Reverse engineering legal professional privilege in a globalising world – the Australian case

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Abstract

Purpose – This paper aims to explore the ways in which the international standards in the field of anti-money laundering (AML) and counter-terrorist financing (CTF) have reshaped regulatory regimes in a globalised world.

Design/methodology/approach – This paper deconstructs the origins and development of international standards in the field of AML and CTF dealing with longstanding legal professional privilege. This paper adopts both qualitative and quantitative research methodologies. The qualitative aspect comprises a literature review of sources, including scholarly works, Financial Action Task Force (FATF) recommendations, reports and domestic laws. The quantitative aspect analyses a unique and comprehensive table reproduced below, that indicates Australia's compliance with all the FATF recommendations over more than a decade with full alternation to FATF's revisions of its recommendations.

Findings – This paper demonstrates that an understanding of the influence of the FATF norms can shed light on the departure from regular lawmaking processes and emerging forms of international governance. The conclusion suggests that tranche II is coming and Australia will amend it in domestic regime to comply with the international standard, applying the AML/CTF regime to the legal profession and thus interfering with legal professional privilege. The question is not if but when.

Originality/value – This paper fills the gaps in the existing literature by contemplating the future of legal professional privilege globally and in Australia, which provides a case study of a regime that does not yet comply fully with AML and CTF international standard. This approach differs significantly from that of other literature in the field, which deals comprehensively with the theoretical foundations of legal professional privilege, as well as its practicalities and limitations, without considering the influence of the international non-binding norms.

Keywords AML, FATF, CTF, Legal professional privilege, TRANCHE II

Paper type Research paper

> Legal professional privilege is "fundamental importance to the protection and preservation of the right, dignity and equality of the ordinary citizen under the law (Bentham, 1827a; Pirsig and Kirwin, 1984)," Jeremy Bentham

Introduction

The Financial Action Task Force (FATF) is an independent inter-governmental body that develops and promotes policies to protect the global financial system against money

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laundering, terrorist financing and the financing of weapons of mass destruction. Even though there exists no binding obligation to abide by the FATF recommendations, they are recognised as the global standard in AML and CTF (Goldbarsht, 2017). The recommendations enjoy high levels of compliance in more than 180 states.

The growing involvement of legal professionals in the facilitation of money laundering and terrorist financing is a matter of widespread concern. Therefore, today, according to an updated FATF recommendation, countries should require lawyers, notaries and other independent legal professionals – including sole practitioners, partners, and employed professionals within professional firms (legal professionals)[1] – to identify, assess and mitigate their money laundering and terrorist financing risks.

Legal professionals, according to the recommendation, should document their assessments, keep these assessments up to date and have appropriate mechanisms in place to provide risk assessment information to competent authorities and self-regulatory bodies. When implemented, this recommendation conflicts with legal professional privilege, which plays an important role in the administration of justice. Nonetheless, many states have introduced new or amended regulatory regimes to cover the legal sector, thus complying with the FATF non-binding norms.

Australia's AML/CTF regime is based on the international standards developed by the FATF. Various pieces of legislation have been amended to achieve better alignment with the FATF recommendations. In 2006, the Australian Government passed tranche I of legislation establishing a new AML/CTF regime covering the financial sector to meet Australia's international obligations as a member of the FATF. Australia promised to apply the *Anti-Money Laundering and Counter-Terrorist Financing Act 2006* (Cth) to legal professionals – tranche II – by 2008. In July 2010 – while already well behind schedule – the government deferred discussion of tranche II of the AML/CTF legislation until mid-2011 to allow time for recovery from the global financial crisis (Ai, 2012). However, it still has not carried out this promise (Chaikin, 2013; FATF, 2018a). Today, Australian legal professionals do not have comprehensive AML/CTF obligations – at least not yet.

This paper adopts both qualitative and quantitative research methodologies. The qualitative aspect comprises a literature review of sources, including scholarly works, FATF recommendations, reports and domestic laws. The quantitative aspect analyses a unique and comprehensive table reproduced below, that indicates Australia's compliance with all the FATF recommendations over more than a decade with full alternation to FATF's revisions of its recommendations[2].

Following this introduction, the first part of the paper discusses the concept of legal professional privilege. The second part focuses on the growing concern with the role that legal professionals play in the facilitation of money laundering and terrorist financing. The international standard that was introduced to mitigate this concern is highlighted in the third part. The fourth part shows that the global standard is actually implemented in many states. It focuses on the current Australian regime and its implementation of the international standard, drawing upon the data presented in the Table I. The conclusion section suggests that tranche II is coming and Australia will amend it in domestic regime to comply with the international standard, applying the AML/CTF regime to the legal profession and thus interfering with legal professional privilege. The question is not if but when.

