



Committee Secretary

Senate Legal and Constitutional Affairs Committee

26th August 2021

Dear Committee Secretary

RE: Inquiry into the adequacy and efficacy of Australia's anti-money laundering and counter-terrorism financing (AML/CTF) regime

AML Experts welcome the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the adequacy and efficacy of Australia's anti-money laundering and counter-terrorism financing (AML/CTF) regime.

Our Experience

AML Experts is a law firm which provides legal, consulting and audit services to reporting entities in Australia, New Zealand, and United Kingdom. Paddy Oliver is the legal practitioner director and the managing director of the firm.

AML Experts works with a wide range of reporting entities including: financial services; gambling; remittance; lending / credit providers; fintechs; legal regulators; legal insurers.

AML, financial crime, and risk management related services provided by AML Experts are:

- Legal advice on the AML/CTF Act;
- Consulting advice on design and implementation of AML-CTF Program;
- ML/TF Risk Assessments and risk management advice;
- Independent Reviews;
- External Audits under AML/CTF Act, Part 13, Division 7; and
- Assistance with AML-CTF Program remediation projects.

Paddy Oliver has been an AUSTRAC appointed External Auditor under AML/CTF Act, Sect. 164 and engaged as an expert witness on AML/CTF related matters. He is a member of the Law Council of Australia Business Law Committee. He is a founder member of the Group of Independent AML Consultants (GIAC). He was previously an Board member of ACAMS Australasian Chapter.



From 2003 to 2005 Paddy advised law firms in the United Kingdom and Ireland on AML laws, and the design and implementation of AML-CTF Programs.

Responses to Discussion Paper

1. Designated Non-Financial Businesses and Professions (DNFBPs)

Questions for consideration

•1.1 To what extent have legislative changes enacted since the 3rd Enhanced Follow-Up Report addressed the compliance issues against FATF Recommendations?

Limited. None of Recommendations 22, 23, and 28 have been addressed.

1.2 For those FATF Recommendations where Australia remains non-compliant or partially compliant, what are the barriers to achieving compliance?

For Recommendations 22, 23, and 28 the barriers to achieving compliance include, but are not limited to:

- Federal Government policy which is currently against legislating amendments to the AML/CTF Act to achieve compliance with Recommendations 22, 23, and 28;
- Federal Government lobbying at FATF level against Australia being placed by FATF under “increased monitoring” to address strategic deficiencies in its regime to counter money laundering, terrorist financing, and proliferation financing for failure to implement Recommendations 22, 23, and 28;
- Active, and to date successful, lobbying by professional peak bodies against the implementation of Recommendations 22, 23, and 28;
- Postponement of the FAFT Follow-Up assessment scheduled for 2019.

1.3 To the extent that Australia was assessed as non-compliant or partially compliant, what should be the priority areas? What needs to happen in the short, medium and long term?

Short term

- Commitment to comply with Recommendations 22, 23, and 28 and to introduce amendments to the AML/CTF Act.
- Consultation on how Recommendations 22, 23, and 28 will be introduced and how the AML/CTF Act will be amended.

Medium term

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- Amending the AML/CTF Act to implement Recommendations 22, 23, and 28.
- Providing a set date for when the AML/CTF Act will apply to those new reporting entities.

Long term

- A statutory review 7 years post application of the AML/CTF Act to those new reporting entities.

1.4 What are the risks to Australia of continued non-compliance or partial compliance with the FATF Recommendations?

Being placed by FATF under “increased monitoring” to address strategic deficiencies in their regimes to counter money laundering, terrorist financing, and proliferation financing.

2. Regulation of DNFBPs

Questions for consideration

2.1 What are the impediments to Australia regulating DNFBPs?

- Federal Government policy which is currently against legislating amendments to the AML/CTF Act to include DNFBPs.
- Federal Government lobbying at FATF level against Australia being placed by FATF under “increased monitoring” to address strategic deficiencies in its regime to counter money laundering, terrorist financing, and proliferation financing for failure to extend the AML/CTF Act to include DNFBPs.
- Active, and to date successful, lobbying by professional peak bodies, against the extension of AML/CTF Act to DNFBPs.
- Subjecting the extension of AML/CTF Act to DNFBPs to a cost benefit analysis. Either Australia accepts its FAFT obligations with respect to all of the FATF Recommendations, or it does not. There is no scope under the FATF Recommendations for a cost benefit analysis of whether to implement some, or all, of those Recommendations.
- The current model of regulating by way of designated services is problematic for many reasons, including: complexity; breath of scope; and unintended consequences. This will also be the case for DNFBPs. Consideration should be given to a move away from designed services for all reporting entities, DNFBPs or other wise, to an entity type based regulation.



