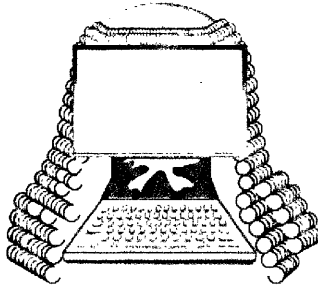


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The impact of the Anti-Money Laundering and Counter-Terrorism Financing Act upon online payment facilitators (internet payment services)

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What is the goal of the AML Act?

Prior to the implementation of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*¹ (AML Act), Australia's anti-money laundering regime consisted predominantly of the *Financial Transaction Reports Act 1988*.² The AML Act has the stated aim of improving Australia's existing anti-money laundering framework, meeting higher and more current international standards, as well as implementing recommendations from international bodies such as the FATF (Financial Action Task Force).³

Under the AML Act, the definition of a "reporting entity" is broadened. In addition, the obligations of reporting entities are increased. Reporting entities must monitor customer transactions during their provision of a designated service. This is in order to identify any risk that the service may involve or facilitate money laundering or terrorism financing.

The AML Act takes into consideration societal changes, international recommendations and research from law enforcement and policy agencies, as well as technological changes and improvements,

in order to attempt to provide a more comprehensive anti-money laundering regime for the Australian jurisdiction.

¹ *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth)

² *Financial Transaction Reports Act 1988* (Cth)

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What is an online payment facilitator/ internet payment service?

The phrases "internet payment system", "internet payment service" or "online payment facilitator" all refer to the following types of service:

- (i) payment services that rely on a bank account and use the Internet as a means of moving funds to or from a bank account,⁴ and
- (ii) payment services provided by non-bank institutions operating exclusively on the Internet and that are only indirectly associated with a bank account.

Examples of such services/facilitators include PayPal, DirectOne and Authorize.net.

A "remittance service" is a service that allows for the transfer of money or property from one location to another. The AML Act uses the term "designated remittance service" to cover services that arrange the transfer of money or property.⁵ Under the AML Act, a "person who provides a registrable designated remittance service at or through a permanent establishment in Australia must register their details with AUSTRAC."⁶

What is the difference between a "payment gateway" and a "payment service"?

A payment gateway is a service provided by a payment processor. It allows credit card information to be collected from a customer and passed over the internet. To be paid through a payment gateway (to have one setup) you require a merchant account with a bank or ADI (Authorised Deposit Taking institution) that your payments can be received into. A gateway is the middleman that transfers credit information over the internet, as well as a result (successful payment for example). Examples of a gateway include Camtech, eWay and SecureNet.

An internet payment service or system is a service whereby payments can be sent and received through a website or through the service providers own system. The user can transfer money to and from the service provider from a nominated bank account or credit card, but end to end transactions are not with the user's bank account, but rather a distinct account with the internet payment service provider. Examples of internet payment service providers include PayPal, ChronoPay and DirectOne.

Section 10(1) of the AML Act outlines under what conditions a remittance service will be found to be a *designated remittance service*. The conditions of what constitutes a designated remittance service are not wholly contained within the AML Act. Section 10(1)(c) states that the term designated remittance arrangement encompasses "other conditions as specified in the AML/CTF rules".

AUSTRAC have released the *Draft Anti-Money Laundering and Counter-Terrorism Financing Rules for designated remittance arrangements*.⁷ Although these are not in their final form, and subject to change, these draft rules give us guidance of the direction which AUSTRAC are heading in their specifying of certain conditions. Upon examination of the conditions outlined in these rules, it does not appear that payment gateways and indeed, some payment services are necessarily "caught", although legal analysis and advice would need to be provided on a case by case basis given the complexities of the AML Act, and the fact that these rules are still to be finalised.

While not currently law, another issue for consideration that may well be applicable to such payment services would be whether or not the provider would have to report international funds transfer instructions under section 45 of the AML Act (which becomes law on 12 December 2008). This section applies to international

funds transfer instructions.⁸ To determine whether or not a particular service would be caught by these provisions of the AML Act, it would be necessary to examine the definition of 'international funds transfer instruction' as defined under section 46 of the AML Act, and seek advice as to whether or not the specific service in question falls within this definition.

What are some of the key dates and milestones that have the potential to impact online payment facilitators?

From 12 March 2008, the non-penalty period for certain civil penalty provisions of the AML Act comes to an end. This provision includes the following⁹:

- Part 5 – electronic funds transfer instructions;
- Part 6 – Register of Providers of Designated Remittance Services;
- Part 10 – Division 2 – records of transactions etc;
- Part 10 – Division 4 – records about electronic funds transfer instructions;
- Part 15 – enforcement; and
- Part 18 – miscellaneous.

Online payment facilitators (internet payment service providers) are specifically caught under Part 6 of the AML Act.

As of 12 December 2007, a number of provisions of the AML Act had already come into effect. The provisions place the following obligations on those who are regulated by the AML Act:

- **Carrying out of customer identification procedures on all new customers:** AUSTRAC have provided a sample customer identification form on their website,¹⁰
- **Maintenance of records of these procedures:** This consists of documenting these procedures, and maintaining accurate records of the information gathered during

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this process. This information must be stored for seven years.

- **Adoption and implementation of an AML/CTF program:** This program is assessable by AUSTRAC, and must consist of the following two components.
- PART A: Identifies, mitigates and manages any risks that the reporting entity may face that involve or facilitate money laundering or the financing of terrorism.
- PART B: Outline the reporting entities customer identification process.

What must the provider of an online payment system do in order to comply with the requirements of the AML/CTF Act?

