



Law Council
OF AUSTRALIA

ANTI-MONEY LAUNDERING GUIDE

for legal practitioners

(Updated January 2016)

David Morrison
A gallant-blooded member of my race
I should very gladly be the first
to change not the last
of things on earth

[Signature]
SECRETARY TO THE TREASURY
GOVERNOR
RESERVE BANK OF AUSTRALIA
THIS AUSTRALIAN NOTE
IS LEGAL TENDER THROUGHOUT
AUSTRALIA AND ITS TERRITORIES

10
ONE HUNDRED

ANTI-MONEY LAUNDERING GUIDE



for legal practitioners

Acknowledgements

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EXECUTIVE SUMMARY

The Australian Government continues to reform Australia's anti-money laundering and counter-terrorism financing (AML/CTF) regime. The ongoing aim of the reforms is to bring Australia into greater compliance with the standards published by the Financial Action Task Force¹ (FATF).

The *Anti-Money Laundering/Counter-Terrorism Financing Act 2006*² represents Tranche 1 of the reforms which is aimed at the financial sector, the gambling sector and bullion dealers. A proposed second tranche of reforms is expected to focus on certain businesses and professions, including legal practitioners.

The AML/CTF regime imposes a number of regulatory obligations on *reporting entities*, including customer and beneficial ownership due diligence, record keeping and transactions reporting. The AML/CTF legislation also contains offences for non-compliance with regulatory obligations and sanctions.

Lawyers are not *reporting entities* as such under the AML/CTF legislation. Instead lawyers are subject to stringent requirements prescribed by the regulatory regime of the legal profession legislation and rules of professional conduct. Through compliance with lawyers' existing obligations, the risks of becoming inadvertently involved in money laundering or the financing of terrorism may be largely addressed.

The Law Council has actively engaged with the Government in representing the interests of the legal profession in relation to Tranches 1 and 2 of the AML/CTF legislation.

It is a major concern for the legal profession that if imposed, further AML/CTF reporting obligations would impact on professional independence, client confidentiality and client legal privilege. Added to this concern is that there is little if any actual evidence of lawyer involvement in money laundering or terrorism financing. For these reasons the Law Council of Australia has opposed the proposed extension of the AML/CTF reporting regime to legal practitioners.

However there is a need for legal practitioners to remain vigilant and adhere to good business management practices. Such practices help legal practitioners continue to minimize their risk of exposure to involvement in money laundering and terrorism financing and fortify law practices by ensuring that awareness of money laundering warning signs and risk management and mitigation strategies is maintained.

The Law Council will continue working with Government on behalf of the profession, and its Constituent Bodies to provide up-to-date information to legal practitioners in relation to AML/CTF issues.

¹ The Financial Action Task Force is an inter-governmental body established in 1989 by the Ministers of its Member jurisdictions. The objectives of the FATF are to set standards and promote implementation of legal, regulatory and operational measures intended to combat money laundering, terrorist financing and other threats to the international financial system.

² The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) is supported by *Anti-Money Laundering and Counter-Terrorism Financing (Iran Counter-Measures) Regulations 2014* (Cth) and *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No1)* together with other legislation are collectively referred to as the AML/CTF regime.

ABOUT THIS GUIDE

This Guide is designed to provide an overview of the development of the AML/CTF regime in Australia. The first sections set out the history of the regime and describe some of the obligations and sanctions that apply to *reporting entities* covered by the AML/CTF Act under Tranche 1.

Lawyers ordinarily engaged in the practice of law in Australia are not *reporting entities* as such. However, this Guide also sets out the obligations to which lawyers are currently subject under various legislative and professional standards including the Australian Solicitors' Conduct Rules where they may be relevant.

The Guide will then outline the possible extension of the AML/CTF regulatory regime to the legal profession under proposed Tranche 2 reforms. This part will include consideration of the potential harmful impact of certain aspects of the regulatory regime on the fundamental issues of client legal privilege and client confidentiality.

The Law Council is finalising a complementary guide to provide guidance on voluntary actions that might assist lawyers to better recognise and respond to possible warning signs of money laundering. The *Lawyers' Guide to Preventing Money Laundering* will detail efficient and proportionate practice management measures to consider irrespective of whether the Government extends Tranche 2 regulatory obligations to legal practitioners.

Introduction

'Recent estimates suggest that the level of money laundered in and through Australia is at least \$10 billion a year.'³

This particularly concerning statement appears on the Australian Crime Commission's website and underpins the Commonwealth Attorney-General's Department's view of why anti-money laundering and counter-terrorism financing (AML/CTF) reforms are required in Australia. Regardless of whether the figures quoted are accurate or not, Australia's AML/CTF system is under review and further reforms are likely to be progressively rolled out.

The Government rationale for the regulation is succinctly stated in the Commonwealth Attorney-General's Department's anti-money laundering Customer Information Brochure:⁴

'The Australian Government introduced anti-money laundering and counter-terrorism financing (AML/CTF) laws to:

- bring Australia's AML/CTF system into line with international standards;
- reduce the risk of Australian businesses being misused for the purposes of money laundering or terrorism financing; and
- meet the needs of law enforcement agencies for targeted information about activity which may be linked to money laundering, terrorism financing and other serious crimes.'

EXISTING LEGAL FRAMEWORK

Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth): Tranche 1

The *Financial Transaction Reports Act 1988* (Cth) (FTRA) established one of Australia's first system for monitoring the flows of money across transactions. The FTRA requires the reporting of transactions that involve certain cash threshold amounts. The reporting requirements of the FTRA were introduced at a time when banking and financial transactions were significantly different to those of today's interconnected global financial system.