- The argument advanced that the cost of further regulation on DNFBPs is undesirable and unjustifiable can be countered by the fact that in 2021 the advances in technology solutions, particularly around electronic verification, have reduced those costs considerably. Regtech solutions can reduce the overall cost of compliance. While there is a cost of compliance, it is not to the extent that DNFBP peak bodies alleged.
- With respect to lawyers and conveyancers this cohort has been undertaking Verification of Identity (VOI) checks with regard to electronic conveyancing matters for several years. VOI checks are similar to AML Act Know Your Customer (KYC) checks. Therefore, a version of VOI could be used under the AML regime. Like AML Act KYC, VOI can be assisted by external electronic verification providers. In fact, many lawyers and conveyancers currently use external providers – both manual and electronic – for VOI.

2.2 What are the reputational risks to Australia if DNFBPs continue to fall outside the scope of AML/CTF regulation?

Australia being placed by FATF under “increased monitoring” to address strategic deficiencies in its regime to counter money laundering, terrorist financing, and proliferation financing for failure to implement Recommendations 22, 23, and 28.

2.3 What reasons or explanations have been advanced for Australia not implementing additional legislative corrective action in relation to DNFBPs?

DNFBPs in general:

- Are, to an extent, already regulated with respect to some measures to identify and know a client. (Although it is arguable these measures are in fact implemented across the DNFBP sectors or that the measures are effective in mitigating financial crime risk);
- Are currently perceived to be over regulated;
- There is no evidence of actual money laundering being committed by those in the DNFBPs;
- The compliance burden would be too onerous and expensive;
- It is for the banks and financial system to detect and deter potential money laundering, not DNFBPs;

For lawyers:



- Breaching client confidentiality (to which there are numerous exceptions already);
- Breaching legal professional privilege (which is not the case); and
- Not a valid macro-economic reform.

2.4 What are the potential risks, costs or other unintended consequences of poor design or implementation of additional AML/CTF regulation?

It must be assumed that the extension of the AML/CTF Act to DNFBPs can be achieved in a way that meets FATF Recommendations and is fit for purpose. The best way to achieve this for DNFBPs is to move away from the concept “designated services” rather only capture DNFBPs by entity type which reflect the narrower scope of FATF Recommendations. If the extension is attempted by way of placing a DNFBP specific table of designated services into the Act, as was proposed in 2008, then there will be a significant cost to the proposed regulated cohort in trying to understand which services are actually caught.

Further, if the drafting of the table is ambiguous then businesses which are not intended to be subject to the Act will be. This is analogous to the current situation regarding AML/CTF Act, Table 1, Items 31 and 32 designated services - remittance services. Due to the poor drafting of, and wide definitions contained in, the AML/CTF there are a considerable number of business caught by the AML/CTF Act which were never intended to be, for example payroll providers and NDIS providers. If a business is subject to the AML/CTF Act due to poor drafting / wide definitions it is currently incumbent on the business to seek legal advice (at their own cost) and then to either implement an AML-CTF Program or seek an exemption from the AML/CTF Act (which is a lengthy process).

Without careful consideration of the mechanism by which the AML/CTF Act is extended to DNFBPs this current Item 31 / Item 32 problem will be replicated across the newly regulated reporting entities.

Additional costs for a poorly designed extension include: the cost of legal advice on whether or not the designated services apply to a individual DNFBP; the cost of consulting advice on design and implementation of an AML-CTF Program if that AML-CTF Program is not ultimately required; additional resourcing for AUSTRAC and the DNFBP peak bodies to provide guidance on the boundaries of the designated services.

A well designed extension would include: more prescriptive AML Rules in a move away the current risk based approach; less complex rules around Know Your Customer; less complex AML Rules in general; regulator approved template AML-CTF Programs; allowing an AML-CTF Program to linked to a business' nature, size, complexity and



reasonable ML/TF risks (there is currently little actual flexibility); and detailed sector guidance.

