



**Australian Government**  
**Attorney-General's Department**

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## **Consultation paper**

**Legal practitioners and conveyancers: a model for  
regulation under Australia's anti-money laundering and  
counter-terrorism financing regime**

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# Introduction

## 1.1 Purpose of consultation paper

The purpose of this consultation paper is to generate discussion about a model for the regulation of legal practitioners and conveyancers under the anti-money laundering and counter-terrorism financing (AML/CTF) regime.

Money laundering (ML) and terrorism financing (TF) are criminal offences that pose a serious threat to Australia's economic stability and national security.<sup>1</sup> This criminal justice response to the threat posed by these financial crimes is complemented by a regulatory response that establishes a framework for collecting valuable information from the private sector about the movement of money and other assets.

ML is the process by which unlawfully obtained funds, such as the proceeds of illicit drug trafficking, fraud, and tax evasion, are given the appearance of having been legitimately obtained. It is a key enabler of serious and organised crime due to its crucial role in allowing criminals to enjoy the profits of their crimes and re-invest their wealth to finance future criminal activities.

TF involves the raising of funds to supply terrorists with the resources they need to carry out their activities. Terrorists and terrorist organisations can use relatively small amounts of money to stage disastrous attacks on Australian soil or to support terrorist activities overseas.

To combat these serious threats, Australia has implemented an AML/CTF regime that comprises the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) and the associated Rules and Regulations.

The AML/CTF regime imposes a range of obligations on businesses when they provide certain services. Because these businesses are at the front line in combating and deterring money laundering and terrorism financing, these compliance and reporting obligations mitigate the risk that they will be exploited by criminals to launder or move illicit funds. The performance of customer due diligence and the reporting of information is the cornerstone of the AML/CTF regime, providing valuable financial intelligence that bolsters the ability of law enforcement and national security agencies to detect, deter, disrupt and prevent crime.

In December 2013, a wide-ranging statutory review of Australia's AML/CTF regime commenced. The review provided an opportunity to explore options to shape a modern AML/CTF regime that positions Australia to address current and future challenges, and complies with international standards.

The report of the review was released in April 2016 and makes 84 recommendations to streamline, simplify and strengthen the AML/CTF regime, achieve greater regulatory efficiencies and enhance Australia's compliance with international standards for combating ML/TF. This includes a recommendation to consider regulatory options to address the ML/TF risks posed by a number of businesses and professions that are currently not regulated under the regime:

***Recommendation 4.6:*** *The Attorney-General's Department and AUSTRAC, in consultation with industry, should:*

- a) develop options for regulating lawyers, conveyancers, accountants, high-value dealers, real estate agents and trust and company service providers under the AML/CTF Act, and*

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<sup>1</sup> Money laundering is criminalised under Division 400 of the *Criminal Code Act 1995* (Cth) (Criminal Code); terrorism financing is criminalised under Division 103 of the Criminal Code.

- b) *conduct a cost-benefit analysis of the regulatory options for regulating lawyers, accountants, high-value dealers, real estate agents and trust and company service providers under the AML/CTF Act.*<sup>2</sup>

The release of this paper represents the first step towards implementing the aspects of this recommendation that relate to legal practitioners and conveyancers.

## 1.2 Conduct of consultation and next steps

Public submissions are invited on the issues raised in this consultation paper. While questions are included at the end of each chapter to guide discussion, these are not intended to limit or constrain stakeholders in their responses.

Submissions can be sent to:

### **Financial Crime Section**

Transnational Crime Branch  
Criminal Justice Policy and Programmes Division  
Attorney-General's Department  
3-5 National Circuit  
BARTON ACT 2600

Submissions may also be submitted electronically to [antimoneylaundering@ag.gov.au](mailto:antimoneylaundering@ag.gov.au) or by facsimile to (02) 6141 2873. The closing date for submissions is **31 January 2017**.

All submissions and the names of persons or organisations that make a submission will be treated as public, and may be published on the Department's website, unless the author clearly indicates to the contrary. A request made under the *Freedom of Information Act 1982* for access to a submission marked confidential will be determined in accordance with that Act.

Roundtable discussions will be arranged with industry representatives and associations, government agencies and other interested stakeholders to discuss specific issues raised in response to the consultation paper.

The feedback from this consultation process will be considered as part of designing of a preferred model for regulation of the sector under the AML/CTF regime. This model will then be subject to a cost-benefit analysis.

Industry will be consulted during the conduct of the cost-benefit analysis.

The cost-benefit analysis will allow the Government to make an informed decision about the most efficient and effective way to address the relevant ML/TF risks posed by the services provided by legal practitioners and conveyancers without unduly hampering the efficient conduct of business.

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<sup>2</sup> Attorney-General's Department, *Report on the Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 and Associated Rules and Regulation* (April 2016).

## 2. Why regulate legal practitioners and conveyancers under the AML/CTF regime?

### 2.1 What are the benefits of regulating legal practitioners and conveyancers under the AML/CTF regime?

The AML/CTF regime provides the foundation of Australia's commitment to meet global standards for combating ML/TF and other serious crimes.<sup>3</sup> These global standards apply to professionals such as legal practitioners and conveyancers when they are involved in certain transactions for a client that pose ML/TF risks.<sup>4</sup>

Legal practitioners and conveyancers provide certain services that operate as a gateway to property and financial markets, financial institutions and other regulated professionals. These 'gatekeepers' provide financial and business services that can be abused to disguise beneficial ownership<sup>5</sup>, conceal the origins and purposes of financial transactions, facilitate tax evasion and, ultimately, launder the proceeds of crime. Operating through or behind a professional adviser can provide a veneer of legitimacy to criminal activity.

Legal practitioners can be used to create complex (but legal) structures that can create distance between criminals and their illicit wealth and conveyancers facilitate a process that allows for the transfer of ownership of property, a high-value asset that provides ideal opportunities for laundering large volumes of illicit funds.<sup>6</sup> In the absence of an AML/CTF regulatory framework, legal practitioners and conveyancers that provide these types of services may be at risk of being targeted and exploited by criminals.

Financial institutions in Australia are currently bearing the compliance and regulatory burden for maintaining robust AML/CTF programs for customers accessing the financial system. The robustness of these AML/CTF programs increases the risk of detection and disruption for those seeking to use the financial system to launder illicit proceeds. However, the use of these programs by financial institutions also enhances the attractiveness of using specialised professionals who are outside of the AML/CTF framework to facilitate and structure financial operations.<sup>7</sup> This, in turn, increases the risks faced by financial institutions when they engage in transactions facilitated by these professions, increasing their compliance burden as they implement measures to mitigate these risks.<sup>8</sup>

The regulation of legal practitioners and conveyancers under the AML/CTF regime would contribute to enhancing and systematising their awareness of ML/TF risks and aid these professionals in better understanding the identity of their clients, the source of the funds underpinning transactions and the nature of the transaction being handled. This may assist legal practitioners and conveyancers to identify early indicators of high risk transactions and criminality, and reduce their exposure to criminal liability. Suspicions about transactions would be reported earlier in the transaction chain, thereby activating the protections of the Act and providing earlier opportunities to detect and deter criminal and terrorist activities. More robust customer due diligence requirements for legal practitioners, in particular, would enhance Australia's visibility and transparency of

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<sup>3</sup> These global standards have been developed by the Financial Action Task Force (FATF), an inter-governmental policy-making body that promotes the effective implementation of measures for combating ML/TF and other related threats to the integrity of the international financial system.

<sup>4</sup> FATF Recommendation 22, criterion 22.1(d).

<sup>5</sup> Beneficial ownership refers to the individual(s) who ultimately own or control a legal entity (e.g. a corporation or trust) and/or the individual(s) on whose behalf a transaction is being conducted.

<sup>6</sup> *Ibid.*

<sup>7</sup> FATF, *Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals*, 2013, p. 7

<sup>8</sup> Australian Bankers' Association, *Submission, Statutory Review of the AML/CTF Regime*, 2014, p. 9

beneficial ownership of trust accounts and company structures that are often established or initiated by legal professionals on behalf of their clients.

The regulation of legal practitioners and conveyancers under the AML/CTF regime would:

- close a significant regulatory gap of compliance with the FATF standards
- enhance and embed a culture of awareness and understanding of ML/TF risks across these sectors and better position these professionals to prevent the misuse of their services by criminals
- harden the sector against criminal exploitation by prompting legal practitioners and conveyancers to fully consider the history and future purpose of funds being handled by them and their firm, making these sectors less attractive to criminals seeking to launder illicit cash
- standardise the collection and reporting of information that can be used to support law enforcement investigations and prosecutions of serious and organised crime and terrorism
- close intelligence gaps and improve the ability for Australia's law enforcement and intelligence community to discover, understand, and respond to money laundering, terrorist financing, and the serious offences that predicate these activities
- reduce the AML/CTF regulatory burden for the finance and banking sectors
- reduce the harm and adverse impacts of ML and TF on the Australian economy and society
- enhance national security, and
- enhance Australia's international reputation as a destination for foreign business and investment.