Legal professional privilege

The origin of legal professional privilege is found to be in the days of the Roman republic. It was one of the commonplaces of the Roman law that a servant, who was, to be sure, a slave,

No.	Evaluation report 2005 (original number before 2012 revision)[a]	Evaluation report 2015[b]	Third follow-up report 2018[c]
1	N/A[d]	Partially compliant	Partially compliant
2	Largely compliant (31)	Largely compliant	Largely compliant
3	Largely compliant (1) and (2)	Compliant	Compliant
4	Compliant (3)	Compliant	Compliant
5	Largely compliant (SRII)	Largely compliant	Compliant
6	Largely compliant (SRIII)	Compliant	Compliant
7	N/A[e]	Compliant	Compliant
8	Partially compliant (SRVIII)	Non-compliant	Largely compliant
9	Compliant (4)	Compliant	Compliant
10	Non-compliant (5)	Partially compliant	Partially compliant
11	Partially compliant (10)	Largely compliant	Largely compliant
12	Non-compliant (6)	Largely compliant	Largely compliant
13	Non-compliant (7)	Non-compliant	Non-compliant
14	Partially compliant (SRVI)	Largely compliant	Largely compliant
15	Non-compliant (8)	Largely compliant	Compliant
16	Non-compliant (SRVII)	Partially compliant	Partially compliant
17	Non-compliant (9)	Partially compliant	Partially compliant
18	Non-Compliant (15) and (22)	Partially Compliant	Partially compliant
19	Partially compliant (21)	Partially compliant	Largely compliant
20	Largely compliant (13) and PC (SRVI)	Compliant	Compliant
21	Compliant (14)	Compliant	Compliant
22	Non-compliant (12)	Non-compliant	Non-compliant
23	Non-compliant (16)	Non-compliant	Non-compliant
24	Largely compliant (33)	Partially compliant	Partially compliant
25	Partially compliant (34)	Non-compliant	Non-compliant
26	Partially compliant (23)	Partially compliant	Partially compliant
27	Partially compliant (29)	Partially compliant	Partially compliant
28	Partially compliant (24)	Non-compliant	Non-compliant
29	Compliant (26)	Compliant	Compliant
30	Largely compliant (27)	Largely compliant	Compliant
31	Compliant (28)	Largely compliant	Largely compliant
32	Partially compliant (srix)	Largely compliant	Compliant
33	Largely compliant (33)	Largely compliant	Largely compliant
34	Partially compliant (25)	Largely compliant	Largely compliant
35	Partially compliant (17)	Partially compliant	Partially compliant
36	Largely compliant (35) and (SRI)	Largely compliant	Compliant
37	Compliant (36) and LC (V)	Compliant	Compliant
38	Compliant (38)	Compliant	Compliant
39	Compliant (39)	Compliant	Compliant
40	Compliant (40)	Compliant	Compliant

Notes: [a]MER 2005 (*n* 67); [b]MER 2015 (*n* 71); [c]MER 2018 (*n* 4); [d]Assessing risks and applying a risk-based approach; [e]Targeted financial sanctions related to proliferation

Table I. Australia's compliance with FATF recommendations

might not give testimony against his master (Buckland, 1908; Radin, 1928). The common law doctrine of legal professional privilege emerged in the sixteenth century as a natural exception to the then-novel right of testimonial compulsion (Holdsworth, 2020). In its origin, it was concerned with the duty of the attorney – his oath and his honour – arising out of his professional relationship with his client rather than with the broader consideration of public interest in the effective working of the legal system (Wigmore, 1961). The modern theory that the doctrine is necessary to promote freedom of consultation of legal advisers by clients

did not clearly emerge until the nineteenth century. Not surprisingly, because the doctrine represents a curtailment of the judicial search for truth, it had its critics from the beginning (Bentham, 1827b; Bowring, 1843). But it became firmly established in the modern form in which it is expressed, not merely as a rule of evidence, but as a matter of public policy with a natural application wherever compulsory disclosure of evidence is involved, whether in judicial proceedings or not.

The concept of legal professional privilege is complex and longstanding. An 1846 case highlighted the fact that unrestricted communication between parties and their professional advisers is considered of such importance as to make it advisable to protect it – even by the concealment of matter without the discovery of which the truth of the case cannot be ascertained[3].

