backlogs to management to bring attention to delays in assessing higher priority financial reports.<sup>14</sup> AUSTRAC

---

<sup>13</sup> ANAO [3.18].

<sup>14</sup> ANAO [3.60].

agreed.<sup>15</sup> It assured the ANAO that its new EAC system would provide more sophisticated tools for managing and analysing large data volumes. The system would also give AUSTRAC the capability to establish new performance targets for monitoring and reporting on the processing of data and other tasks.

In July 2021, the authors made a Freedom of Information application to AUSTRAC seeking information on whether the system addresses the issues raised by Recommendation 2 for the period between July 2015 to February 2017<sup>16</sup>. Specifically, we sought any updated information on AUSTRAC's performance against processing times for financial transaction reports; processing backlogs for key financial intelligence types; and the frequency and nature of reporting to management on processing times; and, where relevant, the reasons why processing targets are not being met.

The AUSTRAC responded in August 2021. It stated that following its searches to identify the requested documents, none were identified as falling within the scope of our FOI request. It indicated that it then conducted a broader search for any documents that might fall within the scope of the ANAO analysis. None were found or provided.

One conclusion that could be drawn from this, is that there does not appear to be a means of following up on progress made against the ANAO's recommendations. Consequently, AUSTRAC's commitment to make the recommended changes cannot be tested or verified.

## Conclusion

The Committee's Term of Reference (a) asks about reliance and reporting between AUSTRAC and reporting entities, and the identification of emerging problems based on financial reports. The AUSTRAC, as a national regulator, has been found by the FATF to be wanting in providing guidance to reporting entities about high-risk customers or situations. The FATF also found that AUSTRAC provided no guidance that applies to DNFBPs. Presumably AUSTRAC developed the Strategic Analysis Brief

---

<sup>15</sup> ANAO [3.61].

<sup>16</sup> This period was selected to give AUSTRAC opportunity to begin addressing the ANAO Recommendation 2 and to imbed its new IT system.

series to provide guidance to DNFBPs. The authors analysed the Brief relating to legal practitioners and observed that using unsuitable or fictitious cases, without AUSTRAC disclosing this, was disingenuous, and misleading. Given the sudden disappearance of the Brief for legal practitioners from AUSTRAC's website, it may well remain the case that there is no guidance, at least for legal practitioners. Moreover, individuals and organisations that rely on the authoritativeness of the AUSTRAC Brief also risk being discredited.

As for the emerging problems to be analysed based on the reporting received by AUSTRAC, we make the following observations. There does not appear to be any evidence that AUSTRAC has followed up on the 2013 recommendations made by the ANAO in its investigation of its operations. It is our understanding that since 2012, the earlier funding arrangements and resourcing restraints that AUSTRAC may have been experiencing at that time, have since been resolved. This raises the question as to whether the issues identified by the ANAO have been addressed. For instance, are there mechanisms to ensure that performance against processing times of incoming transaction reports and processing backlogs are being managed? Unless and until this has been rectified, there is no reason to believe that AUSTRAC is in fact identifying emerging problems based on the reports it receives, to the fullest extent possible. It is our submission that it is incumbent on AUSTRAC to ensure transparency about the effectiveness of its governance arrangements. We further submit, that any financial crime policy extension should proceed only on rigorous, reliable, and empirical evidence.

## Recommendations

The authors recommend:

1. Prior to considering extending the AML regime to Tranche 2 entities, the Committee should recommend that existing issues with how AUSTRAC relies and responds to reporting entities be comprehensively and independently researched and assessed. The Government must get its house in order before it attempts to construct an extension.

2. That the Committee recommends that a mechanism is created by which ANAO audit recommendations can be followed up on, reported against, and that such reports are made publicly available. By way of example, in Canada the Standing Senate Committee on Banking Trade and Commerce recommended that improvement of the AML regime could only be achieved by critical analysis by an independent body of the performance of the regime. This includes its collection of data on for instance the extent to which case disclosures by FINTRAC were used in investigations, prosecutions, and convictions.<sup>17</sup>

---

<sup>17</sup> The March 2013 Canada report from the Banking, Trade and Commerce Committee on money laundering can be found at this link:

<https://sencanada.ca/Content/SEN/Committee/411/banc/rep/rep10mar13-e.pdf>.