



Anti-Money Laundering reforms and D&O insurance impacts

In Part 1 of this series, we discussed certain changes that were made to Australia's Anti-Money Laundering (AML) and Counter Terrorism Financing (CTF) laws in 2021. Here, we explore certain broader and more significant reforms being proposed to the AML/CTF regime along with their potential impact on the D&O insurance space.

Sixteen years following the introduction of the first tranche of anti-money laundering reforms, the Australian Senate Legal and Constitutional Affairs References Committee released its long-awaited report on the adequacy and efficiency of Australia's AML/CTF regime. The report focuses on the implementation of "Tranche 2" reforms which would extend the application of Australia's AML/CTF laws and regulations to designated non-financial businesses and professions (DNFBPs), also known as "professional facilitators" such as lawyers, real estate agents, accountants and trust and company service providers (among others).¹

The implementation of the Committee's recommendations could potentially impact the personal liabilities of directors and officers of professional facilitators (and all relevant reporting entities) with flow-on effects on the insurance cover available for such liabilities.

Reforms – what's feasible?

The committee considered submissions from a range of professional facilitators as well as peak regulatory bodies such as AUSTRAC, the Australian Federal Police (AFP) and the Department of Home Affairs. There has been some criticism of the pace at which Australia has addressed AML/CTF reforms and several submissions noted that reforms are "entirely feasible...with the political will"² given that 195 countries have already legislated similar measures. Professional facilitators on the other hand, raised concerns around the risk of duplicating existing obligations, increased costs of compliance and risks to the operation of legal professional privilege.

Importantly, the report specifically considers increasing civil and criminal penalties as an accountability mechanism for senior management of companies, proposing to increase AUSTRAC's ability to gather and provide detailed and specific information on money laundering within a corporation, to senior leaders of that corporation, such that information on money laundering would be "forced" onto senior executives making prosecution by AUSTRAC and other bodies easier.³

The Committee's final recommendations are that:

- The Australian Government accelerates its consultation with professional facilitators and other relevant stakeholders on the timely implementation of Tranche 2 reforms in line with Financial Action Taskforce (FATF) recommendations.

¹ Financial Action Task Force (FATF), *Glossary of the FATF Recommendations*, 2022 <https://www.fatf-gafi.org/glossary/d-i/>

² Paddy Oliver, Director, AML Experts, Committee Hansard, 9 November 2021, p. 1.

³ John Chevis, *Answers to written questions on notice*, 16 November 2021 (received 9 December 2021), p. 6.

- The government consults with relevant stakeholders, including professional facilitators with specific consideration of:
 - the impact of regulatory reforms on small businesses
 - opportunities and efficiencies to be gained from technological innovation, particularly regarding streamlining regulatory processes and lowering costs and
 - existing regulatory and professional obligations on Tranche 2 entities, including their effectiveness in comparison with the Anti-Money Laundering and Counter-Terrorism Financing Act 2006.
- The Australian government seek advice as to whether section 242 of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 should be amended to ensure adequate protections are afforded to the operation of legal professional privilege.
- The implementation of a beneficial ownership register be pursued to curb the issue of directors hiding their assets using anonymously owned companies¹.

The impact on D&O insurance

As discussed in Part 1 of our coverage on this changing landscape, D&O insurance policies can play a key role in providing cover for senior management and executives who are subject to increased regulatory scrutiny and penalties as a result of the implementation of the proposed reforms.

The timing of the implementation of these reforms in Australia will be impacted by the change in government. There has been increasing pressure to implement Tranche 2 reforms urgently; the ALP has been vocal about AML/CTF reforms, meaning that reforms could be introduced sooner than under the former Coalition government. The Greens also introduced a bill in the Senate in February this year focusing on bringing forward the creation of a beneficial ownership register and the implementation of all reforms by September 2022.²

The impact of reforms on D&O insurance cover will be broad, as any reforms will target all reporting entities, not just professional facilitators. Insurers will likely focus on ensuring insured persons and companies are implementing adequate compliance measures in line with any proposed amendments to the AML/CTF legislation in Australia. This would involve increased scrutiny around an entity's AML/CTF compliance systems and reporting procedures at the policy placement and renewal stage.

We may also see insurers taking other measures including:

- imposing sub-limits on cover for AUSTRAC investigations
- some insurers excluding cover entirely for all losses relating to AML/CTF investigations and
- higher deductibles may be utilised by insurers where an organisation or its senior management are found to not have implemented adequate compliance systems that are in line with a new regulatory regime.

We recommend that organisations, particularly professional facilitators and their senior management, continue to monitor this space and work with their broker in the coming months to understand their risks and exposure to increased liability under a new AML/CTF regime.

Disclaimer: It is recommended that organisations talk to their brokers and understand the breadth, scope and limitations of coverage afforded under their D&O policies. At WTW, we can assist organisations in navigating through the expectations of the regulators and how insurance can play its part in providing the appropriate level of protection for

Contact WTW

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¹ The Senate Legal and Constitutional Affairs References Committee, *The adequacy and efficacy of Australia's anti-money laundering and counterterrorism financing (AML/CTF) regime*, 30 March 2022, p. 9

² Thomson Reuters, *Australian senators keep pressure on for AML/CTF law reform, ahead of Senate report, 2022* <https://insight.thomsonreuters.com.au/business/posts/australian-senators-keep-pressure-on-for-aml-ctf-law-reform-ahead-of-senate-report>

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