The view that legal professional privilege is based upon the fundamental principle is not confined to common law countries. The European Court of Justice regarded it as a concept common to the laws of member states of the European Economic Community that there should be that degree of confidentiality which is necessary to enable any person, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it[4] Professional secrecy is extremely important from a practical perspective and in terms of principle. It is respected in both common-law and civil law systems, and in all the States of the European Union, the confidentiality governing the lawyer–client relationship is legally protected (Eva, 2015). There is only one purpose in this sense, i.e. protecting the person who needs counselling and legal assistance from a lawyer.

The legal framework

According to traditional doctrine, the rationale of legal professional privilege is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal professionals[5] It does so by keeping secret their communications, thereby inducing the client to retain the legal professional and to seek the legal professional's advice, and by encouraging the client to make full and frank disclosure of the relevant circumstances of the privilege[6] The principle underlying the legal professional privilege is of fundamental importance to the protection and preservation of the rights, dignity and equality of the ordinary citizen under the law; it is a precondition of full and unreserved communication with the legal professional. The privilege exists to enable clients to be candid with their legal advisers. If clients were unable to make such disclosure, this would be reflected in the instructions they give, in the advice they are given, and – ultimately – in the legal process of which the advice forms part[7].

The privilege of communication between a client and a legal professional derives from common law and legislation. The basic principles of the common law of legal professional privilege are that it protects the confidentiality of certain communications made in connection with both giving and obtaining legal advice, including communications made prior to the legal practitioner and client entering into a retainer; it extends to potential clients and to the extent that a retainer is necessary; it is met where the client has a genuine belief that they are entitled to the legal advice[8]; and it includes representation in proceedings in a court[9].

Two distinct categories of legal professional privilege can certainly be readily distilled, namely, the "advice privilege" and the "litigation privilege". A workable definition, highlighting this dichotomy, was given by McHugh J[10]:

> Legal professional privilege is the shorthand description for the doctrine that prevents the disclosure of confidential communications between a lawyer and client, confidential communications between a lawyer and third parties when they are made for the benefit of a client,

> and confidential material that records the work of a lawyer carried out for the benefit of a client unless the client has consented to the disclosure. To be protected by the privilege, a communication must be made [for the dominant] purpose of contemplated or pending litigation or for obtaining or giving legal advice.

With regard to statutory requirements, the *Evidence Act 1995* (Cth)[11] sets out the privilege for both advice and litigation. According to the act, evidence is not to be adduced if doing so would result in the disclosure of a confidential communication made between the client and a legal professional or between two or more legal professionals acting for the client or the disclosure of the contents of a confidential document prepared by the client, legal professional or another person for the dominant purpose of the legal professional providing legal advice to the client[12] Furthermore, evidence is not to be adduced if doing so would result in the disclosure of a confidential communication that was made, or the contents of a confidential document that was prepared, for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding in which the client is or maybe, or was or might have been, a party[13].

In addition to the common law and statutory requirements of client legal privilege, a legal professional must take care to ensure that decisions to make allegations or suggestions under privilege against any person are reasonably justified by the material then available to the legal professionals, are appropriate for the robust advancement of the client's case on its merits, and are not made principally to harass or embarrass a person. These rules apply to solicitors and barristers[14].

Limitation on privilege

Besides the statutory exception – which deals with cases of client consent, defendants in criminal proceedings, joint clients and misconduct[15] – there are common law exceptions to the general rule: cases in which the privilege will not exist, even though the communication was made confidentially for obtaining professional legal advice. The privilege will not apply where the communication was part of a criminal or unlawful proceeding or was made in furtherance of an illegal object – for example, where the client sought legal assistance as a step in, or preparatory to, the commission of a crime or fraud, even though the legal professional was unaware of the purpose of the communication at the time it was made[16].

To summarise, client legal privilege is a privilege that lies with the client not to disclose communications made confidentially between a client and the client's legal adviser for the purpose of legal advice. The legal adviser has no right to waive the privilege or to decide when it applies[17], as the privilege is that of the client and not of the legal professional[18]. The legal professional is bound to preserve the client's privileged communications in relation to advice and litigation.

Money laundering and the legal profession

An emerging official narrative suggests that the involvement of legal professionals in money laundering and terrorism financing is a significant and increasing problem (Mitsilegas, 2006). The reliance on legal professionals, it is suggested[19], is due to the stringent AML/CTF controls imposed on financial institutions, making it more difficult to launder criminal proceeds and heightening the risk of detection, together with the use of increasingly complex laundering methods (Benson, 2018; He, 2006). In addition, criminals seek out the involvement of legal professionals in their money laundering activities – sometimes because a legal professional is required to complete certain transactions, and sometimes to access specialised legal and notarial skills and services that could assist in laundering the proceeds of crime[20]. Furthermore, the perception among the launderers is

that legal professional privilege or professional secrecy will delay, hamper or effectively prevent investigation or prosecution against them if they engage the services of legal professionals[21].