## 2.2 What are the money laundering and terrorism financing vulnerabilities?

The World Economic Forum identified the use of professional facilitators as one of two key enablers of money laundering, alongside the related activity of concealing beneficial ownership through complex corporate and trust structures for the purpose of illicit financial transactions.<sup>9</sup>

In this context, there is increasing concern that Australian and overseas-based organised crime groups may be misusing and exploiting the services provided by legal practitioners and conveyancers to undertake transactions to:

- conceal proceeds of crime
- obscure ultimate ownership through complex layers and legal entity structures
- evade tax and exploit known tax shelters
- evade regulatory controls, including Australia's AML/CTF regime
- provide a veneer of legitimacy to criminal activity
- create distance between criminal entities and their illicit income or wealth by using complex business and corporate structures
- avoid detection and confiscation of assets, and
- hinder law enforcement investigations.<sup>10</sup>

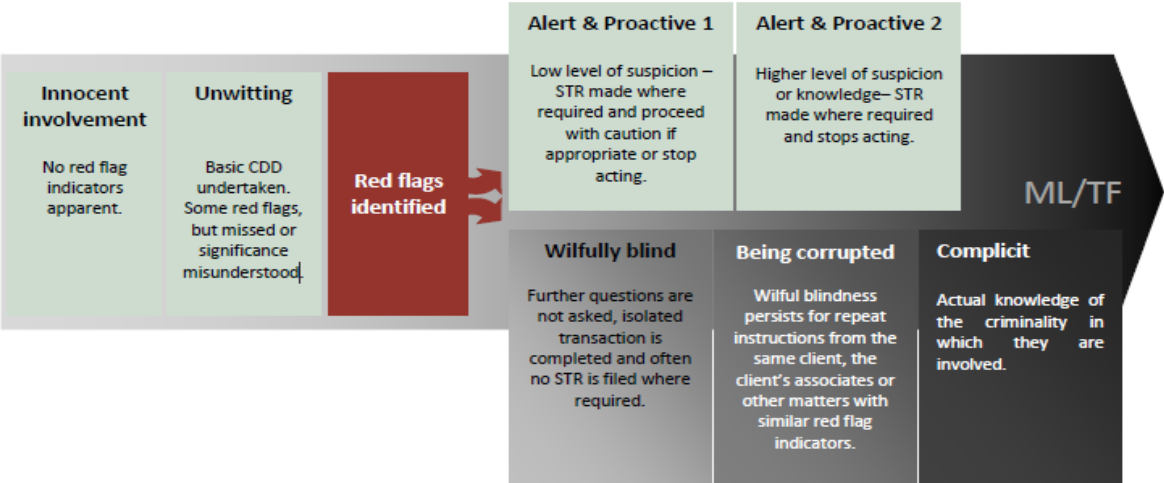
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<sup>9</sup> World Economic Forum, Global Agenda Council on Organized Crime, *Organized Crime Enablers*, July 2012

<sup>10</sup> AUSTRAC, *Strategic Analysis Brief: Money laundering through legal practitioners*, 2015, p. 5

The inter-government body that sets international standards for combating ML/TF, the Financial Action Task Force (FATF), released a report in 2013 that considered legal practitioners to be vulnerable to ML/TF because they handle a large number of financial and related transactions. After reviewing international case studies and literature, the FATF assessed that the involvement of legal practitioners in money laundering could not be described simply as either “complicit” or “unwitting”, but tended to follow a continuum from ‘innocent involvement’ to ‘complicit’ (see **Figure 1**, below).<sup>11</sup>

**FIGURE 1:**



The FATF assessed that a lack of awareness of ML/TF risks among legal practitioners inhibited the identification of ‘red flags’ and increased their vulnerability to being exploited by clients seeking to misuse otherwise legitimate legal services for ML/TF activities.<sup>12</sup> Red flags are indicators that can assist legal practitioners to take a risk-based approach to the customer due diligence obligations.<sup>13</sup> They illustrate the types of abnormal or unusual circumstances that may give rise to a reasonable suspicion that a transaction may involve ML/TF or other criminal activity.

Red flags can relate to the client, the source of the funds and the choice of lawyer or conveyancer or the nature of the retainer. These indicators should not automatically be considered as a basis for a suspicion of ML/TF, as a client may be able to provide a reasonable explanation for the circumstances surrounding the way in which a transaction is being conducted. However, where there are a number of red flag indicators, a legal practitioner or conveyancer should be alert to the possibility that ML or TF is occurring. For example, where a client is a business entity that cannot be found on the internet, avoids personal contact, uses a free-of-charge email address and uses multiple bank accounts without good reason. If a legal practitioner or conveyancer is not collecting enough information to fully understand who the client is and the nature of the transactions, they will not be able to identify red flags and conduct a proper assessment of the extent to which the client exposes them to ML/TF risks.

The FATF also identified the following key ML/TF methods that commonly use or require the services of a legal practitioner:

- use of client accounts

<sup>11</sup> FATF, *Money Laundering and Terrorist Financing Vulnerabilities of Legal practitioners*, 2013, p. 5

<sup>12</sup> *Ibid*, at 6.

<sup>13</sup> *Ibid*, at 77.

- purchase of real property
- creation of trusts and companies
- management of trusts and companies, and
- setting up and managing charities.<sup>14</sup>

The value and utility of these money laundering methodologies are not contingent on the complicity of the legal practitioner or conveyancer, as they may be unfamiliar with the signs that may indicate that their services are being misused to facilitate criminal activity. Offences have been created to ensure persons who become involved in ML/TF recklessly, or by negligently failing to undertake adequate measures to prevent their businesses being misused, are brought to justice.

Robust due diligence processes mitigate the risks associated with the full spectrum of ML/TF facilitation, from innocent involvement to criminal complicity, and are important to businesses and professionals more generally to assist them to identify the risks involved in dealing with particular customers and transactions. This point was demonstrated in a recent matter before the ACT Supreme Court.<sup>15</sup> In this matter the plaintiff was the victim of identity theft and a house which she owned was sold upon the instructions of a fraudster who provided instructions to the real estate agent and a solicitor. The property was sold and the proceeds lost. The presiding judge, Mossop AsJ, was critical in his judgment of the failure of the real estate agent and the solicitor to undertake sufficient checks to identify that their instructions were being provided by the owner of the properties.

In February 2015, the Victorian Law Reform Commission completed a review on the use of regulatory regimes to help prevent organised crime and criminal organisations entering into, or operating through, lawful occupations and industries.<sup>16</sup> The report of this review outlines three regulatory measures that may reduce the risk of professionals either wittingly or unwittingly enabling organised crime activity:

- professional ethics education and support
- customer due diligence measures, and
- accessorial liability provisions.<sup>17</sup>

## 2.3 What are the international standards?

The FATF has developed a series of Recommendations that are recognised as the international standards for combating ML/TF (and the proliferation of weapons of mass destruction). These Recommendations were most recently revised in 2012.<sup>18</sup>

The FATF Recommendations require a range of AML/CTF obligations to apply to lawyers, notaries and other independent legal practitioners 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

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<sup>14</sup> *Ibid*, at 23.

<sup>15</sup> *Astell v Australian Capital Territory* [2016] ACTSC 238.

<sup>16</sup> Victorian Law Reform Commission, *Use of Regulatory Regimes in Preventing the Infiltration of Organised Crime into Lawful Occupations and Industries*, February 2016, available online at: [http://www.lawreform.vic.gov.au/sites/default/files/VLRC\\_Regulatory\\_Regimes\\_Report\\_for\\_web.pdf](http://www.lawreform.vic.gov.au/sites/default/files/VLRC_Regulatory_Regimes_Report_for_web.pdf).

<sup>17</sup> *Ibid*, at 94.

<sup>18</sup> Financial Action Task Force, *International Standards on combating money laundering and the financing of terrorism and proliferation*, *The FATF Recommendations*, February 2012, available online at: [www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html](http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html).



- management of bank, savings or securities accounts
- organisation of contributions for the creation, operation or management of companies, and
- creation, operation or management of legal persons or arrangements, and buying and selling of business entities.<sup>19</sup>

The international standards for AML/CTF obligations for lawyers, notaries and other independent legal practitioners centre on:

- customer due diligence (customer identification and verification, ongoing due diligence, transaction monitoring and enhanced due diligence)
- applying enhanced due diligence to politically exposed persons
- assessing and mitigating the ML/TF risks associated with new technologies
- specific measures for relying on customer due diligence performed by third parties
- suspicious matter reporting
- internal controls and special measures for mitigating risks for foreign branches and subsidiaries, and
- enhanced due diligence when dealing with higher risk countries.

As Australia allows conveyancing transactions that provide for the buying and selling of real estate to be conducted by licensed conveyancers, conveyancers are also captured by the FATF Recommendations when they conduct these transactions.

As a member of the FATF, Australia periodically undergoes a mutual evaluation of its AML/CTF regime. This process assesses compliance with the FATF Recommendations and the effectiveness of AML/CTF measures. The most recent mutual evaluation for Australia was completed in April 2015 and makes a number of recommendations to enhance the operation of the AML/CTF regime.<sup>20</sup> The report strongly criticises the non-regulation of the legal profession (and a number of other sectors) under the AML/CTF regime.

The recommendations from the mutual evaluation report have been taken into account as part of the statutory review of the AML/CTF regime.

## DISCUSSION QUESTIONS

1. What services provided by legal practitioners and conveyancers pose a ML/TF risk?
2. Do any of these services pose a low ML/TF risk in the Australian context?
3. What are the effects of requiring legal practitioners and conveyancers to comply with AML/CTF obligations when performing services that may pose an ML/TF risk?
4. To what extent are due diligence obligations captured by existing regulation for legal practitioners and conveyancers?

<sup>19</sup>See FATF Recommendations 22 and 23.

<sup>20</sup>Financial Action Task Force, *Anti-money laundering and counter-terrorist financing measures, Australia: Mutual Evaluation Report, April 2015*: <http://www.fatf-gafi.org/documents/documents/mer-australia-2015.html>.