In 1989 several nations formed the Financial Action Task Force (FATF) to try to address concerns about money laundering in the illicit drug trade. FATF (now comprising 34 members) developed standards, *Forty Recommendations on Anti-Money Laundering and Nine Special Recommendations on Counter-Terrorist Financing*⁵ intended to apply to financial gatekeepers. In 2003, lawyers were included within the FATF's designation of *Non Financial Businesses and Professions* (DNFBPs) which is the focus of particular recommendations including for example:

- R 22 Customer due diligence and record-keeping; and
- R 23 Other measures.⁶

A review in 2005 of Australia's implementation of these recommendations by the FATF found

³ Australian Crime Commission, *Crime Profile on Money Laundering*, accessed December 2015 at <https://crimecommission.gov.au/publications/intelligence-products/crime-profile-fact-sheets/money-laundering>

⁴ Commonwealth Attorney-General's Department, *Customer Information Brochure*, accessed December 2015 at <https://www.ag.gov.au/CrimeAndCorruption/AntiLaunderingCounterTerrorismFinancing/Documents/CustomerInformationBrochure.doc>

⁵ The Recommendations were revised in 1996, 2003 and 2012 (and further updated October 2015) and are available at http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf

⁶ The FATF Recommendations were last updated in 2012 and October 2015, many of the relevant recommendations were re-numbered as part of this update.

the Australian systems were well behind the FATF's recommended best practice.

The response of the Australian Government was to release in December 2005 the Anti-Money Laundering and Counter-Terrorism Financing Bill for consultation, which became legislation (the AML/CTF Act) on 12 December 2006. Supporting AML/CTF rules and regulations were implemented in 2007 and 2008.⁷

In June 2013, the FATF released a report on what it referred to as the vulnerabilities of legal professionals to money laundering and terrorism financing.⁸

In 2014-2015, the FATF conducted a second evaluation of Australia's AML/CTF regime (based on technical compliance and effectiveness) resulting in a mixed review that suggests a modest improvement since 2005.⁹

In December 2013, the Attorney-General's Department and the Australian Transaction Reports and Analysis Centre (AUSTRAC) launched Australia's first statutory review of Australia AML/CTF Regime. The Statutory Review Report will build on the recommendations of the FATF in 2015 and is expected to be tabled in Parliament in 2016.

Current obligations of *reporting entities* under the Act

The reforms implemented were designed to be rolled out in tranches. Tranche 1 was directed to *reporting entities*¹⁰ engaged in the financial sector, gambling sector, bullion dealers and businesses that provide particular *designated services*¹¹.

In February 2012, the FATF published revised recommendations which deal with risks relating to money laundering, terrorist financing, the financing of the proliferation of weapons of mass destruction and others.

It is pertinent to briefly set out the obligations placed on *reporting entities* under the AML/CTF Act. The obligations include:

- identification and verification - *reporting entities* must identify and verify a customer's identity before providing the customer with a designated service and carry out ongoing due diligence on customers.
- reporting - *reporting entities* must register and report to AUSTRAC suspicious matters, certain transactions above a threshold amount and international funds transfer instructions. AUSTRAC is, in turn, authorised in certain circumstances to provide that information to domestic regulatory, national security and law enforcement agencies and certain international counterparts.
- Developing and maintaining an AML/CTF program - *reporting entities* must introduce into their businesses, and comply with, AML/CTF programs which are designed to identify, mitigate and manage money laundering, terrorist financing and other risks that the reporting entity might reasonably face in its business.
- Record keeping - *reporting entities* must make and retain certain records, and retain certain documents given to them by customers, for seven years.

⁷ See for example the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth); *Anti-Money Laundering and Counter-Terrorism Financing (Iran Counter-Measures) Regulations 2014* (Cth) and *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No1)* available at <https://www.comlaw.gov.au/Details/C2015C00616/Download>

⁸ Financial Action Task Force, *Report: Money Laundering and Terrorism Financing Vulnerabilities of Legal Professionals*, June 2013 available at <http://www.fatf-gafi.org/media/fatf/documents/reports/ML%20and%20TF%20vulnerabilities%20legal%20professionals.pdf>

⁹ Financial Action Task Force, *Mutual Evaluation Report Australia*, April 2015 available at <http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/Mutual-Evaluation-Report-Australia-2015.pdf>

¹⁰ *Reporting entities* is defined under section 5 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.

¹¹ Table 1 (section 6, AML/CTF Act) prescribes which financial services activities are *designated services* under the AML/CTF Act.

The *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)* (AML/CTF Rules) provides further clarification on specific AML/CTF program requirements that *reporting entities* should have, including:

- client identification (referred to as the 'know your customer' requirements);
- systems and controls for ongoing assessment of money laundering or terrorism financing risks;
- a transaction monitoring program aimed at identifying money laundering or terrorism financing and identifying suspicious transactions;
- an AML/CTF risk awareness training program for employees;
- an employee due diligence program to:
 - screen prospective employees who may be in a position to facilitate the commission of a money laundering or terrorism financing offence, including re-screening process when employees are promoted or transferred; and
 - manage employees who fail, without reasonable excuse, to comply with any system, control or procedure;
- a process for governing board or senior management approval of the AML/CTF program;
- the designation of a person at managerial level as the 'AML/CTF Compliance Officer';
- regular independent reviews of Part A of the AML/CTF program to assess effectiveness, compliance and implementation of the program; and
- procedures for the *reporting entity* to have regard to feedback from AUSTRAC on the *reporting entity's* performance on its management of money laundering or terrorism financing risk.

Significant further amendments to the customer due diligence provisions of the AML/CTF Rules commenced on 1 June 2014. The main changes include that *reporting entities* must now collect and verify information about the settlors of trusts. *Reporting entities* are also now obliged to identify and verify not just their customers, but any beneficial owners of a customer (corporate or trust). Beneficial owners are defined as natural persons who ultimately own or control the customer (whether directly or indirectly).

Another significant change is in relation to *politically exposed persons* (PEP). These are individuals entrusted with prominent public functions in a government body or international organisation, including politicians and judicial officers. The changes to the AML/CTF Rules expand the definition of PEP so that it now also includes Australian politicians and high officials, as well as foreign officials. Increased or enhanced due diligence measures now apply to domestic PEPs in certain situations.

The Commonwealth agency, AUSTRAC, which has responsibility for administering the *Financial Transaction Reports Act 1988*, is also the regulator for obligations under the AML/CTF Act.

