ARA SUBMISSION

ANTI-MONEY LAUNDERING AND COUNTER-TERRORISM FINANCING AMENDMENT BILL 2024

October 2024

The Australian Retailers' Association (ARA) welcomes the opportunity to provide comments to the Legal and Constitutional Affairs Legislation Committee (the Committee) regarding the Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024 (the Bill).

The ARA is the oldest, largest and most diverse national retail body, representing a $420 billion sector that employs 1.4 million Australians – making retail the largest private sector employer in the country.

We represent the full spectrum of Australian retail, from our largest national and international retailers to our small and medium sized members, who make up 95% of our membership. Our members operate in all states and across all categories - from food to fashion, hairdressing to hardware, and everything in between.

ARA welcomes efforts to simplify and modernise Australia's AML/CTF regime, building on feedback from first and second round consultations. We believe the proposed Bill creates efficiencies and clarity on certain issues. However, we are concerned that there is still uncertainty regarding intended scope of applicability of certain aspects of the Bill.

Remittance Services

As noted in the Attorney General Department's second consultation paper, the current definition of 'designated remittance arrangement' under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2007* (Cth) (the Act) is broad, creating uncertainty about the intended scope, which has resulted in entities investing significant time and effort in evaluating its application, and creating a lack of confidence on whether registration is required. Our understanding is that the definition of remittance was originally intended to apply narrowly. However, the current wording in the Act may lend itself to an expansive view of what is in scope, and inadvertently capture entities that transfer funds as an adjunct to their main retail business or other business activities.

We also note that AUSTRAC has issued a number of exemptions for entities providing items 31 and 32 designated services, which suggests the current wording in the legislation does not appropriately capture the intended scope.

Transfer of Value Services

The Bill proposes to amend the Act to:

- replace the existing payment designated services in items 29 to 32 of table 1, section 6 of the Act with three new payment designated services that are provided by an ordering institution, a beneficiary institution, and an intermediary institution; and
- provide an exemption for certain *ordering institutions* and *beneficiary institutions* that provide the payment designated services incidentally to the provision of another service (the incidental exemption).

Given the uncertainty that exists under the existing Act noted above, we support these amendments to the Act but consider more must be done to:

1. clarify the applicability of the incidental exemption, including whether certain factors must be taken into account for this analysis;
2. confirm via the AML/CFT Rules that persons who receive and pass on a transfer message incidentally to another service are not *intermediary institutions,* noting the Bill does not expressly extend the incidental exemption to intermediary institutions.

We consider further guidance is required from AUSTRAC on the above issues though amendments to the Rules and supplementary guidance papers. We believe this is critical for ensuring the regime remains proportionate and appropriately focused on operators that perform these activities as a core function.

Incidental Exemption

The Explanatory Memorandum provides limited guidance on when the incidental exemption is intended to apply. It states:

> *"When considering if a transfer is incidental to the provision of another service, the question to consider is whether the other service is a type of value transfer service, in which case it is irrelevant to consider whether the value transfer is incidental. However, if the other service is of a different nature (for example, managing a fleet of cars), then the transfer of value will be excluded…*
> *The definition of a 'beneficiary institution' excludes most value transfers that are done incidentally to the provision of another service (not just a designated service). When considering if a transfer is incidental to the provision of another service, consider whether the other service is a type of value transfer service or if the service is of a different type, in which case the transfer of value will be excluded."*

This suggests that the intention is for the incidental exemption to have broad application – available to any person that transfers money incidentally to another service that is not the transfer of value. This would also be consistent with the approach taken by AUSTRAC in granting exemptions in relation to the existing payment designated services. In many of these exemptions the transfer of money was not the primary purpose of the arrangement but was incidental to another service (for example, fleet management, lay-by administration services, a share registry and a marketplace)[1].

We consider examples of operators that make money available, or accept an instruction for the transfer of money, *incidentally to the provision of another service*, might include ride-sharing services for online deliveries, gig-economy workers providing food delivery services and online marketplaces. While value transfer to such drivers and merchants is a component of these business models, these transfers are ancillary to the provision of other core services (i.e., transport services, food delivery services, listing and sale of goods). In those cases, payments are not a stand-alone service; the primary purpose of those arrangements is to allow the seller/provider/merchant to make their goods or services available, and the transfer of money occurs incidentally to this. We note these operators will generally already be engaging other payment service providers that are or will be registered with AUSTRAC to receive and disburse funds to third parties.

Further, we consider the application of the incidental exemption (and the AML/CTF Act overall) to non-bank issuers of gift cards may become less clear under the Bill. In recognition of the lower ML/TF risk posed by low-value stored value cards, under the current AML/CTF Act, issuers of gift cards that fall under the thresholds set out in items 21 to 24 (Under-the-Threshold GCs) are not captured by those items. Further, provided an issuer of

[1] Exemption 13 of 2023.

an Under-the-Threshold GC is not an ADI, bank, building society, credit union or prescribed in the AML/CTF Rules, it does not provide an item 29 or 30 designated service and may not otherwise be captured.

However, because the Bill proposes to expand the definition of "*ordering institution*", it is possible non-bank issuers of Under-the-Threshold GCs may be required to enrol and comply with the AML/CTF Act if they accept an instruction for a transfer of value card that is used for payment. This appears inconsistent with the specific exclusion of these types of cards under items 21-24. It may also mean that retailers which issue Under-the-Threshold GCs that can be used to pay a merchant other than the issuer (and accordingly involve a transfer of value) may be caught. This could include, for example, the issuer of a low value gift card that can be utilised to purchase a t-shirt from a third party.