# 3. What existing laws regulate legal practitioners and conveyancers?

## 3.1 The legal profession

### *Professional and ethical obligations*

Legal practitioners are regulated on a state and territory basis. They are subject to professional and ethical rules and obligations that derive from a range of sources, including professional rules, legislation and the common law.

On 1 July 2015, New South Wales and Victoria became the first states to come under a common framework for legal regulation, with other states and territories expected to follow. This framework standardises practising certificates, billing arrangements, complaint handling processes, professional discipline issues and continuing professional development. A Legal Services Council has been established and a Commissioner for Uniform Legal Services Regulation appointed to oversee the implementation of the uniform framework.

Seven different regulatory frameworks continue to operate at the state and territory level to deal with the day-to-day regulation of legal professions. Regulation is currently based on a co-regulatory model, which includes Law Societies and Bar Associations, independent statutory authorities, and the Supreme Courts in each State and Territory.

Independent statutory authorities with regulatory roles include the:

- Legal Services Board and Legal Services Commissioner, Victoria
- Legal Services Commissioner, New South Wales
- Legal Services Commission, Queensland
- Legal Practice Board, Western Australia
- Legal Practitioners Conduct Board, South Australia, and
- Legal Practice Board of Tasmania.

There are 16 Australian State and Territory Law Societies and Bar Associations some of which perform certain regulatory functions, for example, issuing licences to practice, establishing rules and professional standards, and investigating complaints of professional misconduct and unsatisfactory conduct under delegation. These Law Societies and Bar Associations include the:

- Australian Capital Territory Law Society
- Australian Capital Territory Bar Association
- Law Society of New South Wales
- New South Wales Bar Association
- Law Society Northern Territory
- Northern Territory Bar Association
- Queensland Law Society
- Bar Association of Queensland
- Law Society of South Australia
- South Australian Bar Association

- Tasmanian Independent Bar
- Law Society of Tasmania
- Law Institute of Victoria
- The Victorian Bar
- Law Society of Western Australia, and
- Western Australian Bar Association

The Law Council of Australia (LCA) represents these 16 State and Territory Law Societies and Bar Associations (the LCA Constituent Bodies) at the national and international level.

The legal and professional obligations for legal practitioners are enforceable. A legal practitioner found guilty of unsatisfactory professional conduct or, in more serious cases, professional misconduct, can be subject to disciplinary action by the relevant regulatory authority. Sanctions available for findings of misconduct range from cautions, reprimands and pecuniary fines to being struck off the roll of practitioners and imprisonment.<sup>21</sup> This is in addition to any civil or criminal liabilities that might arise from the conduct.

Further, existing regulation requires independent statutory regulators (their delegates or staff) to report to the police (or other investigative or prosecution authority) any serious offences that they suspect on reasonable grounds involves a lawyer or member of a law practice.<sup>22</sup>

The *Australian Solicitors Conduct Rules* (ASCR) apply as principle-based statements of a legal practitioner's professional obligations.<sup>23</sup> The Rules are designed to assist solicitors to act ethically and in accordance with the principles of professional conduct established by the common law and the ASCR. For example, adherence to the conduct rules requires that lawyers uphold the law and only advise clients about lawful conduct. As lawyers can only accept a client's lawful competent instructions, they cannot wilfully or negligently allow their practices to be used to facilitate or further any unlawful purpose. In considering whether a solicitor has engaged in unsatisfactory professional conduct or professional misconduct, the ASCR apply in addition to the common law. In this way, the conduct rules and legal profession legislation form a comprehensive regulatory framework that covers every aspect of legal practice. Any breach of the Rules or legislative provisions can constitute unsatisfactory professional conduct or misconduct.

Legal practitioners must also comply with obligations under State and Territory legislation when they hold money on behalf of clients (or third party payers) in the course of their work. This legislation includes detailed accounting processes for the independent oversight of law practice and trust accounts.

The regulatory framework for legal practitioners in Australia is extensive and robust. However the intent and scope of the regulation is aimed at the preservation of high standards of professional conduct, an aspect of which includes preventing and detecting irregularities or suspected irregularities involving funds entrusted to the law practice in the course of the provision of legal services.

However, the regulation does not address the specific risk that services provided by legal practitioners may be misused for ML/TF purposes without the lawyer's knowledge. For example, the regulatory obligations that apply to trust accounts are stringent and focus on managing those accounts, rather than examining the purpose,

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<sup>21</sup> See for example *Legal Profession Act 2007* (Qld) S24(1), S25(1) and (2); s74(1), s115(2),s121(1) (a), s354(1) and *Legal Profession Uniform Law Application Act 2014* (NSW) at ss 10, 148, 353,643, 675. These provisions are replicated in the corresponding law of every state/territory.

<sup>22</sup> See for example *Legal Profession Uniform Law Act 2014* (NSW) at section 465. This provision is replicated in the corresponding law of every state/territory.

<sup>23</sup> Available online at [http://www.lawcouncil.asn.au/lawcouncil/images/Aus\\_Solicitors\\_Conduct\\_Rules.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/Aus_Solicitors_Conduct_Rules.pdf).

source and legitimacy of the funds placed in the account and the client's proposed transaction. However, any model for AML/CTF regulation of the profession should leverage existing regulation wherever possible.

### *Existing AML/CTF regulatory obligations*

Legal practitioners are partly regulated under Australia's AML/CTF regime.

Under section 15A of the *Financial Transaction Reports Act 1988* (FTR Act), solicitors, solicitor corporations, and partnerships of solicitors have obligations to provide significant cash transaction reports (SCTRs) to AUSTRAC. The reporting obligation under section 15A of the FTR Act is triggered if a significant cash transaction is entered into by, or on behalf of, a solicitor in the course of practicing as a solicitor. A 'significant cash transaction' is defined as meaning a cash transaction involving the transfer of currency equivalent to \$10,000 AUD or more. SCTRs require only the details of transactions involving threshold amounts of cash. No subjective or value judgment about the client, the lawfulness of the funds or transactions is required.

Legal practitioners are generally not *reporting entities* subject to the customer verification, suspicious matter reporting, or international transaction reporting requirements of the AML/CTF Act. Legal practitioners are only subject to the reporting obligations of the AML/CTF Act where the solicitor provides a 'designated service' under the Act, except in situations where solicitors are specifically exempted from those reporting obligations. However, the majority of legal practitioners do not provide 'designated services' as currently defined under the Act.

The Law Council of Australia has published an *Anti-Money Laundering Guide for legal practitioners*, most recently updated in January 2016.<sup>24</sup>

## **3.2 Conveyancers**

Conveyancing is the process of transferring ownership of a legal title of land (property) from one person or entity to another and is usually completed in Australia by a licensed or registered conveyancer or a solicitor. This activity is currently not subject to AML/CTF regulatory or reporting oversight.

Conveyancers are currently licensed or registered to undertake conveyances in New South Wales, the Northern Territory, South Australia, Tasmania, Victoria and Western Australia. Conveyancers are not licenced to operate in either Queensland or the ACT, where conveyancing is undertaken by solicitors only. Licensing and registration requirements are similar across Australia. For example, NSW Fair Trading issues conveyancer licences and regulates the sector. A licensee must renew their licence annually to continue to practice as a conveyancer. This process requires licensees to undertake continuing professional development courses, keep up to date with changes in legislation and professional issues and have sufficient professional indemnity insurance.

In 2010, the Property Exchange Australia (PEXA) was established as an online property exchange network to facilitate national electronic conveyancing. Members of PEXA (typically lawyers, conveyancers and financial institutions) can lodge documents with Land Registries and complete financial settlements electronically. The Australian Registrars' National Electronic Conveyancing Council (ARNECC) has developed a regulatory framework, under which PEXA operates. This includes the Participation Agreement, and Verification of Identity and Digital Certificates. To ensure consistency between paper and electronic transactions, the Verification of Identity standards apply to both types of transaction in Victoria and NSW and are expected to apply in all other jurisdictions by 2017-2018.

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<sup>24</sup> Law Council of Australia, *Anti-money laundering guide for legal practitioners* (2016), available online at: [http://www.lawcouncil.asn.au/lawcouncil/images/LCA\\_AML\\_Guide\\_for\\_Legal\\_Practitioners-\\_updated.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/LCA_AML_Guide_for_Legal_Practitioners-_updated.pdf).

Any model for the AML/CTF regulation of conveyancers should leverage existing customer due diligence obligations for conveyancers under the electronic conveyancing framework.

#### **DISCUSSION QUESTION**

5. To what extent do existing mechanisms that require regulatory oversight of legal practitioners and conveyancers mitigate any ML/TF risks that may be posed by the services they provide?
6. To what extent are due diligence obligations captured by existing regulation for legal practitioners and conveyancers at a national, state or territory level?
7. Is there evidence of a systemic problem with legal practitioners allowing ML or TF to occur by (negligently, recklessly or complicitly) failing to institute adequate measures?
8. Is more regulatory oversight of legal practitioners and conveyancers justifiable?

## 4. What are the obligations under the AML/CTF regime?

### 4.1 Existing AML/CTF obligations

In Australia, the AML/CTF Act provides the legislative framework under which regulated businesses (known as 'reporting entities') are regulated for AML/CTF purposes. The details of these obligations are set out in the *Anti-Money Laundering and Counter-Terrorism Financing Rules* (AML/CTF Rules).<sup>25</sup>

Businesses are supervised for compliance with their AML/CTF obligations by AUSTRAC, Australia's financial intelligence unit (FIU) and the AML/CTF regulator.