2.5 What are the implications for Australia as a competitive global economy and our ability to attract global investment if DNFBPs are not regulated under the AML/CTF regime?

Being placed by FATF under “increased monitoring” to address strategic deficiencies in their regimes to counter money laundering, terrorist financing, and proliferation financing. There is a significant cost to a country placed on the FAFT “grey list”.

2.6 What has been the experience of other countries with the regulation of DNFBPs and how is this instructive to Australia?

New Zealand

Post a FATF Mutual Evaluation the New Zealand AML/CFT Act was extended to DNFBPs in 2018-19. New Zealand closely followed the FATF Recommendations with respect to scope of which DNFBPs were regulated. Also, there was a further safeguard for lawyers with respect to legal professional privilege contained in the amended AML/CFT Act.

United Kingdom

The three legal jurisdictions of the United Kingdom implemented AML regulatory laws for DNFBPs in 2004. This was in response to the UK requirement to implement the European Union 3rd Money Laundering Directive. The UK took the approach of making the respective professions' regulatory bodies the AML regulator with respect to each profession. Further, detailed sector specific guidance around AML/CTF operational policies, process, and controls was developed for each profession to follow. This allows each profession to have a tailored set of guidance which, if followed, provides a safe harbour against a potential prosecution for regulatory breaches.

During the consultation period prior to extension of AML laws to law firms the respective UK jurisdiction law societies were generally against the extension. Opposition was based on the familiar arguments of: legal professional privilege; existing regulation; and cost. The UK Government at the time pushed ahead with the extension to lawyers after agreeing several concessions with the law societies (for example, lawyer fees are not subject to the equivalent of the suspicious matter reporting regime). Also, there is a wider acceptance in the UK that AML laws are for a greater societal good.

Further EU Money Laundering Directives (4th and 5th) have been implement in the UK including for DNFBPs.



Ireland

Ireland extended AML regulatory laws to DNFBPs in 2004 as a response to the requirement to implement the European Union 3rd Money Laundering Directive. The further European Union Money Laundering Directives have also been applied to DNFBPs.

Other European Union Countries

Most, if not all, have implemented the various European Money Laundering Directives (3rd, 4th, 5th) with respect to DNFBPs. Each country will have local variations but the overall obligations will be consistent.

The common theme across New Zealand, United Kingdom, Ireland and other European Union countries is that AML laws can be extended to DNFBPs with if the political will to do so exists.

Other Common Law Jurisdictions

Singapore and Hong Kong have implement AML laws for DNFBPs. Canada has partially implemented AML law for DNFBPs.

United States of America

USA not implement any type of AML law for DNFBPs at either State or Federal level. Nor is it likely to.

3. 2016 Statutory Review

Questions for consideration

3.1 To what extent do recommendations in the 2016 AGD Review remain relevant to the regulation of DNFBPs in Australia?

Those recommendations which have not been implemented remain relevant to both the regulation of DNFBPs and current reporting entities.

3.2 To what extent are recommendations from the 2016 AGD Review and the 2017 project plan yet to be implemented?

2016 Statutory Review.

The following recommendations of the 2016 Statutory Review are still relevant:

- Simplify the AML/CTF Act;
- Simplify and rationalise the AML/CTF Rules;



- Co-design future reforms in partnership with industry and partner agencies;
- Provide regulated businesses with enhanced feedback;
- Re-consider the AML/CTF regulation of specific services that pose a low ML/TF risk;
- Minimise the regulatory burden associated with complying with CDD obligations;
- Simplify and streamline transaction reporting requirements to minimise regulatory burden and more closely align them with the FATF standards;
- Assess whether the international funds transfer reporting obligations accurately reflect ML/TF risks; and
- Simplify, streamline and clarify AML/CTF program obligations.

2017 Project Plan

The majority of those recommendations have been implemented. Those which have yet to be fully implemented include:

- P1.7 - Cost benefit analysis of tranche 2;
- P1.9 - Sanctions laws;
- P1.11 - Other AUSTRAC projects (particularly exemptions)
- P2.2 - Geographic Link;
- P2.3 - Definitional issues;
- P2.4 - Risk assessment and monitoring; and
- P2.5 – Guidance.

3.3 In relation to recommendations that remain outstanding, what are the barriers to their implementation?

None.