Similar to the arguments above, we consider there are good arguments that the value transferred when these types of cards are used is incidental to the issuance and management of these cards (noting those activities might themselves be incidental to the operation of a marketplace, digital platform, or group of retail stores). To appropriately manage ML/TF risk, consideration should be given to ensuring the incidental exemption applies to non-bank issuers of Under-the-Threshold GCs.

To assist industry to assess applicability of the incidental service exemption, the ARA recommends that AUSTRAC work with industry to issue more detailed guidance on what is a 'core' vs. 'incidental' service, with additional examples beyond those provided in AGD's Paper 4 and the Explanatory Memorandum.

Extending the Incidental Exemption to Intermediary Institutions

The Bill proposes to amend the Act to introduce the following concepts:

1. a transfer message, which is defined as, for a transfer of value, a message that contains information relating to the content of the payer's instruction for the transfer of value, but does not include a message of a kind specified in the AML/CTF Rules; and
2. an intermediary institution, which is defined as a person which:
   a) in the course of carrying on a business, receives and passes on a transfer message for a transfer of value in a value transfer chain; or
   b) is specified in the AML/CTF Rules.

The Explanatory Memorandum states that:

> *The intention is to capture those intermediary institutions that take a more active role in 'passing on' a* value *transfer message to another institution in the value transfer chain.*

We note the above description of intermediary institution is very broad and could arguably be interpreted to capture *any* entity passing on information about a payment instruction. However, we think there are good arguments for why one of the above-mentioned operators (e.g., a marketplace or ride-share service provider) is *not* an intermediary institution.

Also, we note the Bill does not expressly extend the incidental exemption to intermediary institutions. However, we do not consider it was the drafter's intention to capture entities that pass on a transfer messaging *incidentally* to another service within the ambit of intermediary institutions. We consider it would be an odd outcome to exempt operators from being the ordering institution and beneficiary institution on the basis of the incidental exemption but then also impose many of the obligations under the Act (including the requirement to have an AML/CTF Program) on such operators as an intermediary institution.

We also consider this is inconsistent with exemptions that AUSTRAC has previously granted (refer to examples in section 3 of this submission), which indicate that it does not intend for the Act to apply to entities that may handle messages relating to funds transfers but do so incidentally to another core service.

We therefore suggest the Committee recommend AUSTRAC specify in the Rules that persons who receive and pass on a transfer message *incidentally* to another service are not intermediary institutions.

Without this clarification, we consider industry will continue to face significant uncertainty on whether or not certain types of operators (e.g., a marketplace, or ride-sharing service provider) may provide an item 31 designated service if it passes on a message that contains information relating to a customer's instruction to transfer money.

Risk-based Approach and Potential Impact on Retailers

We recommend the Committee also apply a risk-based approach in making its recommendations regarding the Bill and the intended scope of transfer of value services. An increasing number of Australian retailers are reaching customers through multiple channels, including their own physical stores, online stores and marketplaces.

Many retailers have expanded the selection available to customers on their online stores by integrating marketplace offerings that enable other businesses to offer products alongside the retailer's own products on the retailer's website. Marketplaces also enable small businesses to reach more customers at lower costs and with lower overheads than would be associated with setting up their own physical or online store.

Retailers selling on marketplaces and retailers who offer products on their store through a marketplace model remain, at their core, retailers and should be outside of the scope of this regime. Capturing retailers and marketplaces under this regime would impose onerous requirements on a broad range of businesses – driving up compliance costs which would likely be passed on in some form to other small businesses and customers, and potentially impeding innovation and growth in the Australian retail sector adversely impacting Australian consumers and the wider economy.

We note retailers typically employ a variety of controls which mitigate the risk of abuse throughout the entire AML/CFT lifecycle, through robust merchant registration requirements, sanctions screening to actual goods delivery and funds disbursement. These controls provide retailers with confidence that their stores are being used for the purchase of goods, and that instances of abuse are either prevented, or detected and stopped, at the earliest.

We also note retailers that are in the funds flow will generally be working with duly registered payment service provider(s) to receive and disburse funds to merchants. Capturing such retailers within the AML/CFT regime would therefore impose a duplicative compliance burden, which we consider is unjustified given the role of the other providers in the value chain and the protections those parties already have or will have in place as a result of these reforms.

Finally, we understand that most of the proposed changes will take effect from 31 March 2026. They are likely to require significant updates to existing AML/CTF Programs and related procedures, as well as adding significant compliance requirements to entities that will be brought into scope of the regime through the proposed reforms. Given the detailed underlying requirements are not yet available to industry, we are concerned that the March 2026 compliance timeframe may not be realistic for organisations given the complexity of the requirements contemplated by the reforms.

We therefore recommend that this timeframe be extended, for a minimum of 18 months from when the updated AML Rules are published, to allow organisations sufficient time to make necessary adjustments to come into compliance.

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Thank you again for the opportunity to provide a submission on these matters. We look forward to a continued open consultation now and into the future. Any queries in relation to this submission can be directed to our policy team at policy@retail.org.au.