Businesses that provide a regulated service under the AML/CTF Act (a 'designated service') generally have obligations to:

- enrol with AUSTRAC
- register with AUSTRAC if the reporting entity provides a remittance service
- conduct customer due diligence
- implement ongoing customer due diligence procedures
- implement and maintain an AML/CTF compliance program
- lodge transaction and suspicious matter reports (SMRs), and
- comply with various AML/CTF related record-keeping obligations.

An explanation of these obligations is provided at **Annexure A**.

Customer due diligence is a central obligation and regulated businesses are required to identify and verify each of their customers so those businesses can:

- determine the ML/TF risk posed by each customer
- decide whether to proceed with a business relationship or transaction, and
- assess the level of future monitoring required.

Customer due diligence requirements under the AML/CTF regime include:

- considering the broader risks associated with customers
- collecting identification information in relation to customers
- collecting identification information about who owns and controls customers
- verifying information, and
- performing ongoing customer due diligence and monitoring - including scrutiny of transactions.

The AML/CTF regime does not adopt a 'one-size-fits-all' approach to AML/CTF regulation. The risk-based approach is a key pillar of Australia's AML/CTF regime and central to the effective implementation of the FATF standards. It allows businesses to implement their obligations in a way which is proportionate to their level of ML/TF risk. This approach recognises that the regulated business is in the best position to assess the ML/TF risks posed by its customers, delivery channels, products and services and allows these businesses to allocate resources for AML/CTF measures in an efficient and proportionate way. Exemptions from complying with

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<sup>25</sup> The AML/CTF Rules are contained in the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1). See <https://www.legislation.gov.au/Series/F2007L01000>.

AML/CTF obligations can be provided under the AML/CTF Act and the AML/CTF Rules.<sup>26</sup> Applications for exemptions are assessed on a case-by-case basis and granted where there is evidence that a service, or the circumstances surrounding the provision of a service, poses a low ML/TF risk.

AML/CTF obligations can also be modified in the AML/CTF Rules. For example, regulated businesses can use simplified customer due diligence procedures on customers in certain circumstances.<sup>27</sup> The simplified customer due diligence procedures can provide significant regulatory relief for some regulated businesses.

## 4.2 AUSTRAC's role

As Australia's FIU and AML/CTF regulator, AUSTRAC's objective is to detect, deter and disrupt the ML/TF risks and threats that affect Australia's financial system, and to contribute to the growth of Australia's economy.

AUSTRAC collects and analyses financial transaction reports submitted under the AML/CTF Act to develop and disseminate actionable financial intelligence to national and international law enforcement, national security, revenue and regulatory agencies, as well as international counterparts, for investigation.

AUSTRAC's financial intelligence is an integral element in the detection and investigation of serious and organised crime, ML/TF and tax evasion.

As part of its regulatory role, AUSTRAC works collaboratively with its regulated population to promote compliance with the obligations of the AML/CTF Act by providing, among other things, guidance and assistance to reporting entities. AUSTRAC also assesses reporting entities' compliance with AML/CTF obligations and undertakes enforcement action where serious non-compliance is identified.

In performing its regulatory functions, AUSTRAC must ensure, among other things, that the AML/CTF regime supports economic efficiency and competitive neutrality.

## 4.3 Approaches adopted in other countries

In recent years, the regulation of legal practitioners under AML/CTF regimes in line with the FATF's international standards has increased, particularly within the member states of the European Union (EU) and across Asia. For example, Bangladesh, Hong Kong, Singapore, Malaysia, Spain, Belgium, and Switzerland all regulate lawyers with varying levels of effectiveness.

While the extension of the AML/CTF Act to encompass gatekeepers would meet Australia's international obligations, this policy driver is secondary to the pursuit of a robust AML/CTF regime in Australia. The lack of oversight of gatekeepers, including the legal services profession, compromises the strength of the broader AML/CTF regime and provides a "back-door" through which the regulated banking and finance sectors can be exploited for ML/TF purposes

The United Kingdom has regulated legal practitioners for AML/CTF purposes for a number of years. Obligations are imposed under the *Money Laundering Regulations 2007* and the Law Society of England and Wales has a statutory regulatory arm that regulates lawyers for AML/CTF purposes (the Solicitors Regulation Authority).<sup>28</sup> Obligations include customer due diligence, ongoing monitoring, record-keeping, and reporting obligations,

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<sup>26</sup> For example, section 248 of the AML/CTF Act provide for exemptions and modifications of AML/CTF obligations by the AUSTRAC CEO. The AUSTRAC CEO may also grant exemptions from obligations under the FTR Act. Since 2006, the AUSTRAC CEO has granted approximately 120 exemptions to regulated businesses in accordance with AUSTRAC's Exemption policy.

<sup>27</sup> Paragraphs 4.2.10 to 4.2.13 of the AML/CTF Rules and Parts 4.3 and 4.4 of the AML/CTF Rules.

<sup>28</sup> The Money Laundering Regulations are available online at: [http://www.legislation.gov.uk/uksi/2007/2157/contents/made?utm\\_source=Mondaq&utm\\_medium=syndication&utm\\_campaign=inter-article-link](http://www.legislation.gov.uk/uksi/2007/2157/contents/made?utm_source=Mondaq&utm_medium=syndication&utm_campaign=inter-article-link)

including suspicious activity reporting (SAR) obligations. However, the number of SARs lodged by legal practitioners is low and the quality of the reports poor.<sup>29</sup>

The UK Government reviewed the SARs regime in 2015 and concluded that both the public and private sectors are investing too many resources in ‘dealing reactively with relatively low risk transactions’. These findings underpin proposals for significant reforms to the SARs regime detailed in the UK Government’s *Action Plan for anti-money laundering and counter-terrorist finance*, released in April 2016.<sup>30</sup> These proposals reforms include measures aimed at building a stronger partnership between government and the private sector, enhancing the law enforcement response, improving the effectiveness of the supervisory regime and increasing international outreach.

Some legal professionals in New Zealand are subject to a number of AML/CTF obligations under the *Financial Transactions Reporting Act 1996* (NZ FTR Act), including:

- verification of the identity of customers and agents of a transaction
- submission of suspicious matter reports to the Commissioner of Police, and
- retention of transaction and identification verification records.<sup>31</sup>

These obligations apply primarily in instances when a legal professional receives funds in the course of the customer’s business for the purposes of a deposit or investment, or for the purpose of settling real estate transactions.<sup>32</sup> Section 44 of the NZ FTR Act provides protection from criminal, civil and disciplinary proceedings for a person who supplies information about a suspicious transaction if the information is provided in good faith. The obligation for legal practitioners to report suspicious transactions under the NZ FTR Act in certain circumstances does not appear to have caused significant practical issues, although report numbers are low.

The New Zealand Government has recently committed to passing legislation to regulate legal professionals (and real estate agents, accountants, trust and company service providers, gambling service providers, conveyancers and high-value goods dealers) more generally under their AML/CTF regime in 2017. A consultation paper was released to industry in August 2016 inviting public comment.<sup>33</sup> The New Zealand Law Society lodged a submission in response to this paper, indicating that they recognised the case for regulating lawyers for AML/CTF purposes.<sup>34</sup> A key concern for the New Zealand Law Society is that ‘the new obligations will need to be carefully crafted to ensure the solicitor/client relationship is preserved to the greatest extent possible, while still delivering on New Zealand’s AML/CFT commitments to the international community’.<sup>35</sup>

While Canada passed legislation and regulations that included provisions to regulate legal practitioners under the AML/CTF regime more than a decade ago, the provisions pertaining to the legal profession remained inoperative pending a challenge to the validity of the laws by the Canadian Federation of Law Societies. The Canadian Federation of Law Societies has acknowledged that requiring lawyers and notaries to take measures to

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<sup>29</sup> Sahota, Roger, *Would your AML practices make the SRA ‘raise an eyebrow’?*, Solicitors Journal, September 2015, available online at: [www.solicitorsjournal.com/comment/would-your-aml-practices-make-sra-raise-eyebrow](http://www.solicitorsjournal.com/comment/would-your-aml-practices-make-sra-raise-eyebrow)

<sup>30</sup> Available online at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/517992/6-2118-Action\\_Plan\\_for\\_Anti-Money\\_Launding\\_\\_web\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/517992/6-2118-Action_Plan_for_Anti-Money_Launding__web_.pdf)

<sup>31</sup> Section 3(1)(l) of the New Zealand *Financial Transactions Reporting Act 1996* defines a “financial institution” to include: a lawyer or an incorporated law firm, but only to the extent that the lawyer or incorporated law firm receives funds in the course of their business (i) for the purposes of deposit or investment, or (ii) for the purposes of settling real estate transactions.

<sup>32</sup> Anti-Money Laundering Forum, *New Zealand: Are lawyers covered by anti-money laundering legislation*, available online at: [http://www.anti-moneylaundering.org/asiapacific/New\\_Zealand.aspx](http://www.anti-moneylaundering.org/asiapacific/New_Zealand.aspx) (viewed on 29 January 2016)

<sup>33</sup> New Zealand Ministry for Justice, *Improving New Zealand’s ability to tackle money laundering and terrorist financing*, [https://consultations.justice.govt.nz/comms/tackling-money-laundering-and-terrorist-financing/user\\_uploads/aml-phase-2-draft-consultation-document-v4.pdf](https://consultations.justice.govt.nz/comms/tackling-money-laundering-and-terrorist-financing/user_uploads/aml-phase-2-draft-consultation-document-v4.pdf).

