December 2022

STATEMENT

A Call for Applying the *Anti-Money Laundering and Counter-Terrorist Financing Act 2006* (Cth) (AML/CTF Act) to Designated Non-Financial Businesses and Professions (DNFBPs)

The **Financial Integrity Hub at Macquarie University Law School** drives transformative change through interdisciplinary and future-focused research that provides cutting-edge solutions to the global challenge of financial crime. The Financial Integrity Hub is independent and focuses exclusively on the integrity of financial systems and compliance with the domestic and global regimes for anti-money laundering and counter-terrorist financing. There is currently no other research centre of this kind in Australia.

We write in support of applying the AML/CTF Act across various gatekeeping industries, known as DNFBPs. These industries – which include real estate agents, lawyers and other independent legal professionals, notaries, accountants, trust and company service providers, and dealers in precious metals and stones – play a key role in facilitating efforts by individuals and companies to enter the financial system. They are therefore considerably exposed to the risk of handling illicitly sourced funds. Imposing stronger regulations on DNFBPs is of enormous importance in preventing money laundering and strengthening Australia's national security.

Introduction

Alarmingly, the latest indicators suggest that our nation is fast becoming one of the money laundering capitals of the world.

Australia has plummeted in Transparency International's latest Corruption Perceptions Index, the world's most widely cited ranking of perceived levels of public sector corruption.[1] We have fallen behind many other countries in the developed world, including New Zealand, the United Kingdom, Canada and Singapore. The 2021 result represents the lowest score received by Australia since 2012, the earliest year with comparable data available.

[1] Transparency International, *Corruption Perceptions Index 2021* (2021).

The global regime

Australia's AML/CTF regime is based on the international standards developed by the Financial Action Task Force (FATF). Various Acts and Regulations have been amended to align with the FATF recommendations. In 2006, in order to meet Australia's international obligations as a FATF member, the Australian government passed tranche 1 of legislation establishing a new AML/CTF regime for the financial sector. Australia promised to apply the AML/CTF Act to DNFBPs (tranche 2) by 2008. In July 2010, already well behind schedule, the government deferred discussion of tranche 2 until mid-2011 to allow time for the economy to recover from the global financial crisis. In April 2016, the Attorney-General's Department report on the statutory review of the AML/CTF regime identified implementing obligations on DNFBPs as a priority area for action.[2] This was the last real attempt to introduce these reforms. At the end of 2022, Australia still has not fulfilled its promise. DNFBPs do not have comprehensive AML/CTF obligations – at least not yet.

Concerns about the AML/CTF risks for DNFBPs have been on the agenda of regulators and law enforcement agencies for many years. In 2012, FATF completed a comprehensive review of its standards and published revised recommendations to bolster global safeguards and further defend financial system integrity by granting governments more effective tools for combatting financial crimes. The recommendations have since been revised many times, most recently in March 2022, to ensure that they remain up to date.[3]

Of relevance for DNFBPs are Recommendations 22 and 23. Recommendation 22 focuses on customer due diligence (CDD). This includes identifying and verifying the identity of the client and beneficial owners where relevant; understanding the nature and purpose of the business relationship, including the source of funds; and maintaining records of the CDD material. Under Recommendation 23, DNFBPs must report suspicious transactions when, on behalf of a client, they engage in a financial transaction in relation to specified activities, including buying and selling real estate; managing client money, securities or other assets; managing bank, savings or securities accounts; organising contributions for the creation, operation or management of companies; creating, operating or managing legal persons or arrangements; and buying and selling business entities.

Australia's compliance with the global regime

FATF first conducted a mutual evaluation report (MER) on Australia's AML/CTF policies in 2005.[4] The MER found that while Australia had indeed legislated according to the standards, there were deficiencies that amounted to a failure to comply with all accepted standards. Australia was deemed

[2] Attorney-General's Department, *Report on the Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 and Associated Rules and Regulations* (2016).
[3] Financial Action Task Force, *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations* (updated March 2022).
[4] Financial Action Task Force, *Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism Australia* (October 2005).

non-compliant with Recommendation 22 (which was then numbered Recommendation 12). In a subsequent evaluation in 2015, FATF noted that some progress had been made through the adoption, in 2006 and 2007 respectively, of the AML/CTF Act and the AML/CTF Rules. However, Australia deemed that only casinos and bullion dealers were subject to AML/CTF obligations under the standard. As a result, Australia was again rated non-compliant with Recommendation 22.[5] Because it does not subject all DNFBPs to AML/CTF requirements on suspicious transaction reporting, instituting internal controls, and complying with higher risk country requirements, Australia was also rated as non-compliant with Recommendation 23.