- They have to register as a Designated Remittance Service (and should have already done so);
- Conduct customer due diligence (KYC – Know Your Customer framework in place);
- Reporting requirements (to AUSTRAC) for suspicious transactions, and a regime to monitor for suspicious matters/transactions; and
- Record keeping and retention of records (for seven years) and documents and information provided by customers.

What are some of the possible differences for the end-users of payment facilitators?

As a customer or end-user the effect will be in what information the user has to provide to the payment facilitator in order to establish an account or gain access to the service. New customers to these "designated services" will be required to be identified, potentially in more detail than prior to the AML changes. This could involve the supplying of more detailed information to the service provider (for example, a licence number, etc).¹¹

Further and more detailed analysis of the effect of these provisions on online payment facilitators is difficult to gauge at this point in time. Currently, we are within AUSTRAC's "prosecution free period" for reporting entities. During this period, AUSTRAC will not prosecute an entity, so long as that entity is taking reasonable steps towards full compliance.¹²

The key players who provide the services of online payment facilitators have always been well positioned for compliance with the AML Act given the fact they are generally operating on an international scale, and such risk based anti-money laundering frameworks have been setup in the UK and other jurisdictions.

How can you tell if a service provider is registered? What are the risks if they aren't?

The fact that the Register of Providers of Designated Remittance Services¹³ (RPDRS) remains confidential, and is not publicly accessible, makes it difficult, if not impossible, for the average punter to check on a particular service provider's status so far as registration and compliance with this aspect of the AML Act.

Under section 10(2) of the AML Act, a remittance arrangement is *an arrangement that is for the transfer of money or property*. This definition clearly covers the major players in the Australian online payment facilitator marketplace.

While many online payment facilitators would have, in the course of providing their service, stored various customer information over the period of their relationship with a customer (and perhaps in perpetuity through the use of various backup technologies), the now stringent requirement to keep records (and keep them in an accessible manner) for seven years is an increase in the service provider's overheads. In addition, given the additional level of information to be stored, online

payment facilitators must ensure that they have adequate security systems, policies and frameworks in place to guard users' privacy.

One of the original concerns highlighted during the Inquiry into the Exposure Draft of the AML Act by the Senate was that the customer identification requirements and procedures would require face-to-face identification and sighting of primary identification documents.¹⁴ This would have had a huge impact on the business of online payment facilitators.

The risks to a customer if a service provider is not registered with AUSTRAC are minimal. So far as the AML Act is concerned, all compliance burdens are placed on the Designated Service Provider, not the end user. The risk to a customer or end user is the fact that they are dealing with a provider who is not complying with the law, or indeed best practice.

Moving forward

As of 31 March 2008, most reporting entities will be required to file a compliance report with AUSTRAC. This will provide key information on how compliance with the AML/CTF regime is truly progressing.

Each phase of implementation is followed by a 15 month period where AUSTRAC does not seek civil penalties against reporting entities.¹⁵ As each of these 15 month periods expires, we may begin to hear more from the stakeholders in the AML/CTF regime. From 12 March 2008 the 15 month penalty free period is due to expire for RPDRS. This is when we may start to see the real impact upon online payment systems and service providers.

As with any newly implemented regulatory regime, the AML / CTF framework has the potential to place a significant burden upon those who are required to comply with the AML Act and associated framework. This includes online payment facilitators,

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who have their success and failure tied up in the ease of use of their systems. In observing this, it is important to note that AUSTRAC have taken their role as educator as a primary one, and have managed to provide helpful and useful guides, questionnaires and tutorials on its website. Their approach, to date, has been conciliatory and educational in the implementation of this new framework. Indeed, the prominence and importance that AUSTRAC has given to its educational role has been impressive to date.¹⁶ This collaborative approach appears to have greatly assisted all areas of industry impacted by the AML Act and associated framework, and has gone a long way in establishing a degree of goodwill between the regulator and industry.

¹² J Maguire, P Jones, *December 2007 – the AML Report Card*, Financial Services Newsletter (2007/2008)

¹³ AUSTRAC, *Guidance Note – Register of Providers of Designated Remittance Services*, July 2007 at page 4.

¹⁴ PayPal, *Submission to ‘Inquiry into the Exposure Draft of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2005’*, 8 March 2006 (http://www.aph.gov.au/senate/committee/legcon_ctte/anti-money_laundering/submissions/sublist.htm)

¹⁵ AUSTRAC, *AUSTRAC Guidance Note – Application of the Policy (Civil Penalty Orders) Principles 2006*, December 2007 (amended issue v2)

¹⁶ AUSTRAC, *Regulatory Guide - Foreward*, http://www.austrac.gov.au/rg_forward.html

⁴ FATF, *Report on New Payment Methods*, 13 October 2006

⁵ AUSTRAC, *Remittance Providers Registration*, 20 February 2008

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http://www.austrac.gov.au/remittance_services.html

⁷ AUSTRAC, *Draft Anti-Money Laundering and Counter-Terrorism Financing Rules for designated remittance arrangements*, 29.05.07 v3

⁸ *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth), section 46 (defined)

⁹ AUSTRAC, *AUSTRAC Guidance Note – Application of the Policy (Civil Penalty Orders) Principles 2006*, December 2007 (amended issue v2)

¹⁰ AUSTRAC, *Regulatory Guide – Appendix J*, http://www.austrac.gov.au/rg_app_j.html

¹¹

http://www.ag.gov.au/www/agd/agd.nsf/Page/Anti-moneylaundering_Frequentlyaskedquestions#heading7