Legal professional services may be targeted for money laundering and terrorist financing in the following ways. First, criminals may use legal practitioners to move cash; to deposit, transfer or withdraw funds; or to open bank accounts. This can conceal the connections between criminals and the proceeds of their crimes. Second, legal professionals may operate trust accounts to deposit, hold and disburse funds on behalf of clients. Criminals may use legal professionals to facilitate the movement of illicit funds through these trust accounts. Third, criminals may use legal professionals to move illicit funds disguised as the proceeds of legitimate debt recovery action. Fourth, legal professionals may unwittingly assist criminals in money laundering and terrorist financing through real estate activities by establishing and maintaining domestic or foreign legal entity structures and accounts; facilitating or conducting financial transactions; receiving and transferring large amounts of cash; falsifying documents; establishing complex loans and other financial arrangements; and facilitating the transfer of ownership of property to nominees or third parties. Fifth, legal professionals have specialist knowledge of the establishment and administration of corporate structures. These structures allow criminals and terrorists to conceal illicit funds; obscure ownership through complex layers; legitimise illicit funds; and, in some cases, avoid tax and regulatory controls[22].

The response of the international standard

Concerns about the involvement of the legal profession acting as advisers and facilitators for money laundering and terrorist financing are not new. In fact, they have been on the agenda of law enforcement and regulators for many years[23]. In 2001, the FATF identified seven sectors as gatekeepers with respect to money laundering and terrorist financing. The legal profession is one of those sectors[24]. Accordingly, the FATF extended its recommendations to apply to legal professionals, with several coverage options[25]. These options deal with the coverage of legal professionals, customer due diligence (CDD), suspicious transaction reports and increasing diligence, beneficial ownership and control of corporate vehicles, and the application of AML/CTF obligations to non-financial businesses and professions – including the legal profession (Shepherd, 2009). The FATF issued a revised set of recommendations in 2003. For the first time, the recommendations also apply to legal professionals in situations where they prepare for or carry out transactions for a client[26].

In 2012, the FATF completed a comprehensive review of its standards and again published revised recommendations. The revision aimed to bolster global safeguards and further defend financial system integrity by granting governments more effective tools with which to act against financial crimes. The recommendations were revised nine times, with the most recent update in October 2018, to ensure that they remain up to date, relevant and capable of universal application[27]. An additional revision to the standards for legal professionals is expected to be adopted in the second half of 2019.

Of particular relevance for legal professionals is Recommendation 22, which focuses on CDD. This includes identifying and verifying the identity of the client and beneficial owners where relevant; understanding the nature and purpose of the business relationship, including the source of funds; and maintaining records of the CDD material. Also relevant is Recommendation 23, which deals with other measures.

Recommendation 22 provides that the general requirements of the FATF for CDD and record-keeping (Recommendations 10, 11, 12, 15 and 17) apply to legal professionals when they prepare for and carry out transactions for their clients concerning certain specified

activities, namely, the buying and selling of real estate; the managing of client money, securities or other assets; the management of bank, savings or securities accounts; the organisation of contributions for the creation, operation or management of companies and the creation, operation or management of legal persons or arrangements; and the buying and selling of business entities.

Under Recommendation 23, legal professionals are required to report suspicious transactions when, on behalf of a client, they engage in a financial transaction in relation to the activities described above. However, legal professionals, acting as independent legal professionals, are not required to report suspicious transactions (but they do need to perform CDD) if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege[28].

There exists no binding obligation to abide by these FATF recommendations. However, they are considered to reflect the current international standards in AML/CTF and enjoy high levels of compliance (Goldbarsht, 2017; Bantekas, 2014; Terry, 2010).