3.4 Should the implementation of recommendations about DNFBPs be a priority? If so, why?

Partially. Those recommendations are the last reminding major recommendations to be implemented.



Recommendations which could be considered minor, for example those around exemptions, should also be considered for priority. The implementation of these will improve regulation for all reporting entities.

4. AUSTRAC

4.1 Is AUSTRAC's design, operational approach and effectiveness in enforcing existing legislation appropriate for implementing Tranche 2 legislation, investigation and compliance requirements?

Partially. AUSTRAC would have little, or no, experience of understanding how DNFBPs operate and are currently regulated. For example, with respect to lawyers AUSTRAC would not have detailed knowledge of the state based regulation of lawyers, the interaction with professional obligations, and how potential enforcement action would impact professional conduct rules.

4.2 Is AUSTRAC appropriately resourced for implementing Tranche 2?

No. AUSTRAC would need extra resourcing including people with significant sector knowledge.

4.3 Is AUSTRAC's fit within Australia's broader financial regulatory ecosystem optimal for implementing Tranche 2?

No. To ensure that all newly regulated DNFBPs have sufficient formal guidance implementation of the new AML obligations AUSTRAC would need to work closely with the current DNFBPs' peak bodies and regulators.

4.4 Do the regulatory frameworks that exist in other countries (see the 'International experience' section following) provide any alternative approaches that should be considered?

New Zealand

New Zealand does not have a unified AML regulator / Financial Intelligence Unit. There are three regulators across the various reporting entity sectors. The Department of Internal Affairs is responsible for regulation of DNFBPs.

United Kingdom

Each DNFBP sector is regulated by the its respective peak regulator with the proviso that the is no self-regulation. For example, lawyers in England & Wales are regulated for AML by the Solicitors Regulation Authority a statutory regulator, not the England & Wales Law Society.



Ireland

Each DNFBP sector is regulated by its peak body where it has one. For example, lawyers in Ireland are regulated for AML by the Law Society of Ireland.

5. Australian Taxation Office

No submissions.

6. International Experience

Questions for consideration

6.1 How does the Australian experience compare internationally?

Good except of extension AML laws to DNFBPs.

6.2 Are there unique challenges affecting Australia's ability to implement recommendations from FATF?

None that have not been faced, and successfully overcome, in other similar jurisdictions.

6.3 What could Australia learn from international counterparts such as New Zealand, Singapore, the United Kingdom and Canada?

Across all those jurisdictions the common theme has been national government action to implement all FAFT Recommendations.

6.4 How does the lack of regulation of DNFBPs in Australia impact its relationships and collaboration with international counterparts, with regard to serious and organised and financial crime?

Failure to regulate DNFBPs could be seen by foreign jurisdictions as a weakness in Australia's willingness to counter serious organised crime, and transnational organised crime.

7. Current & Emerging Challenges in AML/CTF

Questions for consideration

7.1 How do the priority areas identified by FATF in 2021 inform Australia's response to emerging challenges in AML/CTF?

No submission.



7.2 How do the emerging challenges identified by FATF apply in the Australian context?

No submission.

7.3 Do Australia's weaknesses or lack of compliance with FATF Recommendations make us more vulnerable to money laundering activities than comparable economies?

Yes. Due to failure to implement all FAFT Recommendations Australia is a risk due to weakness around DNFBPs, especially the gatekeeper professions.

7.4 What learnings are there for Australia from experiences in other nations' implementation of AML/CTF regulation to DNFBPs?

When a national government makes the policy decision to extend AML/CTF regulation to DNFBPs it must:

- Provide assistance to DNFBP peak bodies and regulators as those entities will be the focal point for providing guidance to their respective sector. This is especially important during the implementation phase.
- Ensure that the proposed AML/CTF regime is as fit for purpose with each DNFBP sector as possible even if that means sector specific legislation or guidance.
- Provide assistance to the AML/CTF regulator, if it is not already a DNFBP regulator, to allow for the increased number of the regulated population and to increase the knowledge base of its staff with regard to each DNFBP sector.

7.4 Are there case studies of direct experiences, especially from overseas countries, which will inform understanding of the key issues?