AUSTRAC functions include:

- receive suspicious transaction reports;
- appoint external auditors to assess reporting entities' risk management and compliance;

- require annual compliance reports;
- issue remedial directions to *reporting entities*; and
- enter into enforceable undertakings with *reporting entities*.

Current offences, sanctions and risks for *reporting entities* under the AML/CTF Act

The AML/CTF Act takes two approaches to sanctions including both offences and civil penalty provisions.

Many offences are contained at Part 12 and include, for example, up to ten years imprisonment¹² for:

- producing false or misleading information;
- producing a false or misleading document;
- making or possessing a false document; and
- making or possessing equipment for making false documents.

Five year imprisonment offences¹³ exist for:

- conducting transactions so as to avoid reporting requirements relating to threshold transactions¹⁴; and
- conducting transfers so as to avoid reporting requirements relating to cross-border movements of physical currency.

Two year imprisonment offences exist for providing or receiving a designated service using false customer names or ensuring customer anonymity.¹⁵

Civil penalty provisions exist throughout the AML/CTF Act with respect to detailed compliance issues, including failing to:

- carry out the applicable customer identification procedures before the commencement of the provision of a designated service;
- conduct ongoing customer due diligence;
- have an anti-money laundering and counter-terrorism financing program;
- retain transaction records;
- retain records of identification procedures;
- retain records about electronic funds transfer instructions;
- conduct money laundering and terrorism financing risk assessments; and
- report a suspicious transaction.

Suspicious transaction reporting obligations arise when a *reporting entity* provides, offers to provide, or is requested to provide, a designated service. If the entity has reasonable grounds

¹² AML/CTF Act sections 136 - 138

¹³ AML/CTF Act sections 142 & 143

¹⁴ The threshold is currently set at \$10,000 for cash transactions.

¹⁵ AML/CTF Act sections 139 - 141

for suspicion, it must formally contact AUSTRAC within 24 hours for terrorist financing matters and three days for all other matters.

What must be reported includes:

- a person who is not who he/she claims to be;
- having information likely to be of relevance to an investigation or prosecution of a person for an evasion, or an attempted evasion of Commonwealth, State or Territory taxation law;
- having information likely to be of relevance to an investigation or prosecution of a person for an offence against a Commonwealth, State or Territory law; and
- information that may be of assistance in the enforcement of the *Proceeds of Crime Act 2002* (Cth); or a State or Territory equivalent.

A person must not disclose to a customer (or anyone else) that a suspicious matter report has been made to AUSTRAC or that a suspicion has been formed, or any information that may assist someone to infer that a suspicion has been formed. To do so could contravene the AML/CTF Act's provisions against 'tipping off'. Tipping off is a criminal offence that can attract a penalty of two years' imprisonment or 120 penalty units or both.¹⁶

Implications for legal practitioners

The scope of those enterprises subject to the first tranche obligations was at first somewhat unclear.

AUSTRAC has advised that legal practitioners generally are not intended to be subject to these first cut of obligations. However, where legal practitioners also hold an Australian Financial Services License or deal with financial securities as an agent of a person such obligations may arise. Legal practitioners would be well advised to review the existing legislation to ensure their activities do not give rise to these obligations.

Due to broad definitions in the AML/CTF Act there has also been some concern that legal practitioners were subject to obligations under the Act because some legal services may inadvertently fall within the ambit of the table of *designated services* at section 6, for example:

- Items 31 and 32 (receiving or making property available under a designated remittance arrangement); or
- Items 46 and 47 (providing a custodial or depository service).

The primary concern was that ordinary trust account activities might fall within the definition of designated remittance arrangements.

In order to clarify the position in relation to designated remittance arrangements, AUSTRAC introduced Chapter 23 of the AML/CTF Rules which specifies that persons who provide a remittance service in the course of carrying out a 'law practice' or an 'accounting practice' are not captured by the definition of a 'designated remittance arrangement' in the AML/CTF Act and are therefore exempted from the obligations placed on remittance providers under the Act.

Chapter 23 created this exemption by reference to section 10 of the AML/CTF Act. However, the *Crimes Legislation Amendment (Serious and Organised Crime) Act (No. 2) 2012* made substantive changes to the formulation of the definition of 'designated remittance arrangement' in section 10 of the Act. This resulted in the current formulation of the exemption in Chapter 23 of the Rules no longer marrying with the AML/CTF Act.

In December 2011, AUSTRAC amended Chapter 23 of the rules in order to bring the

¹⁶ AML/CTF Act section 123

formulation of the relevant exemption into line with the current wording of the AML/CTF Act. Chapter 23 now relevantly provides:

23.1 These Anti-Money Laundering and Counter-Terrorism Financing Rules are made under section 229 of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (AML/CTF Act) for the purpose of paragraph (e) of the definition of 'non-financier' in section 5 of the AML/CTF Act.

23.2 For paragraph (e) of the definition of 'non-financier' in section 5 of the AML/CTF Act, the following persons are specified:

- (1) a person carrying on an accounting practice; or
- (2) a person carrying on a law practice.

23.3 In this Chapter:

- (1) 'accounting practice' means a business carried out by either of the following:
 - (1) an accountant (however described) that supplies professional accounting services; or
 - (2) a partnership or company that uses accountants (however described) to supply professional accounting services;
- (2) 'law practice' means a business carried out by either of the following:
 - (1) a legal practitioner (however described) that supplies professional legal services; or
 - (2) a partnership or company that uses legal practitioners (however described) to supply professional legal services.

There was also concern that activities such as holding certain items of property, for example in estate matters might fall within the definition of providing a custodial or depository service.

In order to clarify the position in relation to custodial deposit box services AUSTRAC introduced Chapter 40 of the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007* (No. 1), which relevantly provides:

40.1 These Anti-Money Laundering and Counter-Terrorism Financing Rules (Rules) are made under section 229 of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (AML/CTF Act) for the definition of 'exempt legal practitioner service' in section 5 of the Act.