Compliance with the international standard

Legal professionals in many states are complying with the international standard[29]. This is not something to take for granted because of the eminent tension with legal professional privilege[30]. For example, in Hong Kong, all legal professionals are regulated by the *Legal Practitioners Ordinance* (LPO)[31]. A legal professional must be a member of the Law Society and hold a practising certificate[32]. Under the LPO, the Law Society is empowered to make rules governing the professional practices, conduct and discipline of legal professionals; however, there was no statutory obligation for CDD and record-keeping for legal professionals. In 2008, the FATF rated Hong Kong non-compliant with the global standard (FATF, 2008a). Hong Kong has since taken progressive steps to extend CDD and record-keeping obligations to the legal professions[33]. The *Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance*[34] (AMLO) came into operation in 2012 to require financial institutions[35] to comply with CDD and record-keeping requirements[36]. The government introduced the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) (Amendment) Bill 2017 into the Legislative Council on 28 June 2017 to amend the AMLO to apply statutory CDD and record-keeping, among other requirements, to legal professionals[37] when they conduct certain specified transactions[38]. Singapore, in its third mutual evaluation report (MER)[39], was rated non-compliant with Recommendation 22 (FATF, 2001). It was noted that AML/CFT measures for the legal professionals were not consistent with the FATF standards and that CDD measures for legal professionals had some deficiencies. Since then, Singapore has taken steps to enhance its AML/CFT requirements with regard to the legal profession, and in 2016 it was rated partly compliant (FATF, 2016). In its third MER, the UK was rated partially compliant with these requirements; in 2018, it improved to achieve a rating of largely compliant (FATF, 2007; FATF, 2018b). Israel was rated non-compliant with these recommendations in 2008, as it imposed no reporting obligations upon legal professionals; it improved to partly compliant in 2018 (FATF, 2008b; 2018c).

Australia

The legal framework

To comply with their duty to the court and the administration of justice, legal professionals in Australia must not engage – in the course of practice or otherwise – in conduct which demonstrates that the legal professional is not a fit and proper person to practise law or which is likely to a material degree to be prejudicial to or diminish public confidence in the

administration of justice or bring the profession into disrepute[40]. A breach of the regulatory rules can constitute unsatisfactory professional conduct or professional misconduct and may give rise to disciplinary action[41]. The duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty[42], even if the client gives instructions to the contrary[43]. Therefore, when a lawyer becomes aware that a client is engaging in unlawful conduct, the lawyer must counsel the client against such conduct without participating in the conduct. And when the client insists on some step being taken which, in the legal professional's opinion, is dishonourable, the legal professional can stop acting for the client.

Money laundering and terrorism are criminalised via Division 400 of the Schedule to the *Criminal Code Act 1995* (Criminal Code) (Leighton-Daly, 2015). The Criminal Code provides a range of penalties that may be applied to persons who deal with the proceeds of crime. Legal professionals who inadvertently or unwittingly allow acts of money laundering to occur as a result of failing to make proper enquiries are liable to prosecution under Division 400.

In addition, the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (AML/CTF Act) stipulates what a reporting entity must do if it forms a reasonable suspicion that the circumstance presented by an individual fall into one or more of the wide circumstances outlined in the Act[44]. A legal professional is not a "reporting entity". Furthermore, the AML/CTF Act states that the law relating to legal professional privilege is not affected by the AML/CTF Act[45]. The operative sections of the AML/CTF Act – which include identification verification[46], ongoing CDD[47] and reporting suspicious matters[48] – act to diminish the unique relationship that exists between lawyer and client, part of which involves legal professional privilege.

What the Financial Action Task Force found

The FATF conducted an evaluation report on Australia's AML/CTF policies in 2005[49]. The MER[50] found that while Australia had indeed legislated according to the standards, there were perceived deficiencies in its arrangements. This amounted to a failure to comply with all accepted standards. FATF found Australia non-compliant with Recommendation 22 (which was previously numbered 12), as deficiencies had been identified. In a subsequent evaluation, it was noted that some progress had been made through the adoption, in 2006 and 2007, respectively, of the AML/CTF Act and the *Anti-Money Laundering and Counter-Terrorism Financing Rules*, last amended in 2014. However, Australia deemed only casinos and bullion dealers to be subject to AML/CTF obligations under the standard. The AML/CTF Act also provides exemptions for legal professionals, even though these two sectors have been identified as high money laundering threats in Australia's national threat assessment.

The AML/CTF Act applies to a "reporting entity", which is a person who provides a designated service[51]. The Act also applies to legal professionals when they provide a designated service; however, it does not affect the law relating to legal professional privilege. Legal professionals are obliged under the *Financial Transactions Reports Act 1988* (Cth) to report when they receive more than $10,000 in cash[52]; however, these obligations are not specific to legal professionals. As a result, Australian was rated as non-compliant with Recommendation 22 (FATF, 2015). Given that legal professionals are not subject to AML/CTF requirements on suspicious transaction reporting, instituting internal controls, and complying with higher risk countries requirements, Australia was also rated as non-compliant with Recommendation 23 (FATF, 2015).

