

REPLACEMENT EXPLANATORY STATEMENT

Issued by the authority of the Attorney-General

Australian Transaction Reports and Analysis Centre Industry Contribution Act 2011
Australian Transaction Reports and Analysis Centre Industry Contribution
Determination 2022 (No. 1)

OUTLINE

The Determination is made by the Minister for Home Affairs under subsection 9(1) of the *Australian Transaction Reports and Analysis Centre Industry Contribution Act 2011* (Industry Contribution Act) for the financial year 1 July 2021 to 30 June 2022 (2021–22).

Section 8 of the Industry Contribution Act imposes a levy on certain entities ('leviable entities') regulated and supervised by the Australian Transaction Reports and Analysis Centre (AUSTRAC). The purpose of the levy is to recover the costs of the performance of AUSTRAC's regulatory and intelligence functions. It is intended that the levy will recover 100% of those costs (including depreciation) in 2021–22.

Section 7 of the *Australian Transaction Reports and Analysis Centre Industry Contribution (Collection) Act 2011* provides that the levy is payable in instalments. The amount of each instalment is dealt with in section 9 of the Industry Contribution Act. The purpose of making the levy payable in instalments is to enable more than one instalment to be made payable in a single financial year, if this is necessary to recover AUSTRAC's costs. For the 2021–22 financial year, only one instalment of levy will be payable.

Subsection 9(1) of the Industry Contribution Act provides for the Minister, by legislative instrument, to determine the amount of an instalment of levy payable by a leviable entity for a financial year. Paragraph 9(2)(a) requires the Minister to make at least one determination under subsection (1) for each financial year. Paragraph 9(2)(b) puts a cap, called the 'statutory limit', on the sum of all amounts of all instalments of levy payable by all leviable entities for a financial year. The term 'statutory limit' is defined by subsection 7(1) of the Industry Contribution Act to mean, in relation to a financial year, 'the amount that is 2 times the sum of all amounts appropriated by the Parliament for the purposes of AUSTRAC for the financial year'.

The Determination determines the amount of the instalment of levy for 2021–22.

Subsection 9(3) of the Industry Contribution Act provides that a determination made for the purposes of subsection 9(1) may do one or more of the following:

- specify an amount or a method for determining an amount;
- specify different amounts or methods for different classes of leviable entities;
- specify a nil amount or a method resulting in a nil amount;
- specify methods that refer to acts done or circumstances existing before either the commencement of the determination or the commencement of the Industry Contribution Act, or both.

Subsection 9(4) of the Industry Contribution Act provides that a determination made for the purposes of subsection 9(1) for a financial year may, despite subsection 12(2) of the *Legislation Act 2003*, be made after the beginning of that financial year.

Details of the Determination are set out below. The Determination is a legislative instrument for the purposes of the *Legislation Act 2003*.

CONSULTATION

The development and refinement of the structure of the industry contribution charging model was undertaken during the 2014–15 financial year, following the Government's budget announcement on 13 May 2014 that it was replacing the cost recovery arrangements administered by AUSTRAC (known as the AUSTRAC supervisory levy) with an industry contribution levy to fund AUSTRAC's regulatory and financial intelligence functions.

Three separate rounds of stakeholder consultation were undertaken, during which AUSTRAC released three stakeholder consultation papers:

- 26 June 2014
- 25 September 2014, and
- 3 December 2014.

Following this extensive consultation process, the structure of the charging model for the industry contribution levy was finalised. Details of the model were published on the AUSTRAC website on 28 January 2015.

The underlying structure of the charging model for the 2021–22 financial year is largely unchanged from the model that was used for 2014–15 and subsequent

years. There have been some changes to the factors for individual components, in order to reflect differences in the amount to be recovered from liable entities each levy year.

Consultation was undertaken in relation to the Determination. A consultation paper was released to liable entities on 10 January 2022. The consultation paper provided an overview of AUSTRAC's strategic direction, details on AUSTRAC's annual budget allocation for the 2021–22 financial year and proposed arrangements for the Industry Contribution for the 2021–22 financial year.

The industry contribution levy is not captured by the Australian Government's Cost Recovery Guidelines. However, AUSTRAC undertakes annual consultation on the levy consistent with the Guidelines, and AUSTRAC's consultation paper is in a format similar to a Cost Recovery Impact Statement.

REGULATORY IMPACT STATEMENT

AUSTRAC has been advised that a Regulatory Impact Statement (RIS) is not required. The industry contribution arrangements are a revenue measure, and as such fall outside the requirement to prepare a RIS.