<sup>34</sup> Available online at: [https://www.lawsociety.org.nz/\\_data/assets/pdf\\_file/0010/105004/l-MOJ-AMLCTF-Phase-Two-consultation-16-9-16.pdf](https://www.lawsociety.org.nz/_data/assets/pdf_file/0010/105004/l-MOJ-AMLCTF-Phase-Two-consultation-16-9-16.pdf)

<sup>35</sup> *Ibid*, at 2.



deter criminals from involving them in money laundering and finance terrorism is a valid societal goal, but considered that the regime itself failed to comply with Canada's fundamental constitutional principles. The Canadian Federation of Law Societies also considered that the establishment and enforcement of rules for client identification, verification and cash handling obviated the need for the involvement of another regulator for AML/CTF purposes.

In 2015 the Canadian Supreme Court struck down these provisions and concluded that they violated protections in the Charter of Rights against unreasonable search and seizure, and the rights of security of the person, and were unconstitutional because they violated solicitor-client privilege.<sup>36</sup> The Canadian Government is currently considering how it will respond to this decision.

Legal professionals are not currently captured by the *Currency and Foreign Transactions Reporting Act of 1970* (Bank Secrecy Act) or any other legislation imposing AML/CTF regulation in the United States. In the absence of any specific anti-money laundering legislation applicable to lawyers, the American Bar Association and other bar and specialty law associations developed and adopted *Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing* (Good Practices Guidance) in 2010.<sup>37</sup>

#### DISCUSSION QUESTION

9. What lessons can be learned from the experience of regulating legal practitioners under AML/CTF regimes in other jurisdictions?

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<sup>36</sup> *Canada (Attorney General) v Federation of Law Societies of Canada* [2015] 1 SCR 401.

<sup>37</sup> American Bar Association, *Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing*, 2010

# 5. How would AML/CTF obligations impact on the legal profession and conveyancers?

## 5.1 Legal professional privilege

Legal professional privilege protects the disclosure of certain communications between a legal practitioner and a client when these communications are for the dominant purpose of seeking or providing legal advice (advice privilege), or for use in existing or anticipated legal proceedings (litigation privilege).<sup>38</sup> The privilege belongs to the client, enabling the client to provide full and frank disclosure to his or her legal practitioner knowing that this information will not be used against them. This full and frank disclosure is important because it enables lawyers to provide competent and independent legal advice.

In Australia, legal professional privilege is governed by the common law and statute (under the Evidence Acts of the Commonwealth, states and territories).<sup>39</sup> The statutory privilege under each of the Evidence Acts is generally known as ‘client legal privilege’ and overrides the common law to the extent of any inconsistency. While the statutory privileges are substantially the same across these pieces of legislation, there are some minor variations.

While section 242 of the AML/CTF Act provides that the Act does not affect the law relating to legal professional privilege, representatives from the Australia legal profession have expressed concern that these provisions would not be sufficient to protect legal professional privilege from erosion if legal practitioners are regulated for AML/CTF purposes and, more specifically, required to comply with SMR obligations.<sup>40</sup> Legal profession representatives have also raised concerns about:

- balancing professional obligations relating to legal professional privilege with AML/CTF obligations
- the extent of the scope of legal professional privilege as it applies in the AML/CTF context
- the impact that SMR obligations will have on a client’s willingness to provide full and frank disclosure to his or her legal practitioner
- the possibility that clients may withhold information from their legal practitioner because they fear the information may be used against them, thus making it more difficult for legal practitioners to provide competent and independent legal advice, and
- the timelines for providing SMRs and the potential for this to affect legal professional privilege (in some instances, determining whether legal professional privilege applies is not a straight forward exercise, but requires a complex assessment of the relevant circumstances).

Legal professional privilege issues may also arise where an AML/CTF regulator is exercising search and seizure powers relating to a legal practitioner or a legal firm.

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<sup>38</sup> *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49 at 64–65 [35]; *Daniels Corporations International Pty Ltd v Australian Competition & Consumer Commission* (2002) 213 CLR 543 at 552 [9].

<sup>39</sup> Evidence Act 1995 (Cth), Evidence Act 1995 (NSW), Evidence Act 2001 (Tas), Evidence (National Uniform Legislation) Act 2011, and (NT) Evidence Act 2008 (Vic).

<sup>40</sup> For example, see the Law Council of Australia’s submission to the statutory review of the AML/CTF regime, available at: <https://www.ag.gov.au/Consultations/Documents/StatutoryReviewAnti-MoneyLaunderingAndCounter-TerrorismFinancingActCth200/law-council-of-australia-30april2014.pdf>.

There are a number of communications between a legal practitioner and a client that do not attract legal professional privilege. For example, legal practitioners are permitted to disclose information that would otherwise be viewed as confidential or subject to legal professional privilege if:

- they are permitted or compelled by law to disclose that information, or
- the information is disclosed for the sole purpose of avoiding the probable commission of a serious criminal offence.

Legal professional privilege also does not apply to:

- documents that constitute or evidence a transaction (e.g. trust deeds) even if they're delivered to a legal practitioner for the purposes of obtaining advice or for use in litigation
- the names of a client, and
- advice to facilitate a crime, fraud or civil offence that was the demonstrated purpose of the communication whether or not the legal practitioner is aware of the improper purpose.<sup>41</sup>

The regulation of Australian legal practitioners under the existing AML/CTF regime may cause tension between some of a practitioner's obligations under the AML/CTF Act and a practitioner's professional and legal obligation not to disclose communications that are subject to legal professional privilege. More specifically, this tension may arise where a legal practitioner has an obligation to lodge a suspicious matter report relating to a customer or a transaction, or the legal practitioner is asked by the AML/CTF supervisor to provide information relating to a customer or a transaction, and that information is subject to legal professional privilege.

#### *Suspicious matter reports*

Suspicious matter reporting is a key obligation under the AML/CTF Act. This reporting provides financial intelligence which can be analysed by AUSTRAC and used by government agencies to detect and prevent ML/TF and other serious crimes.

The existing obligation under the AML/CTF Act for businesses to identify suspicious activity and provide AUSTRAC with a suspicious matter report arises when the business forms a suspicion on reasonable grounds that:

- a person (or their agent) is not the person they claim to be, or
- information the reporting entity has may be:
  - relevant to investigate or prosecute a person for an evasion (or attempted evasion) of a tax law, or an offence against a Commonwealth, state or territory law, or
  - of assistance in enforcing the *Proceeds of Crime Act 2002* (or regulations under that Act), or a state or territory law that corresponds to that Act or its regulations, or
- providing the requested service may be:
  - preparatory to committing an offence related to money laundering or terrorism financing, or
  - relevant to the investigation or prosecution of a person for an offence related to money laundering or terrorism financing.<sup>42</sup>

The test for forming a 'suspicion on reasonable grounds' is a subjective one. It generally means that a regulated business has concluded from all the circumstances and information available that a SMR must be submitted. The subjectivity of this test creates a specific challenge for legal practitioners where a communication with a

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<sup>41</sup> *Baker v Campbell* (1983) 49 ALR 385 at 409.

<sup>42</sup> Section 41, AML/CTF Act.

client that may otherwise be subject to legal professional privilege gives rise to a ‘suspicion on reasonable grounds’.

Suspicious matter reporting relies on the regulated professional having sufficient knowledge of the client and the transaction in order to detect unusual patterns in instructions and inconsistency of purpose, and judge when the transaction is suspicious. In practice this would mean that, where a professional develops a concern about a financial arrangement, the professional should learn sufficient information about the client and the source or final destination of any funds involved in the arrangement, including as necessary seeking information from the professionals, if any, on the other side. The professional should then consider whether a suspicious matter report should be made. Where a professional acts in good faith in forming a suspicion of illegal activity and making a suspicious matter report under the AML/CTF Act, the professional will be immune from any action, suit or proceeding.

In circumstances where a professional submits a SMR under the AML/CTF regime, they are prohibited under section 123 of that Act from disclosing the fact that the report is being lodged, or has been lodged, with AUSTRAC. Section 124 of the AML/CTF Act provides that information about, or that is related to, a suspicious matter report is generally not admissible in court or tribunal proceedings.

Any legal practitioner regulated under the current AML/CTF regime and subject to SMR obligations needs to manage various professional responsibilities. In some circumstances, it may be appropriate for the legal practitioner to advise their client in relation to the offence of money laundering. Advice that seeks to dissuade a client from engaging in illegal activity does not amount to tipping off. If the legal practitioner deems it necessary to report suspicious matter activity, then relevant professional standards may require the legal practitioner to no longer act for the client. Once again this would need to be managed in a manner that takes into account the risk of tipping off the client. Legal practitioners would also need to consider the possible application of legal professional privilege.

## 5.2 Client confidentiality

The concept of client confidentiality applies to a range of professionals and all information obtained in the course of the professional’s interaction with clients and potential clients. In most countries, confidentiality can be waived by the client or overridden by express provisions in law.

While client confidentiality is an important part of the relationship that many professionals have with their clients, confidentiality must not be used as a shield for money laundering or terrorist financing activity.

## 5.3 Regulatory impact

The regulation of legal practitioners and conveyancers under the AML/CTF regime would have a regulatory impact, as these professionals would need to bear the initial costs associated with establishing and implementing AML/CTF systems and controls, and ongoing costs to maintain those systems and controls.

