



Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

3rd December 2021

Members of Legal and Constitutional Affairs Committee

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

I would like to thank the Senate Legal and Constitutional Affairs References Committee for inviting me, as Initialism's Principal, to provide a response to the following written questions on notice from Senator Deborah O'Neill:

1. What types of products and services provided by Lawyers, Accountants, and Real Estate should be covered by AML/CTF?
2. Is there an opportunity to streamline some of the sectors to reduce the compliance overheads, by carving out some activities that are low risk?

Thank you once again for this opportunity to participate in this vitally important inquiry which is pivotal to ensuring Australia is brought into line with the FATF's recommendations and therefore creating a hostile environment towards money laundering and terrorism financing threats faced by Australia's financial system, economy, and the wider community.

My responses are attached as an annex to this letter.

Yours faithfully

Neil Jeans - Principal

What types of products and services provided by Lawyers, Accountants, and Real Estate should be covered by AML/CTF?

In 2003 DNFBPs were identified by the FATF as gatekeepers to the financial system, and it was also identified that some DNFBP's legitimate services could be abused by criminals seeking to conceal their criminal activity and/or ownership of the proceeds of criminal activity.

The FATF, when it extended coverage of the FATF Standards to key DNFBP sectors, specifically limited services offered by DNFBPs to those services that money laundering typologies had identified as being vulnerable to money laundering¹.

As a result, the FATF established that the following services should be covered by a country's AML/CTF regime:

- *Real estate agents - when they are involved in transactions for their client concerning the buying and selling of real estate.*
- *Lawyers, notaries, other independent legal professionals and Accountants when they prepare for or carry out transactions for their client concerning the following activities:*
 - *Buying and selling of real estate;*
 - *Managing of client money, securities or other assets;*
 - *Management of bank, savings or securities accounts;*
 - *Organisation of contributions for the creation, operation or management of companies;*
 - *Creation, operation or management of legal persons or arrangements, and buying and selling of business entities.*
- *Trust and company service providers – when they prepare for or carry out transactions for a client concerning the following activities:*
 - *acting as a formation agent of legal persons;*
 - *acting as (or arranging for another person to act as) a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal persons;*
 - *providing a registered office, business address or accommodation, correspondence or administrative address for a company, a partnership or any other legal person or arrangement;*
 - *acting as (or arranging for another person to act as) a trustee of an express trust or performing the equivalent function for another form of legal arrangement;*
 - *acting as (or arranging for another person to act as) a nominee shareholder for another person.*

The FATF's approach of limiting the types of service covered by AML/CTF has been broadly replicated in countries that have brought DNFBPs into their AML/CTF regimes, and this approach should also be adopted by Australia when it brings DNFBPs into the AML/CTF regime.

For example New Zealand's approach links DNFBP inclusion in the AML/CFT regime based on the type of services provided, the status of the business and capture by related relevant legislation, defining a DNFBP caught by the Act as a business that is:

- (a) a law firm, a conveyancing practitioner, an incorporated conveyancing firm, an accounting practice, a real estate agent, or a trust and company service provider, who, in the ordinary course of business, carries out one or more of the following activities:
 - (i) acting as a formation agent of legal persons or legal arrangements:
 - (ii) acting as, or arranging for a person to act as, a nominee director or nominee shareholder or trustee in relation to legal persons or legal arrangements:
 - (iii) providing a registered office or a business address, a correspondence address, or an administrative address for a company, or a partnership, or for any other legal person or arrangement, unless the office or address is provided solely as an ancillary service

¹ FATF Recommendation 12 – October 2003 as amended in 2004

to the provision of other services (being services that do not constitute an activity listed in this subparagraph or subparagraphs (i),(ii), and (iv) to (vi)):