DETAILS OF THE DETERMINATION

Item 1 – Name of Determination

This item sets out the name of the Determination as the *Australian Transaction Reports and Analysis Centre Industry Contribution Determination 2022 (No. 1)*.

Item 2 – Commencement

This item provides that the Determination will commence the day after it is registered as a legislative instrument.

Item 3 – Definitions

Subitem 3(1) defines terms used in the Determination, the more significant of which are:

- 'census day'. This term is defined, in relation to 2021–22, to have the same meaning as in the Industry Contribution Act. The census day for the 2021–22 financial year is 1 July 2021.
- 'earnings'. The amount of a liable entity's 'earnings', as defined, is used in the Determination to identify liable entities that are liable to pay the maximum

amount of the instalment of levy for 2021–22, under sub item 4(4) of the Determination, and, for other leviable entities, in calculating the earnings component of the instalment of levy, under item 5 of the Determination. For a leviable entity that is an authorised deposit-taking institution or a registered financial corporation, or is part of a group of leviable entities that includes such an entity, ‘earnings’ means total profit before tax, depreciation and amortisation (PBTDA). For all other entities the measure is total earnings before interest, tax, depreciation and amortisation (EBITDA). Neither PBTDA nor EBITDA is to be adjusted for significant items.

- ‘leviable entity’. This term is defined, in relation to 2021–22, to have the same meaning as in the *Australian Transaction Reports and Analysis Centre Industry Contribution Act 2011*.
- ‘leviable report’. This means, in relation to a leviable entity, a report given to the AUSTRAC CEO in the 2020 calendar year under subsection 43(2) or 45(2) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) (or in the form required for subsection 43(2) or 45(2), whether or not such a report was required to be given under either subsection), being:
 - a report given by the leviable entity; or
 - a report given by a remittance affiliate of the leviable entity; or
 - a report given by another leviable entity that was acquired by the leviable entity prior to the census day.

Sections 43 and 45 of the AML/CTF Act respectively deal with threshold transaction reports (TTRs) and international funds transfer instructions reports (IFTIs).

- ‘National Electricity Rules’. This means the Rules made under the *National Electricity Law* set out in the Schedule to the *National Electricity (South Australia) Act 1996* (SA).
- ‘remittance affiliate’. This means a leviable entity that provides a designated service covered by item 31 or 32 of table 1 in section 6 of the AML/CTF Act as part of a network of persons of a kind referred to in item 32A of that table operated by another leviable entity.
- ‘registered financial corporation’. This term is defined to have the same meaning as the term ‘registered entity’ in the *Financial Sector (Collection of Data) Act 2001*.

Subitem 3(2) limits references in the Determination to the total profit or total earnings of a liable entity that is a foreign corporation or a subsidiary of a foreign corporation to the total profit or total earnings of the liable entity which are derived from operations in Australia. This affects the operation of the definition of the term 'earnings' in subitem 3(1) of the Determination.

Item 4 – Amount of instalment of levy

Item 4 sets out a general method for determining the amount of the instalment of levy payable by a liable entity for 2021–22, which is subject to five exceptions.

The general method is specified in sub item 4(2). It involves adding together the 'earnings component' for the liable entity, dealt with in item 5 of the Determination, and the 'transaction reporting component' for the liable entity, dealt with in item 6 of the Determination.

The exceptions to the general method are specified in subitems 4(3), (4), (5), (6) and (7).

Subitem 4(3) provides a payment threshold of \$1,100 for the levy instalment. If the amount calculated in relation to a liable entity under subitem (2) is less than \$1,100, then the amount payable by that entity is nil.

Subitem 4(4) provides a maximum payment amount for the levy instalment, applicable to those liable entities with earnings greater than \$5,000,000,000. The amount payable by a liable entity that is not part of a group of liable entities and has earnings of greater than \$5,000,000,000 is \$11,480,616.08. The amount payable by a liable entity that is part of a group of liable entities the total earnings for which are greater than \$5,000,000,000 is \$11,480,616.08 divided by the number of liable entities in the group.

Subitem 4(5) sets the levy instalment at nil for a liable entity that, in its most recent financial year prior to census date, provided designated services only in the capacity of a remittance affiliate. Entities to which subitem 4(5) applies have no amount payable on the basis that AUSTRAC's primary regulatory relationship will be with remittance network providers rather than remittance affiliates.