The legal services sector is characterised by small business enterprises. While the sector includes ‘the big six’ major firms, it predominantly comprises small firms, with sole practitioners or partnerships not employing any additional non-partner staff, representing over half of all firms.<sup>43</sup> The four largest firms account for less than 10 per cent of industry revenue, indicating a low level of market share concentration. A number of firms have a parent firm domiciled in a foreign country that imposes AML/CTF regulation on the legal sector and already have AML/CTF measures embedded into their Australian operations.

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<sup>43</sup> IBIS World, *Industry Report M6931: Legal Services in Australia*, 2015, p. 13, 19 and 23. The ‘the big six’ firms are Herbert Smith Freehills, Allens, Minter Ellison, Clayton Utz, King & Wood Mallesons, and Ashurst Australia.

The degree of impact on individual small businesses beyond the fundamental cost and burden common to all regulated entities would vary depending on the degree of their ML/TF risks and the measures they implement to manage and mitigate these risks.

## 5.4 Regulatory mitigation

The FATF provides for a number of measures to minimise the regulatory impact of AML/CTF regulation.

### *Focus regulation on services that pose a high ML/TF risk*

The FATF standards require the following services provided by ‘lawyers, notaries, [and] other independent legal professionals’ to be regulated under an AML/CTF regime:

- buying and selling of 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, and
- creating, operating or managing legal persons or arrangements, and buying and selling of business entities.

The focus of the FATF standards is on independent practitioners and excludes the activities of ‘internal’ (i.e. in-house) practitioners that provide services to an employer rather than a client.<sup>44</sup> ‘Internal’ would generally encompass legal practitioners that:

- are employed solely by other types of businesses for which they provide legal advice
- do not operate independent accounts or trust accounts for their employer, and
- do not provide services directly to third parties, including clients and business associates of their employer.

Many legal practitioners do not provide the types of services specified in the FATF standards and are unlikely to ever have any AML/CTF obligations. For example, criminal lawyers and general litigation practices.

The FATF standards allow countries to permit regulated businesses to apply simplified customer due diligence measures where lower risks have been identified. The AML/CTF Rules currently provide for the following simplified verification procedures:

- streamlined ‘safe harbour’ procedures for verifying medium or lower ML/TF risk customers who are individuals,<sup>45</sup>
- exemptions from the obligation to determine the beneficial owner of a customer for certain types of customers,<sup>46</sup> and
- simplified verification procedures for certain low ML/TF risk companies and trusts.<sup>47</sup>

These procedures constitute ‘simplified CDD’ and could provide regulatory relief for some legal practitioners and conveyancers under an AML/CTF regulatory model.

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<sup>44</sup> Financial Action Task Force, *RBA Guidance for Legal Professionals* (2008), available online at: <http://www.fatf-gafi.org/media/fatf/documents/reports/RBA%20Legal%20professions.pdf>

<sup>45</sup> Paragraphs 4.2.10 to 4.2.13 of the AML/CTF Rules.

<sup>46</sup> Paragraph 4.12.2 of the AML/CTF Rules.

<sup>47</sup> Parts 4.3 and 4.4 of the AML/CTF Rules.

AUSTRAC can also provide exemptions from obligations on a case-by-case basis; these are granted where there is evidence that a service, or the circumstances surrounding the provision of a service, poses a low ML/TF risk.<sup>48</sup>

### *The risk-based approach*

The risk-based approach to regulation of the AML/CTF Act may assist some firms to minimise compliance costs. The risk-based approach recognises that it is impractical to apply an equal level of vigilance to every client or transaction. Instead, it encourages directing resources and effort towards clients and transactions with a higher potential for ML/TF. This means that affected businesses must implement controls that are in proportion to the risk of ML/TF that they face.

In practice, a risk-based approach would require a professional to consider the ML/TF risk of each client, taking into account relevant risk factors including the type of client, the jurisdictions they deal with, the services they provide and the method through which they provide them, as well as the nature, size and complexity of the client's business. Clients considered to pose a higher ML/TF risk would need to provide additional information to that normally required. Likewise, compliance reporting may well be more strategically targeted based on the assessment of risk particular to a service such as advice on corporate arrangements. A small business that provides a low risk service involving low monetary values to members of a local community may incur lower compliance costs. On the other hand, a large business that provides a high risk service involving substantial sums of cash to foreign nationals or is involved in establishing large or complex corporate structures would be expected to incur significantly greater compliance costs. However, these larger businesses will also benefit from economies of scale and organisational efficiencies.

### *Staggered implementation*

When the AML/CTF Act was introduced, the obligations imposed on regulated businesses were phased in over a period of up to three years, with the first set of obligations not commencing until at least 12 months after the Act received Royal Assent. This gave businesses time to understand their obligations, and to develop cost effective policies and procedures to meet them. As the AML/CTF regulator, AUSTRAC provided assistance to support industry in efforts to comply with obligations under the new legislation and continues to consult with industry on their education and training needs on an ongoing basis.

If the Government decides to introduce AML/CTF regulation for legal practitioners and conveyancers, the same transitional arrangements could be considered.

## **DISCUSSION QUESTIONS**

10. How would AML/CTF obligations impact on client confidentiality and other ethical obligations of legal practitioners and conveyancers? In particular, how would the AML/CTF obligations impact on legal professional privilege?
11. What impact would AML/CTF compliance costs have on access to legal services within the community?
12. What additional administrative structures will legal practitioners need to put in place to comply with the requirements of the AML/CTF regime?
13. How would regulating the legal profession for AML/CTF purposes impact on the delivery of services to clients (particularly in the context of urgent legal matters that require immediate advice)?
14. What other aspects of the legal profession would be impacted by AML/CTF obligations?
15. Would regulation as a reporting entity under the AML/CTF Act affect the independent referral bar? What regulatory model would minimise the impact on the independent referral bar (e.g. reliance on CDD performed by instructing solicitors and /or clerks operate the trust) accounts)?

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<sup>48</sup> See Chapter 4 for a discussion of exemption processes under the current AML/CTF regime.

## 6. Other impacts

### 6.1 Access to legal services

Legal practitioners are comprehensively regulated under state and territory laws that cover every aspect of legal practice.

Additional regulation of legal practitioners under the AML/CTF Act is likely to impact on consumers of legal services. This can include anyone buying a family home, operating a small business, drafting an estate plan, creating a trust or people selling property as a result of a marital or family breakdown.

#### DISCUSSION QUESTIONS

16. What broader impacts could the regulation of AML/CTF legal practitioners and conveyancers have?

## 7. Model for regulation

Any AML/CTF obligations proposed for legal practitioners and conveyancers should be efficient, proportionate to ML/TF risks, and tailored to the nature of the services provided by these professions. For legal practitioners, the proposed model for regulation should take into account the *sui generis* nature of the relationship between a legal practitioner and his or her client.

The existing regulatory model under the AML/CTF regime is the starting point for consultation on a proposed regulatory model for legal practitioners and conveyancers. The consultation process will explore whether and how the obligations under this regime could be applied to legal practitioners and conveyancers, having regard to the FATF standards.

The key obligations under the existing regulatory model are set out in Table 1 below and discussion questions posed as to how these obligations might be applied to services provided by legal practitioners and conveyancers.

### 7.1 Enrolment and scope of services

OBLIGATION	DISCUSSION QUESTIONS
<p>Under the current regime, it is mandatory for all businesses with obligations under the AML/CTF Act to be enrolled on AUSTRAC's Reporting Entities Roll. This obligation applies to all businesses that provide a 'designated service' under section 6 of the AML/CTF Act and all providers of remittance services.</p> <p><b>COMMENT:</b></p> <p>The enrolment process, which is administrative in nature and does not attract any fees, provides AUSTRAC with information on every entity it regulates. This includes details about:</p> <ul style="list-style-type: none"> <li>- business structure</li> <li>- number of employees</li> <li>- annual earnings, and</li> <li>- the designated services they provide.</li> </ul> <p>This information is also used by AUSTRAC to understand and monitor the regulated population, and identify the entities subject to the annual AUSTRAC Industry Contribution<sup>49</sup> (based on earnings and transaction reporting criteria) and the amount that applies to each billable entity.</p> <p>Businesses must enrol with AUSTRAC and be entered on the Reporting Entities Roll before they commence to provide designated services to their clients. Regulated businesses are required to advise AUSTRAC of any changes to their enrolment details within 14 days of the change arising. Penalties may apply to failing to enrol with AUSTRAC.</p>	<ul style="list-style-type: none"> <li>• What professional activities undertaken by legal practitioners and conveyancers should become 'designated services' for the purposes of the AML/CTF Act?</li> <li>• Should legal practitioners and conveyancers be required to enrol with AUSTRAC?             <ul style="list-style-type: none"> <li>- Or are existing obligations for these professionals to be enrolled/licensed sufficient?</li> <li>- If these existing obligations are sufficient, how would any AML/CTF regulator for these sectors identify the regulated population?</li> </ul> </li> </ul>

<sup>49</sup> Information on Industry Contribution is available at: <http://www.austrac.gov.au/austrac-industry-contribution-information>