What is the risk in Australia?

In 2017, the Law Council of Australia who represents 16 Australian State and Territory law societies and Bar associations and the Law Firm Australia published a comprehensive response to the FATF consultation paper about the inclusion of legal practitioners on Australian legal partitioners[53]. The Council raised a few concerns. Among them, that the attempt to assess the efficiency and effectiveness of the operation of Australia's AML/CTF laws by the FATF compliance methodology, without any indication that implementation of the FATF's Recommendations is, in fact, reducing the AML/CTF risks, and the "reduction of financial crime because of a FATF-based response appears to remain elusive"[54].

In addition, it was argued that it will erode client confidentiality and the concept of independent legal advice because of the operation of suspicious matter reporting and information gathering under the notice requirements of the AML/CTF regime; create irreconcilable conflicts of interest where a suspicious matter report is required to be lodged, which will require a legal practitioner to terminate the client retainer agreement for reasons that cannot be disclosed to the client under pain of the legal practitioner committing an offence; create a chilling effect on the client's willingness to provide otherwise protected information openly and frankly resulting in damage to the lawyer client relationship which will impede the legitimate and efficient delivery of legal services; change the role of legal practitioners in the Australian system of justice from trusted advisor to that of informant to law enforcement; impose dual regulation on legal practitioners; and increase compliance burdens and costs associated with operating a legal practice and providing legal services[55]; and that it will threat the operation of the legal professional privilege. In this regard, it is true that the AML/CTF Act "does not affect the law relating to legal professional privilege"[56]. Nevertheless the Law Council argued that it inherently risks breaching the legal professional privilege and that the provisions "wrongly" transferred the burden of protecting the privilege onto the legal profession[57].

What is likely to happen

Australia – a member of the FATF since 1990 – shows ongoing amenability to implementing the international standard. In cases where the FATF found that the implementation was not full, it recommended that Australia enact new legislation or amend existing legislation. Australia followed suit. After the FATF revised its recommendations following 9/11, the Australian Government determined that in order for Australia to maintain its internationally respected position, urgent action was needed to implement the FATF Recommendations (Jensen, 2008).

Many of these deficiencies were addressed, in accordance with the FATF recommendations, by the AML/CTF Act[58]. A decade later, the FATF conducted another review. It found that, even though Australia was not yet fully compliant, it had indeed improved its compliance with many of the deficiencies which had been found and recommended for improvement[59]. The same trend of positive compliance was found in the last follow-up report on Australia's AML/CTF regime.

As shown in Table I, FATF commenced its evaluations of Australia in 2005. It found that Australia was fully compliant with eight of the recommendations, which represented 20 per cent of all recommendations. Following this report, Australia improved its compliance. In 2015, it was fully compliant with 12 recommendation (30 per cent). By 2018, it was fully compliant with 17 recommendations (42.5 per cent). It can also be seen that in 2005 Australia did not comply at all with nine recommendations (22.5 per cent), which in 2016 was reduced to six recommendation (15 per cent) and in 2018 to only five recommendations (12.5 per cent) – or, in other words, Australia was, in one way or another, compliant with 35 recommendations

(87.5 per cent). In addition, the implementation of 13 recommendations improved between 2005 and 2015, and the implementation of another seven improved between 2015 and 2018. In total, from 2005 to 2018, Australia improved its compliance with 20 recommendations – half of all the recommendations. There are only three FATF recommendations that Australia has totally ignored: Recommendation 13, which deals with correspondent banking, and Recommendations 22 and 23, which deal with the legal profession.

It seems that Australia is capable of deferring implementation for some time.[60] However, when the risk to its financial reputation becomes overwhelming, Australia ultimately conforms with the FATF standards.

Conclusion

The full implementation of the AML/CTF regime in Australia, which will affect legal professionals (tranche II), has been delayed for many years. In April 2016, the Attorney-General's Department report on the statutory review of the AML/CTF regime identified the tranche II laws as a priority area for action. It is very likely that the government will take action to address the shortcomings identified by the FATF in the near future (Reuters, 2016; Keenan, 2016).