Subitem 4(6) sets the levy instalment at nil for a liable entity that, on the census day, was a 'Market Generator' within the meaning of the National Electricity Rules.

Subitem 4(7) sets the levy instalment at nil for a liable entity that is a body corporate established for a public purpose by an Act passed by the Commonwealth Parliament.

Item 5 – Earnings component

Item 5 sets out a general method for determining the earnings component for a liable entity, which is subject to two exceptions.

The general method is specified in subitem 5(2). For a liable entity that is not part of a group of liable entities, the general method involves multiplying the earnings for the liable entity by 0.048%. For a liable entity that is part of a group of liable entities, the general method involves multiplying the total earnings for the group by 0.048% and dividing the result by the number of liable entities in the group.

The exceptions to the general method are specified in subitems 5(3) and (4).

Subitem 5(3) provides a payment threshold for the earnings component. It does so by setting the earning component at nil for a liable entity that is not part of a group of liable entities and has earnings of less than \$100,000,000, or a liable entity that is part of a group of liable entities the total earnings for which are less than \$100,000,000.

Subitem 5(4) provides a payment cap for the earnings component for a liable entity if the amount calculated for that entity under subitem (2) is greater than \$5,000,000. For a liable entity to which subitem 5(4) applies that is not part of a group of liable entities, the earnings component is set at \$5,000,000. For a liable entity to which subitem 5(4) applies that is part of a group of liable entities, the earnings component is set at \$5,000,000 divided by the number of liable entities in the group.

Item 6 – Transaction reporting component

The transaction reporting component is calculated by reference to the TTRs and IFTIs that were lodged with AUSTRAC during the 2020 calendar year.

Subitem 6(2) contains a formula for working out a liable entity's transaction reporting component. The formula is made up of two elements, one for report volume and one for report value. The report value element that is to be applied is dependent on the total value of reports lodged with AUSTRAC during the 2020 calendar year.

A higher report value element applies to entities that lodged reports with a total annual value of \$15 billion or more. This reflects the government's decision to recover costs associated with the program: Strengthening Australia's Defences Against Money Laundering and Terrorism Financing from AUSTRAC's largest reporting entities who conduct the most significant transaction reporting by total value of transaction reports.

The transaction reporting component is calculated as follows:

- For entities with a total annual report value of less than \$15 billion:
 - 1.4 cents for each leviable report made by a leviable entity to the AUSTRAC CEO in the 2020 calendar year; and
 - 0.00070301 per cent of the value of the transaction to which the leviable report relates.
- For entities with a total annual report value of \$15 billion or more:
 - 1.4 cents for each leviable report made by a leviable entity to the AUSTRAC CEO in the 2020 calendar year; and
 - 0.00092328 per cent of the value of the transaction to which the leviable report relates.

Subitem 6(3) prevents 'double-counting' of leviable reports in the application of the formula in subitem (2) to different leviable entities.

Subitem 6(4) is included to avoid doubt as to what is meant by the 'value of a leviable report' in subitem (2).

Subitem 6(5) provides a payment cap for the transaction component for a leviable entity if the amount calculated for that entity under subitem (2)(a) is greater than \$14,000,000, then the total transaction reporting component for the entity is \$14,000,000.

Subitem 6(6) provides a payment cap for the transaction component for a levilable entity If the amount calculated for that entity under subitem (2)(b) is greater than \$14,000,000, then the total transaction reporting component for the entity is \$14,000,000.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Australian Transaction Reports and Analysis Centre Industry Contribution Determination 2022 (No. 1)

This Determination 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

The *Australian Transaction Reports and Analysis Centre Industry Contribution Act 2011* (Industry Contribution Act) imposes a levy on certain entities ('leviable entities') which are regulated under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* and supervised by the Australian Transaction Reports and Analysis Centre. Subsection 9(1) of the Industry Contribution Act provides for the Minister, by legislative instrument, to determine the amount of an instalment of levy payable by a leviable entity for a financial year.

This Determination was made by the former Minister for Home Affairs under subsection 9(1) of the Industry Contribution Act for the financial year 1 July 2021 to 30 June 2022. It specifies the amount, or the method for determining the amount, of the first instalment of levy payable by each leviable entity for the financial year. Different amounts and methods are specified for different classes of leviable entities.

Human rights implications

This Determination does not engage any of the applicable rights or freedoms.

Conclusion

This Determination is compatible with human rights as it does not raise any human rights issues.

Mark Dreyfus KC
Attorney-General