## 7.2 Customer due diligence (CDD)

EXISTING OBLIGATIONS	DISCUSSION QUESTIONS
<p>A business that provides designated services regulated under the AML/CTF Act must conduct CDD measures that allow the business to be reasonably satisfied that:</p> <ul style="list-style-type: none"> <li>• an individual customer is who they claim to be, and</li> <li>• for a non-individual customer, the customer exists and their beneficial ownership and/or control details are known.</li> </ul> <p>The CDD measures include:</p> <ul style="list-style-type: none"> <li>• collecting and verifying customer identification information - for example, identity documents, data or other information which can be verified using a reliable and independent source</li> <li>• identifying and verifying the beneficial owner(s) of a customer</li> <li>• identifying whether a customer is a politically exposed person (PEP) (or an associate of a PEP) and taking steps to establish the source of funds used during the business relationship or transaction<sup>50</sup></li> <li>• ongoing customer due diligence and transaction monitoring, and</li> <li>• obtaining information on the purpose and intended nature of the business relationship.</li> </ul> <p>Once a regulated business has established who is a beneficial owner or owners of a client, the business must collect at least the following information in relation to each individual beneficial owner:</p> <ul style="list-style-type: none"> <li>• full name, and</li> <li>• date of birth or full residential address.</li> </ul> <p>The business must take <u>reasonable measures</u> to verify the information it collects about the beneficial owner. Reasonable measures means it must take certain steps to verify the information, and the steps taken must be appropriate given the level of ML/TF risk.</p> <p>Where a business is unable to verify the identity of the client (including beneficial owners) and the purpose and intended nature of the business relationship, the business should generally not agree to act and terminate the business relationship.</p> <p>Simplified CDD verification procedures are permitted. These are:</p> <ul style="list-style-type: none"> <li>• streamlined 'safe harbour' procedures for verifying medium or low ML/TF risk customers who are individuals</li> <li>• exemptions from the obligation to determine the beneficial owner of a customer for certain</li> </ul>	<ul style="list-style-type: none"> <li>• What CDD obligations should legal practitioners and conveyancers have?</li> <li>• What CDD obligations do legal practitioners and conveyancers have that duplicate CDD obligations under the AML/CTF regime?</li> <li>• Should simplified CDD measures be available for some services provided by legal practitioners and conveyancers? <ul style="list-style-type: none"> <li>– If yes, what client type and/or transactions?</li> </ul> </li> <li>• When should the obligation for legal practitioners and conveyancers to conduct CDD on clients commence? <ul style="list-style-type: none"> <li>– Should it be at the point at which the client first seeks advice, or only once there is a retainer in place?</li> </ul> </li> <li>• What opportunities are there for legal practitioners and conveyancers to rely on CDD performed by other businesses involved in same transaction?</li> </ul>

<sup>50</sup> There are three categories of PEPs: *Domestic PEPs* are individuals who hold a prominent public position or function in an Australian government body; *Foreign PEPs* are individuals who hold a prominent public position or function in a government body of a foreign country; and *International organisation PEPs* are individuals who hold a prominent public position or function in an international organisation.

EXISTING OBLIGATIONS	DISCUSSION QUESTIONS
<p>types of customers, and</p> <ul style="list-style-type: none"> <li>simplified verification procedures for certain low ML/TF risk companies and trusts.</li> </ul> <p><b>COMMENT:</b> The AML/CTF regime focuses on requiring businesses to implement systems and controls for the purpose of detecting suspicious activity and to take steps to prevent their services from being misused and exploited by criminals to launder illicit funds. The collection of information about client identity is a central component of these systems and controls, allowing a business to determine whether the interaction with that client is commensurate with the transactional activity on which they are seeking advice and to understand and assess the ML/TF risks posed by accepting the client’s business.</p> <p>The AML/CTF regime currently allows regulated businesses to rely on CDD procedures carried out by a third party in limited circumstances.<sup>51</sup> Reforms are being developed to expand these opportunities. These reforms will be useful where regulated businesses have a shared customer, or where a customer uses services provided by different entities within a corporate group. If conveyancers, legal practitioners, real estate professionals, and mortgagees are all required under the AML/CTF regime to conduct CDD on a shared customer related to a particular transaction, a mechanism could be developed to permit reliance on the CDD performed by someone else who is regulated for AML/CTF purposes in the transaction chain.</p>	

### 7.3 Ongoing customer due diligence

EXISTING OBLIGATIONS	DISCUSSION QUESTIONS
<p>Regulated businesses have obligations to conduct ongoing customer due diligence (OCDD), including:</p> <ol style="list-style-type: none"> <li><b>An enhanced due diligence program.</b> This includes systems and controls in place to determine whether additional information relating to a customer should be collected and/or verified on an ongoing basis. These systems help a business to ensure that it holds up-to-date information about its customers.</li> <li><b>A transaction monitoring program.</b> This program assists a business to identify suspicious transactions, complex or unusually large transactions, and unusual patterns of transactions that may be suspicious.</li> </ol> <p><b>COMMENT:</b> Conducting OCDD and scrutiny of transaction activity throughout the business relationship is important to ensure that the activity is consistent with the business’ knowledge of the customer and their business and risk profile, including where necessary the source of funds. OCDD means that clients engaging in ML/TF may be detected after acceptance. Where a business is unable to verify client identity (including beneficial owners) and the purpose and intended nature of the business relationship, the business should generally not agree to act and terminate the business relationship.</p>	<ul style="list-style-type: none"> <li>What ongoing due diligence obligations should apply to legal practitioners and conveyancers?</li> </ul>

<sup>51</sup> Section 38 of the AML/CTF Act and Chapter 7 of the AML/CTF Rules.

## 7.4 Reporting obligations

OBLIGATIONS	DISCUSSION QUESTIONS
<p>There are three primary reporting obligations under the AML/CTF regime:</p> <ul style="list-style-type: none"> <li>• suspicious matter reporting</li> <li>• international funds transfer instruction reporting, and</li> <li>• threshold transaction reporting.</li> </ul> <p><b>COMMENT:</b></p> <p>Once a client is accepted, the ongoing monitoring of their activities with the regulated business is intended to detect whether the client is engaging in unusual or suspicious transactional activity.</p> <p>Australia imposes threshold transaction reporting (TTR) obligations because of the high ML/TF risks posed by transactions involving large amounts of cash. TTRs must be reported to AUSTRAC where a regulated business that provides a designated service to a client where it involves the payment or transfer of physical currency or e-currency of AUD10,000 or more (or foreign currency equivalent). Solicitors are already required to make reports on significant cash transactions, being cash transactions involving the transfer of currency equivalent to \$10,000 AUD or more under the FTR Act.</p> <p>If at any time while dealing with a customer a regulated business forms a suspicion on a matter that the business suspects may relate to any serious offence under any law of the Commonwealth, including, tax evasion or proceeds of crime, the business must provide a suspicious matter report (SMR) to AUSTRAC. Offences include money laundering, terrorism financing, or operating under a false identity.</p> <p>Regulated businesses are required to submit an SMR to AUSTRAC within three business days of forming the suspicion. If the suspicion relates to the financing of terrorism, the SMR must be submitted within 24 hours of forming the suspicion.</p> <p>The provision of client acceptance procedures that take account of the need to be vigilant about ML/TF issues may be one mechanism to minimise the possibility of having to submit suspicious transaction reports.</p> <p>Any person who sends or receives a funds transfer instruction to or from a foreign country must complete an international funds transfer instruction (IFTI) report. The IFTI report must be submitted to AUSTRAC within 10 business days of sending or receiving the international funds transfer instruction.</p>	<ul style="list-style-type: none"> <li>• Should all reporting obligations apply to legal practitioners and conveyancers?</li> <li>• What regulatory impact would the transition from reporting significant cash transactions under the FTR Act to TTR reporting under the AML/CTF Act have?</li> <li>• Is the existing protection of legal professional privilege under section 242 of the AML/CTF Act appropriate and adequate for an AML/CTF regime that includes services provided by legal practitioners?             <ul style="list-style-type: none"> <li>– If not, what are the issues and what else is required?</li> </ul> </li> <li>• Should the obligation to lodge suspicious matter reports apply to legal practitioners?             <ul style="list-style-type: none"> <li>– Should a modified obligation to lodge suspicious matter reports apply to legal practitioners?</li> </ul> </li> <li>• If legal practitioners have suspicious matter reporting obligations, should such reports be lodged with AUSTRAC, an industry body or some other authority?</li> <li>• To what extent do legal practitioners and conveyancers conduct IFTIs?</li> <li>• Should legal practitioners and conveyancers be able to voluntarily report suspicious matters to the AML/CTF regulator that relate to a service that is not a designated service?</li> </ul>

## 7.5 Internal controls– AML/CTF programs

OBLIGATIONS	DISCUSSION QUESTIONS
<p>Regulated businesses generally have an obligation to develop, implement and maintain an AML/CTF program to identify, mitigate and manage the ML/TF risk arising from the provision of a regulated service.</p> <p>An AML/CTF program should provide for:</p> <ul style="list-style-type: none"> <li>• an ML/TF risk assessment</li> <li>• approval and ongoing oversight by boards (where appropriate) and senior management</li> <li>• appointment of an AML/CTF compliance officer</li> <li>• regular independent review</li> <li>• an employee due diligence program</li> <li>• an AML/CTF risk awareness training program for employees</li> <li>• policies and procedures for the reporting entity to respond to and apply feedback from the AML/CTF regulator</li> <li>• systems and controls to ensure the entity complies with its AML/CTF reporting obligations</li> <li>• CDD procedures (see above), and</li> <li>• OCDD procedures (see above).</li> </ul> <p><b>COMMENT:</b> Systems and controls that assist a business to detect suspicious activity allow the business to take steps to prevent their services from being misused by criminals to launder illicit funds.</p> <p>An important element of AML/CTF regulation is the requirement for regulated businesses to have in place an AML/CTF program to facilitate an AML/CTF culture among all the staff employed by the business. Some of the measures included in an AML/CTF program may already constitute standard industry practice. Regulated businesses can develop AML/CTF programs that reflect their commercial environment, knowledge of their clients and knowledge of the ML/TF risks they face.</p> <p>Industry associations, professional bodies and the AML/CTF regulation would need to provide leadership and guidance on developing AML/CTF programs to comply with AML/CTF obligations.</p>	<ul style="list-style-type: none"> <li>• Should legal practitioners and conveyancers have an obligation to develop and maintain an AML/CTF program?</li> <li>• If yes, what should the components of the AML/CTF program be?</li> <li>• Do law firms that operate internationally already have AML/CTF programs in place that comply with the FATF standards?</li> <li>• What are the implications of a risk-based approach for legal practitioners and conveyancers?</li> <li>• How could professional bodies and/or the AML/CTF regulation assist legal practitioners and conveyancers in developing AML/CTF systems and procedures suited to their professional practices?</li> </ul>