40.2 A service is taken to be an 'exempt legal practitioner service' if:

- (1) it is provided in the ordinary course of carrying on a law practice and is a custodial or depository service other than conduct that under section 766E(1) of the *Corporations Act 2001* constitutes providing a custodial or depository service; or
- (2) it is provided in the ordinary course of carrying on a law practice and it is a safe deposit box or similar facility other than in relation to physical currency.

40.3 In this Chapter 'law practice' means a business carried out by either of the following:

- (1) a legal practitioner (however described) that supplies professional legal services; or
- (2) a partnership or company that uses legal practitioners (however described) to supply professional legal services.

The result of these amendments is that legal practitioners are not currently subject to most of the regulatory obligations under the AML/CTF regime. It is important to note that where a legal

practitioner provides certain *designated services*¹⁷, which may be outside the scope of legal practice, (for example, making loans or providing remittance services) or in competition with the financial services sector, or for which an Australian Financial Services License is required, the legal practitioner may become subject to the reporting and other obligations of the AML/CTF regime in relation to the provision of those services.

Lawyers are subject to a number of regulatory obligations in relation to client funds. While these obligations are not undertaken in compliance with the AML/CTF regime, their objectives nevertheless address risks similar to those for which the AML/CTF legislation was implemented.

REGULATION OF THE LEGAL PROFESSION

This section outlines some of the obligations to which lawyers are subject which are broadly comparable to those targeted by the AML/CTF regime. In some regards, lawyers may be subject to more stringent regulation under present arrangements than is required under the AML/CTF regime.

Criminal laws

Like all citizens, legal professionals are subject to state and federal civil and criminal justice systems. Each State and Territory has money laundering offences that typically arise under proceeds of crime legislation. Division 400 of the *Criminal Code Act 1995* (Cth) (Criminal Code) establishes the Commonwealth's money laundering offences which include offences for dealing with money or property that is or is likely to become proceeds or an instrument of crime. For example in section 400.3 for money or property with a value of \$1,000,000 or more:

- knowingly dealing with the proceeds of crime has a maximum imprisonment of 25 years or a fine of 1500 penalty units, or both;
- recklessly dealing with the proceeds of crime has a maximum imprisonment of 12 years or a fine of 720 penalty units, or both; and
- negligently dealing with the proceeds of crime has a maximum imprisonment of 5 years or a fine of 300 penalty units, or both.

The penalties for Division 400 offences of dealing with the proceeds of crime are 'stepped' in relation to the value of the money or property involved. Section 400.7(3) of the *Criminal Code* for example, provides for a maximum imprisonment of 12 months for negligently dealing with proceeds of crime of merely \$1,000.

Dealing with money or other property is defined as:

- receiving, possessing, concealing or disposing of money or other property; or
- importing money or other property into, or exporting money or other property from, Australia; and
- the money or other property which is proceeds of crime, or could become an instrument of crime, in relation to an indictable offence.

In Australia, no legal practitioners have been prosecuted or convicted of money laundering. In the United Kingdom there are examples of solicitors who have received custodial sentences for regulatory offences such as failing to disclose transactions to the authorities as required.

¹⁷ *Designated services* are defined as services prescribed in section 6 [Anti-Money Laundering and Counter-Terrorism Financing Act 2006](#) (Cth)

- In R v Duff [2002] EWCA Crim 2117 solicitor Jonathan Michael Duff was convicted of failing to disclose knowledge or suspicion of money laundering contrary to section 52(1) of the Drug Trafficking Act 1994 and sentenced to six months imprisonment.
- In R v McCartan [2004] NICA 43 solicitor Gavin David McCartan was convicted of failing to disclose information, contrary to article 44 of the Proceeds of Crime (Northern Ireland) Order 1996 and of using a false instrument, contrary to section 3 of the Forgery and Counterfeiting Act 1981 and was sentenced to two concurrent terms of imprisonment of six months and two months.
- In R v Griffiths [2006] EWCA Crim 2155 solicitor Philip John Griffith was convicted of failing to disclose to the authorities that he knew or suspected that a money laundering offence was taking place and was sentenced to 15 months imprisonment which was reduced to six months on appeal.

Cash reporting

Significant cash transactions entered into in the course of legal practice must be reported to AUSTRAC pursuant to section 15A of the *Financial Transactions Reporting Act 1988* (Cth). The [Financial Transaction Reports Act 1988](#) (Cth) defines significant cash transactions as those involving cash currency equivalent to A\$10,000 or more.

Threshold reporting does not require a suspicion to have been formed.

The Australian Solicitors' Conduct Rules (ASCR) and the legal profession disciplinary system

Legal practitioners in Australia (including Australian-registered foreign lawyers) are bound by enforceable rules of professional conduct. Barristers are subject to parallel conduct rules specific to that form of practice. While the ethical obligations that underpin the Australian Solicitors' Conduct Rules (ASCR) are interrelated, a number of the ASCR are specifically relevant to consider in the context of money laundering or the enabling of the financing of terrorism.

The ASCR act as a guide that assists solicitors to act ethically and in accordance with the principles of professional conduct established by the common law and as articulated by the rules. The ASCR provide a principles-based statement of legal practitioners' ethical obligations and a standard against which to consider whether a solicitor's conduct amounts to unsatisfactory professional conduct or professional misconduct.

The principles articulated by the ASCR require practitioners to manage their law practices and provide legal services in such a way that does not allow furtherance of a client's unlawful objectives (including by way of money laundering or other unlawful purpose). The following ASCR are of particular relevance in this regard:

- **Rule 3** emphasises the paramount duty of an Australian solicitor to the court and the due administration of justice. This duty applies not only in a litigation context, but underpins all a solicitor's actions, including that legal services are provided in a way that minimises the risk that those services may facilitate an illegal purpose, thereby undermining the administration of justice;
- **Rule 4** requires, among other things, that a solicitor must deliver legal services competently and diligently and avoid compromise to his or her integrity. This would include avoiding risks that the law practice and legal practitioners may be used wittingly or unwittingly to facilitate money laundering or enable the financing of terrorism;
- **Rule 5** requires that a solicitor must not engage in conduct, in the course of legal practice or otherwise, which demonstrates that the solicitor is not a fit and proper person to practice 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;

- **Rule 8** requires that a solicitor must follow a client's lawful, proper and competent instructions. Rule 8 clearly embodies a requirement that a solicitor must take reasonable steps and make reasonable enquiries to establish the *bona fides* of the client and the lawful purpose of the client's instructions to ensure that legal services are not unwittingly used as instruments of criminality;
- **Rule 37** requires a solicitor with designated responsibility for a matter to exercise reasonable supervision over solicitors and all other employees engaged in the provision of legal services for the matter.