Trend of positive compliance

Australia, a member of FATF since 1990, has shown ongoing amenability to implementing the international standard. Where the 2005 MER found the implementation to be insufficient, FATF recommended that Australia enact new legislation or amend existing legislation. Australia did so. Many of the deficiencies were addressed by the AML/CTF Act.[6] The 2015 MER found that, although Australia was not yet fully compliant, it had indeed improved its compliance with regard to many of the issues that had been identified. The same trend of positive compliance was found in 2018, when FATF issued its most recent follow-up report on Australia's AML/CTF regime.[7]

In 2005, FATF found Australia fully compliant with only eight of the 40 recommendations (20%). Australia improved, achieving full compliance with 12 recommendations (30%) by 2015 and 17 recommendations (42.5%) by 2018. In 2005, Australia did not comply at all with nine recommendations (22.5%), which was reduced to six recommendations (15%) by 2016 and five recommendations (12.5%) by 2018 – in other words, Australia was, in one way or another, compliant with 35 recommendations (87.5%). In addition, Australia's compliance improved for 13 recommendations between 2005 and 2015, and for another seven recommendations between 2015 and 2018 – an improvement for 20 recommendations (50%) from 2005 to 2018.[8] **Australia has entirely ignored only three FATF recommendations: Recommendation 13, dealing with correspondent banking, and Recommendations 22 and 23, dealing with DNFBPs.**

FATF has delayed its next review of Australia's performance until 2024–25, which will be almost an entire decade since the previous MER. Given the limitations of the existing regime, it is possible that billions of dollars sourced from illegal activities – including human trafficking, drug dealing and child exploitation – will have been funnelled through Australia's financial system during that time.

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[5] Financial Action Task Force, *Anti-Money Laundering and Counter-Terrorist Financing Measures – Australia* (April 2015) 168.
[6] One of the objects of the AML/CTF Act is to address matters of international concern, including the FATF recommendations. See s 3(3)(a).
[7] Financial Action Task Force, *Anti-Money Laundering and Counter-Terrorist Financing Measures – Australia: 3rd Enhanced Follow-up Report & Technical Compliance Re-Rating* (November 2018).
[8] Doron Goldbarsht, 'Reverse Engineering Legal Professional Privilege in a Globalising World – the Australian Case' (2020) 23(3) *Journal of Money Laundering Control* 677, https://doi.org/10.1108/JMLC-02-2020-0011.

Risk to financial reputation

FATF has announced various measures to be taken against countries that fail to discontinue detrimental rules and practices. Any country that is subjected to such countermeasures suffers a blow to its international reputation and all banking operations within that country could be scrutinised for suspicious activity. While this does not, strictly speaking, amount to sanctions, it creates substantial difficulties for the country in question.

This is not to suggest that FATF will apply such countermeasures to Australia for failing to comply with Recommendations 22 and 23. There also seems to be a low risk that FATF will find Australia to be among the 'high-risk' jurisdictions. This would occur only as a result of specific money laundering, terrorist financing, or proliferation financing risks or threats. Therefore, the primary reason for Australia to expand its regime to apply to DNFBPs is to obtain relevant information that can assist in mitigating the risks of money laundering and terrorist financing. **This would promote public confidence in the Australian financial system, fulfil Australia's domestic and international AML/CTF responsibilities, improve Australia's national security, and enhance Australia's position as a clean (rather than corrupt) country.**

On 23 June 2021, the Senate referred the adequacy and efficacy of Australia's AML/CTF regime to the Legal and Constitutional Affairs References Committee for inquiry and report by March 2022. Among other matters, the Committee was tasked with inquiring into the effectiveness of the AML/CTF Act to prevent money laundering and terrorist financing outside the banking sector – including consideration of the regulatory impact, costs and benefits of extending AML/CTF reporting obligations to DNFBPs. The Committee received 52 submissions and held two public hearings in November 2021. Its report concluded:

> Consistent with the Commonwealth government's long-standing position, the committee recommends that the Commonwealth government accelerates its consultation with stakeholders on the timely implementation of tranche 2 reforms in line with the Financial Action Task Force recommendations and ensures that the Australian Transaction Reports and Analysis Centre and the Department of Home Affairs have the right resources to adequately and effectively implement and manage the tranche 2 regime.[9]

The report also noted:

> Australia is a laggard on the world stage, one of only three states to fail to enact any regulation in relation to DNFBPs. As a founding member of FATF, Australia has committed to the implementation of its recommendations and has reaffirmed its commitment as recently as the G20 Summit in Rome in October 2021. The

[9] Senate Legal and Constitutional Affairs References Committee, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (March 2022), 4.28 (Recommendation 1).

> government's failure to enact tranche 2 reforms call into question these commitments. It is difficult to ignore the gap between the Commonwealth government's words and its actions.[10]

Moreover, the inquiry was able to soundly disprove arguments against tranche 2 relating to supposed increased costs by demonstrating that estimates had been severely overinflated – not to mention the benefits of regulation technology in creating business efficiencies. Yet, despite the findings of the inquiry, it seems that so far not much has changed.

Conclusion

The full implementation of the AML/CTF regime in Australia, which must include DNFBPs, has been delayed for too many years. In order for Australia to maintain – and improve – its internationally respected position, immediate action is needed to implement FATF Recommendations 22 and 23.

In our opinion, it is strongly in the interests of Australia to act now and amend the AML/CTF Act to include DNFBPs. Australia is left more vulnerable to integrity abuse as a result of this persistent failure to appropriately address globally recognised areas of vulnerability. In addition, if the government waits until pressure from FATF (such as deadlines for compliance and, if necessary, a finding of non-compliance) forces it to comply, this may tarnish Australia's reputation, threaten its access to international financial markets, and adversely affect the legitimacy and effectiveness of its AML/CTF regime.

We urge the government to consider the potentially dire consequences of delaying any further steps to tighten the AML/CTF regime by extending the obligations under the AML/CTF Act to DNFBPs.

[10] Ibid, 4.22.

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If your organisation would benefit from being part of a cross-sector network and having a greater understanding of the complex issues surrounding financial crime, please contact us to discuss opportunities for collaboration: **fih@mq.edu.au**.

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