Law Council
OF AUSTRALIA

Opening Statement

Senate References Committee on Legal and Constitutional Affairs Inquiry on the adequacy and efficacy of Australia's anti-money laundering and counter-terrorism financing (AML/CTF) regime

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Australia is indeed the lucky country – a free and vibrant working democracy for so many reasons, not the least that we have a strong and profoundly secure attachment to and observance of the rule of law. We have a legal profession that owes its first duty to the court, and its second to its clients. That first duty to the court ought not be underestimated. It is why we swear or affirm an oath of office.

Lawyers in Australia are vital members of our urban, rural, regional, and remote communities, to which we contribute in so many ways different ways. A cornerstone of this contribution is that when a client tells us something to seek our advice, they can do so within the cloak of legal professional privilege, the oldest of the privileges for confidential communications known to the common law.

The foundation for the rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection.

But it is out of regard to the interests of justice, which cannot be upheld, and to the administration of justice which cannot go on, without the aid of people skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, everyone would be thrown upon their own legal resources. Deprived of all professional assistance, an individual would not venture to consult any skilful persons or would only tell their counsel half their case.

Those last words are not mine, but from the Federal Court in *Esso* (*Esso Australia Resources Limited v The Commissioner of Taxation* (1999) 201 CLR 49), taking from the High Court in *Baker v Campbell* (1983) 153 CLR 52 and English precedents from the mid nineteenth century.

Lawyers in Australia are also micro businesses, micro enterprises that feel very hard the reach of over-regulation, not to mention onerous and unnecessary duplication of regulation.

Of course, money laundering is an evil and those who profit from drug trades, from human trafficking, from arms trades, and all the doom that is caused from each – they all must be discovered, disrupted and detained. Tough measures for those bad actors are required because those tough measures are proportionate to the impacts. Equally, in the aftermath of 9/11, terrorism funding needed to be targeted.

Hindsight tells us that AML measures were too late and too little. That ought to be, and continue to be the focus of AML/CTF regimes: proportionate measures applied to demonstrable risk.

I would ask you all to keep the concept of risk in mind, or more so – strategies proportionate to the actual, and evidence-based risk in mind – as you consider what next for AML/CTF regulation.

A question before this Committee is whether Tranche 2 ought to be implemented, and specifically, for our remit, imposed on the lawyers of Australia.

And in that regard, I urge you to distinguish parables or ideas of theoretical risk, from, actual, evidenced, risk based assessments.

And where you consider there is a risk, ask, does the weight of evidence show that it is high? Is it moderate? Is it low?

Because, as FATF requires, any response must be proportionate to that risk based assessment.

There is no evidence, much less credible evidence which supports a conclusion that the Australian legal profession is a high or moderate-risk sector. The risk based assessment is simply not made out.

Of course, we have bad actors, but with our many levels of regulations governing all aspects of legal practice, we find them and "weed them out". You know about the bad ones, precisely because they are found and brought to account. So it should be.

But let's look at the whole of the legal profession and the Tranche 2 recommendations. Insofar as they concern the Australian legal profession the additional compliance is:

- unnecessary – necessary if your sector carries a high risk and the country is grey listed Syria, Jordan, Uganda and the like – but we are so far from that company;
- oppressive – and will cause micro businesses to close. We know this from the experiences in the United Kingdom and New Zealand.
- will fundamentally alter the nature of our client's relationship with his or her lawyer, and thus erase the oldest privileges of all, that being legal professional privilege.

I would imagine that if one of your sons or daughters, or one of your nieces and nephews found themselves in a kind of difficulty that might invoke AML/CTF issues then you would be the first to be telling them to go and seek assistance from a lawyer. However, if Tranche 2 is implemented, then that lawyer's first duty to the court and second duty to your niece, nephew, son or daughter, is overturned.

In its place, the lawyer whom you probably hoped would give advice, help and assistance to your family member becomes an agent of law enforcement, and collector and disseminator of that privileged data to some government agency – with no restraint on its use. It is government sanctioned Lawyer X, but by government compulsion.

The importance of client legal privilege is fundamental to the very fabric of our society.

If we reach a point where lawyers are required to in effect, inform on their own clients in certain circumstances, then ordinary Australians who need legal assistance will not seek it.

If so, there will be a chilling effect on our clients' willingness to provide otherwise privileged information openly and frankly to his or her lawyers and this damages every person's fundamental right to representation.

It will also change the role of legal practitioners in the Australian system of justice – a system we ought to be most proud of – from that of trusted, independent advisor, to that of an agent of law-enforcement and collector of privileged data and disseminator of same to some other agency.

On a separate note, we should not be worried about the prospect that FATF will list Australia on the grey list should we not comply with their Recommendations with respect to lawyers. The experience of Canada is closely aligned with ours, and is a sensible country with which to compare ourselves. As you all know, the Canadian Supreme Court in 2015 struck down Tranche 2 of the AML/CTF regime with respect to lawyers. The point is noteworthy in terms of the reputational risks to Australia under consideration in this

Inquiry. Just last month, FATF published a report on 'Canada's progress in strengthening measures to tackle money laundering and terrorist financing' which was a follow-up analysis to evaluate deficiencies identified in Canada's 2016 Mutual Evaluation Report. In this recent report, against Recommendations 22 and 23, Canada's scores improved from Non-Compliant (NC) to Partially Compliant and from Non-Compliant (NC) to Largely Compliant respectively. These upgrades were awarded despite the report noting that lawyers were not covered by Tranche 2.

If there is a good reason for a jurisdiction to carefully assess and decline to apply a recommended policy, there seems little danger of attracting serious disapprobation.

As Canada's improved marks show, if communication is careful and outcomes well-reasoned, there is no plausible danger of grey listing.

Finally,

- You all should be proud of the micro businesses that are the Australian legal profession.
- You all should be proud that the ethics, regulation and supervision of the legal profession in Australia achieves the fundamental outcomes that the FATF Recommendations target.
- You should not quickly step into cruelling an already heavily regulated profession, with vastly more regulation so you can stand up before FATF and say we are not like grey listed countries. We have never been.
- And we should be very proud and supportive of the micro-businesses of Australia, the law firms in many cities and towns, who labour under the already greatest degree of regulation of any profession, yet provide an essential service to Australians – access to justice.

Can I please invite you to pause on that – Tranche 2 is incompatible with access to justice for all of your constituents, who one day may need to venture into your local lawyer's office.

We are happy to take questions.