Any breach of the legal profession legislation or conduct rules is conduct capable of constituting *unsatisfactory professional conduct* or *professional misconduct*. If there is a finding that a legal practitioner's conduct constitutes *unsatisfactory professional conduct* or the more serious finding of *professional misconduct*, a range of sanctions may be imposed, including:

- removing the practitioner's name from the roll of practitioners¹⁸;
- suspending, cancelling, or imposing conditions upon the practitioner's practising certificate¹⁹;
- cautioning or issuing a reprimand to the practitioner²⁰;
- fining the practitioner, maximum fine ranging \$10,000 to \$100,000²¹; and
- imprisonment.²²

Regulation of flows of money through law practice accounts

The legal profession legislation of every jurisdiction requires that money entrusted to a law practice on behalf of clients (or third party payers) in the course of legal practice or in connection with the provision of legal services is characterised as **trust money**.²³

¹⁸ *Legal Profession Uniform Law 2015* (NSW) ss 119, 120; *Legal Profession Act 2007* (Qld) ss 461(3), 484(2); *Legal Practitioners Act 1981* (SA) ss 89(2)(d), 90AF(6); *Legal Profession Act 2007* (Tas) ss 480(3), 508(2); *Legal Profession Uniform Law 2015* (Vic) ss 119, 120; *Legal Profession Act 2008* (WA) ss 444(2)(b), 463(2); *Legal Profession Act 2006* (ACT) ss 431(3)(b), 460(2); *Legal Profession Act 2006* (NT) ss 528(3), 552(2).

¹⁹ *Legal Profession Uniform Law 2015* (NSW) ss 74,75,76; *Legal Profession Act 2007* (Qld) ss 456(2)(b)–(d), 456(3)(b)–(d), 456(4)(j); *Legal Practitioners Act 1981* (SA) ss 77AB(1)(d), 82(6)(a)(iii)–(iv), 89(2)(b)–(c), 89A(c)–(d); *Legal Profession Act 2007* (Tas) ss 471(b)–(d), 472(b)–(d), 473(n); *Legal Profession Uniform Law 2015* (Vic) ss 74,75,76; *Legal Profession Act 2008* (WA) ss 439(a)–(c), 440(b)–(d), 441(m); *Legal Profession Act 2006* (ACT) ss 425(3)(b)–(d), 425(4)(b)–(d), 425(5)(i); *Legal Profession Act 2006* (NT) ss 525(3)(b)–(d), 525(4)(b)–(d), 525(5)(i).

²⁰ *Legal Profession Uniform Law 2015* (NSW) ss 299(1)(a), 299(1)(b); *Legal Profession Act 2007* (Qld) ss 456(2)(e), 458(2)(a); *Legal Practitioners Act 1981* (SA) ss 77AB(1)(c), 82(6)(a)(i), 89(2)(a); *Legal Profession Act 2007* (Tas) ss 454(2)(a), 456(7)(a), 471(e), 476; *Legal Profession Uniform Law 2015* (Vic) ss 299(1)(a), 299(1)(b); *Legal Profession Act 2008* (WA) ss 426(2)(a), 439(d); *Legal Profession Act 2006* (ACT) ss 413(2)(a)–(b), 425(3)(e), 429(c); *Legal Profession Act 2006* (NT) ss 499(2)(a), 525(3)(e).

²¹ *Legal Profession Uniform Law 2015* (NSW) ss 299(1)(f), 302(1)(l); *Legal Profession Act 2007* (Qld) ss 456(4)(a), 458(2)(b); *Legal Practitioners Act 1981* (SA) ss 82(6)(a)(ii), 82(6)(b)–(c); *Legal Profession Act 2007* (Tas) ss 454(2)(b), 473(a); *Legal Profession Uniform Law 2015* (Vic) ss 299(1)(f), 302(1)(l); *Legal Profession Act 2008* (WA) ss 426(2)(b), 441(a); *Legal Profession Act 2006* (ACT) ss 413(2)(e), 413(3), 425(5)(a), 427; *Legal Profession Act 2006* (NT) ss 499(2)(b), 499(3), 525(5)(a).

²² *Legal Profession Uniform Law 2015* (NSW) ss 10, 148, 353; *Legal Profession Act 2007* (Qld) ss 25(1)(2); 74(1), 115(2), 121(1)(a), 121(2)(a), 354(1)(b); *Legal Practitioners Act 1981* (SA) ss 76(4), 76(4B), 77A(4); *Legal Profession Act 2007* (Tas) ss 13(1), 551, 585; *Legal Profession Uniform Law 2015* (Vic) ss 299(1)(f), 302(1)(l); *Legal Profession Act 2008* (WA) ss 502; *Legal Profession Act 2006* (NT) ss 150, 166, 600.

²³ See for example the definition of *trust money* in the *Legal Profession Act 2007* (Qld) at section 237, similarly in every Australian jurisdiction's legal profession regulatory counterpart.

Trust money includes:

- money received by the practice on account of legal costs in advance of providing services;
- *controlled money* received by the practice;
- *transit money* received by the practice; and
- money received by the practice that is the subject of a power, exercisable by the practice or an associate of the practice, to deal with money for or on behalf of another person.

Under the legislation lawyers must:

- as soon as practicable after receipt of any trust money, deposit the trust money to a general trust account maintained with an approved authorised deposit-taking institution in the relevant jurisdiction, such as a bank, building society or credit union;
- keep accurate comprehensive records of their trust accounts and general accounts for at least seven years and make them available for inspection by external examiners appointed by the regulatory authority; and
- disburse trust money only as directed by the person on whose behalf it is held.