United Kingdom - Legal Profession

When UK Government made the policy decisions to extend AML/CTF regulation to the legal profession it, among other things:

- Provided an implementation time frame;
- Placed regulation with the respective jurisdictions peak legal regulators, for example the SRA in England & Wales; and
- Allowed sector specific guidance. If the guidance is followed then a regulated law firm has a defence against any potential regulatory action. The current version is the Legal Sector Affinity Group Anti-Money Laundering Guidance for the Legal Sector 2021.



8 Other related matters.

Governance & Oversight of AML-CTF Programs

The AML/CTF Act does not place any explicit duties or obligations on the directors or officers of a reporting entity to ensure that the reporting entity “adopts”, “maintains”, and “complies with” its AML-CTF Program. Those obligations fall on the reporting entity itself. While it is correct that the AML/CTF Rule 8.4 imposes the following obligation:

“A reporting entity’s Part A program must be approved by its governing board and senior management. Part A must also be subject to the ongoing oversight of the reporting entity’s board and senior management. Where the reporting entity does not have a board, Part A must be approved and overseen by its chief executive officer or equivalent.”

This Rule, and its equivalent Rule 9.4 with respect to designated business groups, does not impose a positive obligation on the directors and officers to ensure that the AML-CTF Program has been “adopted”, “maintained”, and is being “complied with”. Further, it does not afford AUSTRAC the opportunity to bring civil penalty proceedings, directly against the directors and officers if the reporting entity is found to have breached its AML/CTF Act obligations.

At present, the only potential course of action against the directors and officers of a reporting entity which has been found to be in breach the AML/CTF Act, or has accepted an AML/CTF Act penalty, is by way of civil proceedings brought by ASIC under Sect. 180 of the Corporations Act. That limits the scope to corporations notwithstanding the fact the many reporting entries are not corporations rather sole traders, or trading trusts, or partnerships.

To date, even with the high profile civil proceedings taken against reporting entities by AUSTRAC, ASIC has not brought any such proceedings against any director or officer of a reporting entity subject to an AUSTRAC civil penalty proceedings. It must be assumed that ASIC either does not believe that it is possible to bring a successful Corporations Act, Sect. 180 proceeding against a director or officer of a reporting entity for an AML/CTF Act breach, or that it is not ASIC’s responsibility to regulate directors or officers outside the boundaries of the Corporations Act, or both. It is a major lacuna in the law that a director or officer can be banned by ASIC for allowing a corporation to breach certain provisions of the Corporation Act but AUSTRAC does not have similar powers to ban the director or officer of reporting entity for allowing the reporting entity to breach the AML/CTF Act.



We submit that it is for AUSTRAC to enforce the governance obligations under the AML/CTF Act. After all, it is AUSTRAC which is the AML/CTF Act regulator and it is the agency which gathers the evidence and brings proceedings. If ML, TF and serious crime is the risk to Australia which is stated by the Federal Government and AUSTRAC, and the AML/CTF Act is a key plank of mitigating those risks, then there should be sanctions against directors and officers of reporting entities which breach the AML/CTF Act. Without the threat of personal liability those directors and officers may not devote sufficient resources to allow a reporting entity to implement an effective AML-CTF Program.

To enable a more effective governance system within reporting entities, and to assist AUSTRAC with enforcement, the AML/CTF should be amended to impose actual and stated responsibilities on director and officers of reporting entities akin to those under the Corporations Act. For example, an overarching obligation on a director or officer to ensure that the reporting entity takes reasonable measures to:

- adopt an AML-CTF Program;
- maintain an AML-CTF Program; and
- comply with its AML-CTF Program.

Breaching this obligation would be a civil penalty provision. A referral power to ASIC with respect to directors and officers of a reporting entity corporation to seek a ban could also be considered.

There would of course be the usual type of defences available to the directors and officers.

To allow for the wide range of legal entity types that are reporting entities the AML/CTF should be amended to have a wide definition of “officer”. An example is the Victorian Occupation Health and Safety Act, 2004 which defines officer to include “a person who makes or participates in the making of decisions that affect the whole or a substantial part of the business” and “a person who has the capacity to affect significantly the financial standing of” a body corporate, a partnership, an unincorporated body, or an association.

Further, AUSTRAC should utilise its power to seek injunctive relief under AML/CTF Act, Part 15, Division 6 - Injunctions against directors and officers. A similar power has been used in New Zealand.



Yours sincerely,

Paddy Oliver
Managing Director