## 7.6 Record-keeping

OBLIGATIONS	DISCUSSION QUESTIONS
<p>Regulated businesses must make and retain the following records for seven years:</p> <ul style="list-style-type: none"> <li>records relating to the provision of a regulated service to a customer</li> <li>records of the CDD procedure the regulated business undertakes for customers to whom they provided, or proposed to provide, a regulated service</li> <li>records of electronic funds transfer instructions, and</li> <li>AML/CTF programs.</li> </ul> <p><b>COMMENT:</b> In tracking down money trails, it is essential that law enforcement agencies be able to recreate patterns of suspicious activity and reconstruct individual transactions. This is very much dependent upon the record management practices of regulated businesses.</p>	<ul style="list-style-type: none"> <li>What records should legal practitioners and conveyancers be required to keep?</li> <li>To what extent can record-keeping obligations for AML/CTF purposes leverage off other record-keeping obligations or practices (for example, under taxation or corporations law, and laws governing the use of legal practitioners' trust accounts)?</li> </ul>

## 7.7 Monitoring and supervision

REGULATORY APPROACH	DISCUSSION QUESTIONS
<p>While AUSTRAC currently monitors and supervises enrolled businesses for compliance with their AML/CTF obligations, a number of regulatory approaches could be taken to monitor and supervise legal practitioners and conveyancers regulated under the AML/CTF regime. This includes a risk-based industry collaborative approach.</p> <p>Under this co-regulation approach, professional bodies would have primary responsibility for developing guidance to assist their membership to implement appropriate detection systems and for monitoring effectiveness. Rather than legislating customer due diligence models for each sector, professional bodies would design appropriate procedures for their industry. The AML/CTF regulator would be responsible for setting principles and guidelines, and undertaking any enforcement action for non-compliance.</p> <p>Risk-based procedures are essential to this approach. Rather than checking every transaction, risk assessment procedures have the potential to reduce effort and cost. The risk-based approach allows professionals to tailor their policies and procedures to the potential risk of ML/TF in particular client transactions. The risk-based approach minimises the regulatory burden on both firms and clients while maintaining effective controls. It is an approach supported by the FATF and increasingly adopted by other countries. However, some regulated businesses, particularly smaller regulated businesses, find applying the risk-based approach a challenge and would prefer greater prescription of AML/CTF obligations.</p> <p>Alternatively, professional bodies or AUSTRAC could have sole responsibility for monitoring and supervising these sectors for AML/CTF purposes.</p>	<ul style="list-style-type: none"> <li>Should AUSTRAC monitor and supervise legal practitioners and conveyancers for compliance with AML/CTF obligations?</li> <li>Are there professional bodies or existing regulatory authorities that could regulate or co-regulate legal practitioners and conveyancers?</li> <li>What regulatory approach should be adopted for legal practitioners and conveyancers?</li> <li>What advice and assistance should the AML/CTF regulator provide to support legal practitioners and conveyancers to implement AML/CTF obligations?</li> </ul>

# ANNEXURE A: OBLIGATIONS UNDER THE ANTI-MONEY LAUNDERING AND COUNTER-TERRORISM FINANCING REGIME

## 1. Enrol/register with AUSTRAC

Any business that provides a service regulated under the AML/CTF Act must be enrolled on AUSTRAC's Reporting Entities Roll.

Businesses which intend to provide remittance services (remitters) must also apply to be registered with AUSTRAC.

More than 14,000 regulated businesses across the financial, remittance, gambling and bullion sectors are currently enrolled with, and regulated by, AUSTRAC for their compliance with their AML/CTF Act obligations.

## 2. Conduct customer due diligence

A regulated business must conduct CDD measures that allow the business to be reasonably satisfied that:

- an individual customer is who they claim to be, and
- for a non-individual customer (such as a company), the customer exists and their beneficial ownership details are known.<sup>52</sup>

By knowing its customers a regulated business should be better able to identify and mitigate ML/TF risks in the conduct of their financial transactions, particularly where the activity or transactions are unusual or uncharacteristic.

The CDD measures include:

- collecting and verifying customer identification information - for example, identity documents, data or other information which can be verified using a reliable and independent source
- identifying and verifying the beneficial owner(s) of a customer
- identifying whether a customer is a politically exposed person (PEP) (or an associate of a PEP) and taking steps to establish the source of funds used during the business relationship or transaction<sup>53</sup>
- ongoing customer due diligence and transaction monitoring, and
- obtaining information on the purpose and intended nature of the business relationship.

The CDD procedures developed by a regulated business must be included in a business's AML/CTF program (see below).

## 3. Implement ongoing customer due diligence procedures

Regulated businesses must have in place appropriate systems and controls to determine whether additional customer information (including beneficial owner information) should be collected and/or verified on an ongoing basis to ensure that it holds up-to-date information about its customers. This process is known as 'ongoing customer due diligence' (OCDD). The decision to apply the OCDD process to a particular customer depends on the customer's level of assessed ML/TF risk.

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<sup>52</sup> A beneficial owner of a customer is defined as an individual (a natural person or persons) who ultimately owns or controls (directly or indirectly) the customer.

<sup>53</sup> See footnote 50 above for a description of the categories of PEPs.

Ongoing customer due diligence also includes:

- implementing a transaction monitoring program, and
- developing an 'enhanced customer due diligence' program (ECDD).

A transaction monitoring program is a program for monitoring transactions using a risk-based approach and allows a regulated business to:

- identify transactions that are considered to be suspicious, and
- identify complex, unusually large transactions and unusual patterns of transactions which have no apparent economic or visible lawful purpose.

ECDD is the process of undertaking additional CDD in certain circumstances deemed to be high risk. For example, ECDD may be appropriate where the customer is located in a country where there are weak AML/CTF controls. The ECDD program details the procedures the reporting entity must undertake in these high risk circumstances.

The OCDD procedures developed by a regulated business must be included in the business's AML/CTF program (see below).

#### **4. Implement and maintain an AML/CTF program**

Regulated businesses must develop and maintain a written AML/CTF program that sets out the operational framework for meeting compliance obligations under the AML/CTF Act.

The AML/CTF program must have two parts and should specify how the business identifies, mitigates and manages the risk of its products or services being misused to facilitate ML/TF.

Part A covers identifying, managing and reducing the ML/TF risk faced by a regulated business and includes:

- an ML/TF risk assessment of the business conducted by the entity
- approval and ongoing oversight by boards (where appropriate) and senior management
- appointment of an AML/CTF compliance officer
- regular independent review of Part A
- an employee due diligence program
- an AML/CTF risk awareness training program for employees
- policies and procedures for the reporting entity to respond to and apply AUSTRAC feedback
- systems and controls to ensure the entity complies with its AML/CTF reporting obligations, and
- ongoing customer due diligence (OCDD) procedures (see above).

Part B covers a regulated business' CDD procedures and includes:

- establishing a framework for identifying customers and beneficial owners of customers so the reporting entity can be reasonably satisfied a customer is who they claim to be, and
- collecting and verifying customer and beneficial owner information.

#### **5. Lodging transaction reports**

Regulated businesses have a number of ongoing reporting obligations. These obligations relate to:

- threshold transaction reports (TTRs)

- international funds transfer instructions (IFTIs) reports, and
- suspicious matter reports (SMRs) with AUSTRAC.

Where a business provides or commences to provide a regulated service to a customer that involves the payment or transfer of physical currency or e-currency of AUD10,000 or more (or foreign currency equivalent), the business must submit a TTR to AUSTRAC. The TTR must be submitted to AUSTRAC within 10 business days of the transaction taking place.

If a business sends or receives a funds transfer instruction to or from a foreign country, the business must complete an IFTI report. The IFTI report must be submitted to AUSTRAC within 10 business days of sending or receiving the international funds transfer instruction.

If at any time while dealing with a customer the regulated business forms a suspicion on a matter that the regulated business suspects may relate to any serious offence, tax evasion or proceeds of crime, the business must provide a SMR to AUSTRAC. Offences include money laundering, terrorism financing, operating under a false identity or any other offence under Commonwealth, State or Territory law.

Regulated businesses must submit an SMR to AUSTRAC within three business days of forming the suspicion. If the suspicion relates to the financing of terrorism, the SMR must be submitted within 24 hours of forming the suspicion.

## **6. Record-keeping**

Regulated businesses have a range of record-keeping obligations under the AML/CTF Act. These obligations depend on the type of regulated service it provides but generally include records about:

- transactions
- electronic funds transfers
- customer identification procedures
- AML/CTF programs, and
- due diligence assessments of correspondent banking relationships.