Trust money must be dealt with in accordance with strict accounting rules. Where a legal practitioner without reasonable excuse causes any deficiency in any trust account or trust ledger, the practitioner becomes liable to severe penalty, imprisonment or both.²⁴ The regulation relating to trust accounts is procedurally detailed and comprehensive²⁵ prescribing for example, processes for investigations, external examinations, the approval of authorised deposit taking institutions, management of statutory deposits and other matters.

The regime also requires that law practice accounts are subject to independent oversight that provides supervision, investigation and audit of accounts. For example, in NSW the Trust Accounts Department of the Law Society of NSW is the regulatory authority that ensures the compliance of law practices across the entire jurisdiction with the stringent laws concerning the receipt, holding and disbursement of trust money. The Trust Accounts Department conducts investigations of solicitors' trust and controlled money accounts as well as the review of general account records in order to detect and prevent fraud. The Trust Accounts Department also conducts education programs and provides advice to legal practitioners and legal support staff. Finally, to promote best practice the Trust Accounts Department develops and maintains a range of practical resources that assist practices in complying with their stringent accounting obligations.²⁶

Obligation to report irregularities and suspected irregularities

In all jurisdictions, as soon as a legal practitioner or legal practitioner associate becomes aware of irregularity in any of the law practice's trust accounts, there is an obligation to report it in writing to the designated authority or corresponding authority responsible for regulation of trust accounts.²⁷

²⁴ For example *Legal Profession Uniform Law 2015* (NSW) and (Vic) ss 148 - 500 penalty units or imprisonment for 5 years or both;

²⁵ For example the *Legal Profession Act 2007* (Qld) contains dedicated trust accounting provisions that span from sections 236 to 298 and in the *Legal Profession Act 2007* (Qld) from regulations 26 to 78.

²⁶ The *legal profession legislation* of every Australian jurisdiction is very similar with regard to the obligations that arise for the receipt, holding and disbursement of all client funds.

²⁷ *Legal Profession Act 2006* (ACT) section 231; *Legal Profession Uniform Law 2015* (NSW) Schedule 1 section 154; *Legal Profession Act 2006* (NT); *Legal Profession Act 2007* (Qld) section 260; *Legal Practitioners Act 1981* (SA) section 216; *Legal Profession Act 2007* (Tas) section 254; *Legal Profession Uniform Law 2015* (Vic) Schedule 1 section 154; *Legal Profession Act 2008* (WA) section 227.

Obligation to report suspected offences

The legal profession legislation places a duty on the independent Commissioner of Legal Services, Councils or appropriate authority who suspect on reasonable grounds (after investigation or otherwise) that a person has committed an offence against any act or law, must report the suspected offence to the law enforcement or prosecution authority.²⁸

Regulation of property transactions

The Property Exchange Australia (PEXA) regime is an electronic business environment for completing property transactions, including electronic lodgement with Land Registries and the settlement of funds. Stringent processes and procedures are in place on the PEXA platform including:

- identification and verification procedures for all parties including corporate and trust bodies;
- centralised deposit and settlement money handling;
- regulator oversight; and
- whistleblower policy.

Under the scheme, whistleblowers are encouraged to expose or bring to the attention of National E-Conveyancing conduct they reasonably believe to be corrupt, illegal or unethical. This also includes deliberate attempts to conceal such conduct.

Verification of identity this is fulfilled in a number of ways, For example, PEXA must identify members of the network in a face-to-face interview. This must be completed during the onboarding process by a PEXA Verification Officer or Account Manager, or by a participating verification of identity service provider such as ZipID.

Once transacting, it is the responsibility of all members to verify the identity of the client/s they represent in accordance with the Model Participation Rules (MPR). Client verification of identity can be conducted by members themselves or alternatively by a participating verification of identity service provider.

Practitioner responsibilities for client verification of identity are detailed in the Model Participation Rules. Additionally, retail providers of digital signature certificates may also require members to complete verification of identity in a face-to-face interview as part of their digital certificate acquisition process. This reduces the vulnerability of legal practitioners in the process, particularly since the system caters for international verification of identity arrangements.

Regulator oversight The Australian Registrars' National Electronic Conveyancing Council (ARNECC) is the body established to facilitate the implementation and ongoing management of the regulatory framework.

Handling cash If the client is providing cash to the transaction they will be able to forward funds to the member's source account, which could be a Statutory Trust Account or PEXA Registered Source Account. Both of these are financial institutions that are *reporting entities* for AML/CTF purposes. This means effectively that funds will bypass lawyers trust accounts and provide AUSTRAC with information about the transaction where required. For lawyers, it reduces their exposure to risk and obviates the need for lawyers to be regulated directly by AML/CTF obligations.

Monitoring the conduct of practitioners

Independent legal profession regulators take an ever increasing role in the proactive monitoring of legal practitioner conduct. The Uniform Legal Profession legislation also allows

²⁸ *Legal Profession Uniform Law 2015* (NSW) Schedule 1 at section 465; *Legal Profession Act 2006* (NT) section 704; *Legal Profession Act 2007* (Qld) section 706; *Legal Practitioners Act 1981* (SA); *Legal Profession Act 2007* (Tas) section 649; *Legal Profession Uniform Law 2015* (Vic) Schedule 1 at section 465; *Legal Profession Act 2008* (WA) section 589.

independent regulators to take an educative role.

Law practices can adopt or convert to an Incorporated Legal Practice business structure. The incorporated nature of the business structure opens law practices to the additional regulatory oversight of Australia's corporate watchdog the Australian Securities and Investment Commission (though effectively this function is performed by the independent legal services regulators). This allows State or Territory regulators to conduct a range of functions including for example ethics checks; web-based surveys; self-assessment checks and onsite reviews designed to ensure law practices are complying with their obligations under the legislation and rules.

Provision of education and information

The Law Council of Australia is publishing a complementary *Lawyers' Guide to Preventing Money Laundering and Terrorism Financing*. The Guide will provide legal practitioners with practical guidance on identifying and addressing the risk of unwitting participation in money laundering or terrorism financing in providing professional legal services.