- (iv) managing client funds (other than sums paid as fees for professional services), accounts, securities, or other assets:
 - (v) providing real estate agency work (within the meaning of section 4(1) of the Real Estate Agents Act 2008) to effect a transaction (within the meaning of section 4(1) of the Real Estate Agents Act 2008):
 - (vi) engaging in or giving instructions on behalf of a customer to another person for—
 - A. any conveyancing (within the meaning of section 6 of the Lawyers and Conveyancers Act 2006) to effect a transaction (within the meaning of section 4(1) of the Real Estate Agents Act 2008), namely,—
 - the sale, the purchase, or any other disposal or acquisition of a freehold estate or interest in land:
 - the grant, sale, or purchase or any other disposal or acquisition of a leasehold estate or interest in land (other than a tenancy to which the Residential Tenancies Act 1986 applies):
 - the grant, sale, or purchase or any other disposal or acquisition of a licence that is registrable under the Land Transfer Act 1952:
 - the grant, sale, or purchase or any other disposal or acquisition of an occupation right agreement within the meaning of section 5 of the Retirement Villages Act 2003:
 - B. a transaction (within the meaning of section 4(1) of the Real Estate Agents Act 2008); or
 - C. the transfer of a beneficial interest in land or other real property; or
 - D. a transaction on behalf of any person in relation to the buying, transferring, or selling of a business or legal person (for example, a company) and any other legal arrangement; or
 - E. a transaction on behalf of a customer in relation to creating, operating, and managing a legal person (for example, a company) and any other legal arrangement; and
- (b) includes a person or class of persons declared by regulations to be a designated non-financial business or profession for the purposes of this Act; but
- (c) excludes a person or class of persons declared by regulations not to be a designated non-financial business or profession for the purposes of this Act.

The United Kingdom Money Laundering Regulations also adopts the FATF standards regarding the types of services provided by DNFBPs that are covered by its AML/CTF regime.

Is there an opportunity to streamline some of the sectors to reduce the compliance overheads, by carving out some activities that are low risk?

From the outset, the FATF has sought to limit the type of activity covered to financial transactions undertaken on behalf of a customer by DNFBPs, limiting the activity to that deemed particularly vulnerable to, or at higher risk of, being used to launder the proceeds of criminal activity. As such it can be determined that “low risk” activities have already been carved out.

The FATF’s position has not changed since 2003, and the service type limitation set out above provides a sound basis to limit the impact, and therefore the compliance costs, on the DNFBP sectors.

However, it is also important to recognise that there are other mechanisms available that could further reduce the impact and compliance costs associated with AML/CTF.

In June 2019 The FATF also published guidance on the risk-based approach for the legal profession ², accountants ³ and trust and company service providers (TCSPs) ⁴.

The FATF's guidance highlights the development of the ML/TF risk assessment as a key starting point for the application of the risk-based approach (RBA), and also highlights that the systems and controls adopted to mitigate and manage ML/TF risks should be commensurate with the nature, size and complexity of the particular business and the ML/TF risk faced by that business.

Building on this, the AML/CTF Act also allows the CEO of AUSTRAC to limit the AML/CTF requirements on particular businesses based on the level of ML/TF risk AUSTRAC have determined for an industry sector, which reduces the AML/CTF obligations and therefore the impact of AML/CTF compliance.

For example, Chapter 10 of the AML/CTF Rules provides relief to certain gaming businesses based on the ML/TF risk posed. These reliefs include establishing thresholds under which customer due diligence needs to be completed prior to providing a designated service. Furthermore, Section 30 of the AML/CTF Act allows for further variations to customer due diligence requirements to be included in the AML/CTF Rules, where it is deemed that the designated service is low risk.

Additionally, Chapter 52 of the AML/CTF Rules exempts gaming machine venues with no more than 15 electronic gaming machines from the majority of obligations under the AML/CTF Act except for reporting certain transactions and suspicious matter reports.

Notwithstanding the above, it is my opinion that DNFBPs providing the services specified by the FATF standards should be subject to a minimum level of AML/CTF obligations. These obligations should include, but may not necessarily be limited to:

- Undertaking an ML/TF Risk Assessment;
- Documenting (in an AML/CTF Program) and undertaking:
 - AML/CTF Risk Awareness Training;
 - Customer Due Diligence;
 - Monitoring of customer financial transactions;
 - Reporting Suspicious Matters to AUSTRAC;
 - Reporting Threshold Transactions and International Funds Transfer Instructions to AUSTRAC (if applicable);

This will ensure that DNFBPs play an active role in the AML/CTF regime and appropriately support ASUSTRAC and law enforcement efforts to fight crime and associated money laundering.

² FATF Guidance on RBA for lawyers - <https://www.fatf-gafi.org/media/fatf/documents/reports/Risk-Based-Approach-Legal-Professionals.pdf>

³ FATF Guidance on RBA for accountants - <https://www.fatf-gafi.org/media/fatf/documents/reports/RBA-Accounting-Profession.pdf>

⁴ FATF Guidance on RBA for TCSPs - <https://www.fatf-gafi.org/media/fatf/documents/reports/RBA-Trust-Company-Service-Providers.pdf>