It is true that Australia, like other states in the world, has not been fully compliant with Recommendations 22 and 23. Some might argue that the fact that Australia has failed for years to implement tranche II proves that its parliament is able to resist the FATF. As seen in this article, however, Australia's resistance to compliance is impermanent.[61] It seems that the FATF has great practical influence over the CTF regime globally – including in Australia. Like other states, Australia is eventually unable to resist the pressure to legislate in accordance with the FATF recommendations. Based on the fact that the global standard has reshaped regulatory regimes in Australia and throughout the world, it seems that the day when legal professionals in Australia will be covered by the AML/CTF regulations is not far away. Even if the evidence shows that the risk in Australia for the abusing of legal partitioners for ML and TF is low – if exist at all – and will cost billions, annually, as suggested by the Law Council. There is no question of the need for such compliance. Nor is there any doubt that this compliance will affect the important and longstanding protection provided by legal professional privilege.

This paper has shed light on one of the emerging forms of international governance in this era of globalisation: the departure from regular lawmaking processes. It has focused on Australia's duties under the FATF recommendations and their impact on legal professional privilege in Australia. The paper has demonstrated the role of the domestic legislature and the influence of the international non-binding norms.

Notes

1. This paper adopts the definition of 'legal professionals' used by the FATF. See FATF, *Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals* (June 2013) annex 3. The recommendations explicitly exempt corporate legal officers and professionals working for government agencies, who may already be subject to AML/CFT measures.
2. The data collected for this complex table is kept with the author, who would be happy to provide it on request.
3. *Reece v Trye* (1846) 9 Beav 316 at 319.
4. A.M. &S. Europe Ltd.v. Commission of the European Communities (1983) QB 878, 949-950.
5. *Esso Australia Resources v Commissioner of Taxation* [1999] HCA 67, [35].

6. *Grant v Downs* (1976) 135 CLR 674, 685.
7. *Baker v Campbell* (1983) 153 CLR 52, 130.
8. *Grofam Pty Ltd v Australia and New Zeeland Banking Group Ltd* (1993) 45 FCR 445, 456.
9. *Esso Australia Resources v Commissioner of Taxation* [1999] HCA 67, [34]. For a discussion about the test for determining whether legal professional privilege attaches to a confidential communication between a legal adviser and a client, Brown (2000).
10. *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 550.
11. Equivalent Acts in State and Territory jurisdictions are the *Evidence Act 1995* (NSW); *Evidence Act 2008* (Vic); *Evidence Act 2001* (Tas); *Evidence Act 2011* (ACT); and *Evidence (National Uniform Legislation) Act 2011* (NT).
12. *Evidence Act 1995* (Cth) s 118.
13. *Evidence Act 1995* (Cth) s 119.
14. *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*, r 21.2 (solicitors); *Legal Profession Uniform Conduct (Barristers Rules) 2015*, r 61 (barristers).
15. *Evidence Act 1995* (NSW) ss 121–126.
16. *Varawa v Howard Smith & Co Ltd* (1910) 10 CLR 382, 385, 386, 390.
17. *R v Bell; Ex parte LEES* (1980) 146 CLR 141, [5].
18. *Ramsbotham v Senior* (1869) LR 8 Eq 575, 578–9.
19. FATF, *Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals* (June 2013) 7.
20. FATF, *Typology Report* (2002).
21. FATF, *Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals* (2013); FATF, *Risk-Based Approach: Guidance for Legal Professionals* (23 October 2008).
22. AUSTRAC, *Strategic Analysis Brief: Money Laundering through Legal Practitioners* (December 2015).
23. Choo (2014). In 2010, the American Bar Association, the International Bar Association, and the Council of Bars and Law Societies of Europe co-authored a comprehensive guide for lawyers on detecting and preventing money laundering in their practices: American Bar Association, International Bar Association, and Council of Bars and Law Societies of Europe, *Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing* (2010).
24. The other six sectors are casinos and other gambling businesses; dealers in real estate and high-value items; company and trust service providers; notaries; accountants and auditors; and investment advisers. FATF (2002).
25. For a critical discussion on the opportunity for the legal profession in Canada, Australia and the USA to meet with the FATF during on-site visits and the FATF response, Terry and Llerena Robles (2018).
26. FATF (2003). For the argument that little evidence appears to be available to demonstrate that the costs of the regime produce commensurate benefits in FATF member states or in any other jurisdiction, see Law Council of Australia, Submission in Response to Consultation Paper *Legal Practitioners and Conveyancers: A Model for Regulation under Australia's Anti-Money Laundering and Counterterrorism Financing Regime* (7 February 2017) 15.

27. FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations* (updated October 2018).
28. FATF Recommendation 23, Interpretive note.
29. In Canada, legal professionals are subject to the Criminal Code, but they are exempted from the federal legislative regime under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act ('PCMLTFA') due to constitutional principles (*Canada (Attorney-General) v Federation of Law Societies of Canada* 2015 SCC 7). The legal profession has adopted model rules for lawyers and notaries to follow that are designed to reflect the government's legislative objectives under the PCMLTFA. See AML/CTF Working Group, *Guidance for the Legal Profession* (February 2019) 8.
30. Chaikin (*n* 4). See also Shepherd (*n* 36).
31. *Legal Practitioners Ordinance* (Cap 159).
32. *Legal Practitioners Ordinance* (Cap 159), s 7.
33. FATF (2012). For a discussion on the latest AML developments in terms of case law and intended legislative amendments in Hong Kong, Yim and Lee (2018).
34. *Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance* (Cap 615).
35. As defined in Part 2 of Schedule 1 to the AMLO.
36. Schedule 2 to the AMLO.
37. As defined in s 2(1) of the *Legal Practitioners Ordinance* (Cap 159).
38. See 'Enhancing Hong Kong's Regulatory Regime for Combating Money Laundering and Terrorist Financing (I)' *Hong Kong Lawyer* (12 April 2018), available at: www.hk-lawyer.org/content/enhancing-hong-kong%E2%80%99s-regulatory-regime-combating-money-laundering-and-terrorist-financing-i
39. The FATF, together with its global network (the FATF-style regional bodies, which are responsible for the implementation of the recommendations by countries within their region), conducts MERs for almost every state in the world, and on an ongoing basis assesses whether a country is sufficiently compliant with the FATF standards. The MERs provide an in-depth description and analysis of each country's system for preventing abuse of the financial system.
40. See, eg, *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*, r 5.1.
41. See, eg, *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015,* r 2.3.
42. See, eg, *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015,* r 3.1.
43. As Mason CJ observed in *Giannerelli v Wraith* (1988) 165 CLR 543, 556.
44. *AntiMoney Laundering and CounterTerrorism Financing Act 2006* (Cth) ('AML/CTF Act') s 41.
45. *AntiMoney Laundering and CounterTerrorism Financing Act 2006* (Cth) ('AML/CTF Act') s 242.
46. *AntiMoney Laundering and CounterTerrorism Financing Act 2006* (Cth) ('AML/CTF Act') s 3.
47. *AntiMoney Laundering and CounterTerrorism Financing Act 2006* (Cth) ('AML/CTF Act') s 36.
48. *AntiMoney Laundering and CounterTerrorism Financing Act 2006* (Cth) ('AML/CTF Act') s 41.
49. Financial Action Task Force, *Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism Australia* (October 2005) ('MER 2005'); Ross and Hannan (2007).

50. The FATF together with its global network (named FATF Style Reginal Bodies, which are responsible for implementation of the Recommendation by countries within their region), conducts MER for almost every state in the world, and on an ongoing basis assesses whether a country is sufficiently compliant with the FATF standards; providing an in-depth description and analysis of each country's system for preventing abuse of the financial system.
51. AML/CTF Act, ss 5, 6.
52. *Financial Transactions Reports Act 1988* (Cth) s 15. It is important to note that the obligations of that Act do not apply to a transaction to which the AML/CTF Act applies.
53. Law Council of Australia, Submission in Response to Consultation Paper *Legal Practitioners and Conveyancers: A Model for Regulation under Australia's Anti-Money Laundering and Counterterrorism Financing Regime* (7 February 2017)
54. Law Council of Australia, Submission in Response to Consultation Paper *Legal Practitioners and Conveyancers: A Model for Regulation under Australia's Anti-Money Laundering and Counterterrorism Financing Regime* (7 February 2017), page 5.
55. Law Council of Australia, Submission in Response to Consultation Paper *Legal Practitioners and Conveyancers: A Model for Regulation under Australia's Anti-Money Laundering and Counterterrorism Financing Regime* (7 February 2017), 49-53.
56. AML/CTF Act, S 242.
57. Taking from Cromwell J in Canada (Attorney-General) v Federation of Law Societies of Canada 2015SCC 7.
58. One of the objects of the AML/CTF Act is to address matters of international concern, including the FATF recommendations. See s 3(3)(a).
59. For a comprehensive review of Australia compliance with the FATF CTF Recommendations, see Doron Goldbarsht, 'Who's the Legislator Anyway?' (*n* 1).
60. David Chaikin, *The Australian Accounting Profession's Response to Anti-Money Laundering Regulation* (Chartered Accountants Australia and New-Zealand), available at: www.charteredaccountantsanz.com
61. Comp Doron Goldbarsht, 'Who's the Legislator Anyway?' (*n* 1, p.149).

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