Each law society and bar association provides a range of web-based, electronic and paper publications on money laundering and terrorism financing that keep legal practitioners up-to-date.

The legal services commissioners and other independent regulatory authorities also publish information, guidance and cases where appropriate.

Continuing professional development

In all jurisdictions, legal practitioners are required to undertake continuing legal education to remain eligible to hold a practising certificate.

Money laundering awareness is available as a stand-alone topic for CPD. It is also incorporated in CPD undertaken on Ethics, Real Property, Financial Services, Estate Law and many other areas.

Practitioners involved in specialist areas of practice (for example, property lawyers) often belong to numerous professional associations, for example, the Society of Trust and Estate Practitioners and Intellectual Property Association Australia and New Zealand, provide information specific to certain areas of practice.

Professional organisations and associations responsible for arranging professional indemnity insurance also provide resources on risks associated with money laundering and terrorism financing in relation to specific transactional work.

Dedicated AML contact officers

Law societies and bar associations provide legal practitioners with access to dedicated AML/CTF contact officers. These officers are sometimes based in the law society or bar association's Regulatory Compliance Support Units or they may be senior ethics counsellors who are often practising within the criminal law sphere.

These contact officers play a vital role in advising legal practitioners to ethically manage particular instances or circumstances where issues of confidentiality or sensitivity must be considered.

If a legal practitioner's query is less urgent, questions can also be referred to specialist criminal law and/or ethics committees of every law society/bar association.

CURRENT DEVELOPMENTS

Status of Tranche Two legislation

With the first tranche of the legislation passed and implemented, the Government's attention

has turned to the second tranche of reforms. The Attorney-General's Department announced in July 2007 that the following sectors would be affected by the second tranche of the legislation:

- lawyers, notaries, other independent legal professionals and accountants when preparing for or carrying out certain transactions;
- real estate agents in relation to buying and selling of real estate;
- dealers in precious metals and stones engaged in transactions above a designated threshold; and
- trust and company service providers when they prepare for or carry out certain transactions.

Consultation occurred between government and industry stakeholders, including the Law Council of Australia, during 2007-2008. The processes of consultation were delayed by the 2007 Federal Election and the change of Government.

In the wake of the global financial crisis, Tranche 2 consultations were again largely suspended throughout 2009, 2010 and 2011.

In 2013 the issue was revisited when the Attorney-General's Department launched the Statutory Review of the AML/CTF regime. The FATF's 2015 Report recommended amongst other things, that lawyers, accountants and others should become *reporting entities* under the AML/CTF Regime. The AGD and AUSTRAC will consider the FATF's recommendations in finalising the recommendations of the Statutory Review of Australia's AML/CTF Regime (to be tabled in Parliament in 2016).

It might be speculated that Tranche 2 reforms would be implemented with a staggered implementation period of at least two years though the Tranche 1 'non prosecution period' is unlikely to be repeated.

The position of the Law Council of Australia on the possible extension of AML/CTF obligations to lawyers in Tranche 2

The Law Council has maintained a strident and steadfast opposition to the proposed extension of the regulatory requirements of the AML/CTF regime to the legal profession in Australia for the following reasons:

- Certain obligations are fundamentally incompatible with the necessary role contemplated for legal practitioners within the system of justice.
- There is a lack of empirical or typological evidence of systemic involvement or risk of involvement of legal practitioners in facilitating (unwittingly or otherwise) money laundering or terrorism financing.
- The legal profession is subject to an extensive existing regulatory system and core professional obligations not to break or facilitate breaching of the law. The legal, regulatory and professional standards that already exist for the legal profession have been outlined in this Guide. The existing regulatory scheme operates well and is a key point of difference between the legal profession and other Designated Non-Financial Businesses and Professions likely to be targeted by Tranche 2 reforms.
- The regulation of law practices (and controlling the risk of being unwittingly used to facilitate money laundering) is best achieved through existing legal profession regulatory structures and professional obligations, the provision of typology information, guidance and continuing professional development, rather than by introducing an additional layer of statutory regulation.

The Law Council has also highlighted the potential damage to the system of justice in Australia if the AML/CTF regime is extended to the legal profession. To do so would result in:

- strain on the principle of confidentiality and client legal privilege;
- erosion of client lawyer relationship and the independence of the profession;
- imposition of an onerous additional regulatory burden that is likely to impact on ability of Australian law practices to remain competitive in the world legal market;
- an unnecessary additional cost burden for regulatory compliance, which is likely to significantly increase the cost of legal services and make access to legal services less affordable.

The Law Council will continue to strongly advocate that the preferable approach to minimising the risk of inadvertent or unintentional practitioner involvement in money laundering or terrorism financing, is through the provision of detailed information, guidance and continuing professional development directed toward voluntary *best practice* risk management.

Managing risk

Suggested risk management (RM) approaches to consider in certain circumstances:

Large quantities of cash	<p>Large quantities of cash are one of the most obvious signs of potential money laundering.</p> <p>Adhere to significant cash transaction thresholds that already apply.</p> <p>RM: develop policies on handling cash by placing a \$ limit on how much cash (if any) can be accepted. To discourage clients from depositing cash directly to law practice accounts, avoid disclosing law practice account details and insist on electronic funds transfer or encourage clients to deposit trust funds at the bank wherever possible.</p>
Secretive clients	<p>Although high levels of client contact or in-depth understanding of clients' business activities is not always necessary, unusually secretive or obstructive clients might give cause for concern. Clients who provide incomplete instructions or are unwilling to give sufficient details of proposed transactions may compromise a lawyer's ability to provide competent lawful representation.</p> <p>RM: Query the client's approach. If the client remains unwilling to discuss the necessary information or remains unusually or unnecessarily secretive, consider whether you can continue to act for them.</p>

Unusual or unexpected sources of funding or settlement requests	Related transactions will often be funded and settled in similar ways – home purchases for instance might commonly be financed by a mix of mortgage, deposit and proceeds from the sale of a current property. Transactions that are funded through an unusual source or unusual mix of sources might indicate a risk.
	RM: Particular attention should be given to private funding, funds from an unrelated party, and/or direct payments between buyers & sellers. Consider whether there is a need to check the source of funds. Ask the client whether funds come from the client? Similarly with settlements: where is the money going and why? If unsatisfied consider whether you can continue to act for them.
Unusual or unnecessarily complicated business structures or transaction paths	Any business structures or transaction paths which seem unnecessarily complicated, or that the client fails to adequately explain, should be discussed: what is the client trying to achieve or hide?
	RM: Discuss all arrangements with the clients. Ask for clarification or an explanation for arrangements that seem unusual or unnecessarily complicated. If unsatisfied consider whether you can continue to act for them.
Loss-making or mis-valued transactions	An unusual transaction value can be an indication of money laundering and/or may have tax, duty or other implications.
	RM: Transactions where the ultimate value is either significantly more or less than what might be expected should be discussed. Ask how the client has valued the assets being traded. Is there a logical explanation for the discrepancy between the market and actual value of the transaction? If unsatisfied consider whether you can continue to act for them.
Litigation matters that are settled too easily	As with transactions, litigation matters that are settled for a value either significantly above or below what might normally be expected may indicate a risk.
	RM: Ask the client to justify their approach to the settlement. If unsatisfied consider whether you can continue to act for them.
Suspect territories	Transactions involving some territories or jurisdictions may heighten the risk profile of those transactions.
	RM: The International Bar Association provides a summary of money laundering legislation around the world at www.anti-moneylaundering.org The Department of Foreign Affairs and Trade (DFAT) website provides more information about sanctions and the penalties for contravening sanctions law to assist in assessing the money-laundering risks associated with different countries. FATF also regularly issues warnings about certain countries. If sanctions apply or you are unsatisfied consider whether you can continue to act for them.
Unexplained changes in instructions or business entities	Any changes that have no logical explanation, or that the client fails to explain sufficiently may indicate a risk.
	RM: Ask the client to explain or justify changes in instructions. Discuss with a more senior/ethical counsellor if necessary. If unsatisfied consider whether you can continue to act for them.

Instructions outside your normal geographic area, area of expertise, or client market	<p>Clients who choose a law practice specifically because they do not have any knowledge of the client or entities involved, or because they expect not to be asked too many tricky questions.</p>
	<p>RM: It is good practice to adhere to one's area of professional expertise and experience. Distribute lists of work the practice will and will not undertake. Ask yourself: why a particular client is instructing me? If unsatisfied consider whether you can continue to act for them.</p>
Clients wanting to take 'short-cuts' or forego standard processes or activities	<p>Clients that request or apply pressure on lawyers to miss out key stages of a transaction or deviate from accepted procedure, such as for example, due diligence, may be attempting to hide or disguise evidence of criminal activity.</p>
	<p>RM: Omitting procedures or skipping steps in a transaction may compromise a lawyer's ability to provide competent lawful representation. Ask the client to explain their approach and consider if you are happy accepting such instructions.</p>

Likely harmful impact on client confidentiality and client legal privilege

The Law Council of Australia is concerned the requirement for suspicious transaction reporting (if extended to lawyers) would impact on the client lawyer relationship, client confidentiality and client legal privilege.

If these requirements are extended to legal practitioners they will pose a particular challenge because it will often be necessary to ask legitimate questions or seek additional information from clients to check the risk profile of a matter before a suspicion can be formed. This should be clearly distinguished, however, from disclosing any information, or asking additional questions that may lead a client to infer that a suspicion has been formed.

The purpose of client legal privilege is to encourage full and frank communication between lawyers and their clients, thereby serving the broader public interest in encouraging observance of the law and supporting the proper functioning of the administration of justice. Section 242 of the AML/CTF Act states that the Act does not affect the law relating to legal professional privilege, suggesting that a legal practitioner may not be compelled to make reports that are based on information subject to client legal privilege.

Yet the obligation to report suspicious matters conflicts with the lawyer's duty to keep information about the client's affairs secret and could also interfere with the operation of the privilege. For example, the privilege attaches to communications arising out of the lawyer client relationship but the obligation to report a suspicion (and the grounds on which it is based) extends to 'potential clients' and in relation to information about the provision or prospective provision of a *designated service*. As the suspicion (and grounds on which it is based) must be reported within three business days or in some circumstances 24 hours, the obligation to report may arise before there is an established business relationship between the lawyer and potential client.

Client legal privilege has a narrower application than the duty of client confidentiality, and the experience in the UK (where the AML/CTF regulatory regime does extend to lawyers) was that the application of privilege was not as wide as many solicitors thought. If the information came to a practitioner in privileged circumstances, it might not be necessary to report a suspicious transaction, but it is rarely a simple matter to decide if information is provided in privileged circumstances.

In terms of confidentiality, under the AML/CTF regime, information that a client discloses to his/her legal practitioner within a confidential setting, would be potentially reportable where such information is not also privileged.

Effectively by the client disclosing the information, pursuant to AML/CTF reporting obligations

a lawyer would be statutorily compelled to become an agent of law enforcement authorities, a role that is inherently inconsistent with the lawyer's obligations to the client.

In short, lawyers would become compelled to disclose information that they are duty-bound to keep confidential.

NEXT STEPS

The Law Council has been actively engaged with the Government in representing the interests of the legal profession in relation to Tranche 1 and Tranche 2 of the AML/CTF legislation and will continue to do so vigorously.

The Law Council will also continue working with its Constituent Bodies to provide up-to-date information to legal practitioners in relation to AML/CTF issues.

The Law Council will keep this Guide and other guidance materials updated to ensure continuing education of the legal profession on AML/CTF risk management.

ATTACHMENT A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia. The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2016 Executive as at 1 January 2016 are:

- Mr S. Stuart Clark AM, President
- Ms Fiona McLeod SC, President-Elect
- Mr Morry Bailes, Treasurer
- Mr Arthur Moses SC, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Michael Fitzgerald, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.



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