**Parliamentary Joint Committee on Law Enforcement**
PO Box 6100
Parliament House
Canberra ACT 2600

**Submission to Inquiry:**
**The Capability of Law Enforcement to Respond to Money Laundering and Financial Crime**

1. Thank you for the opportunity to respond to this Inquiry.

2. I am a Senior Lecturer in Law at the Australian National University, where I teach courses in Financial Crime Law and Transnational Anti-Corruption Laws. I was previously a Research Fellow at the Centre for Finance and Security at the Royal United Services Institute (RUSI), UK. I am also the author of *Doing Business with Criminals*, a book on the history of, and policy tensions inherent in, the anti-money laundering and counter-terrorist financing (AML/CTF) regime forthcoming with Cambridge University Press.

3. This submission provides comments on a range of issues within the Inquiry's Terms of Reference.

The Scale of Money Laundering in Australia

4. Given the clandestine nature of money laundering, no country can reliably estimate the scale of money laundering occurring within its borders. All such available estimates internationally are 'guesstimates'.

5. For instance, all proceeds of profit-generating predicate crimes within Australia need to be laundered in some form. The scale of many of those crimes is difficult to estimate, for instance due to under-reporting and the challenges of detection. Various forms of corruption and fraud are good examples. To compound the difficulty, proceeds of foreign crimes may either be invested in Australia or laundered overseas using the services of Australian-based professionals or Australian-incorporated companies. This means that one can identify relevant predicate offences and money laundering typologies, but coming up with a comprehensive estimate of the scale of money laundering in Australia is virtually impossible.[1]

6. This should not impede the recognition of money laundering as a key threat to the prosperity and security of Australians. All organised crime relies on the ability to save, move or invest the proceeds of crime. As a high-income country with a free, open society, as well as a regional financial centre, Australia is inherently attractive to criminal actors as both a place to commit crime and destination to invest its proceeds.

Australia's AML/CTF Legislation

[1] See Anton Moiseienko and Tom Keatinge, 'The Scale of Money Laundering in the UK: Too Big to Measure?', *RUSI Briefing Paper*, February 2019.

7. Australia's AML/CTF legislation is world-leading in some respects and inadequate in others.

8. On the positive side, AUSTRAC's use of financial reporting, including suspicious matter reports (SMRs), international fund transfer instructions (IFTIs) and threshold transaction reports (TTRs), is widely recognised to be highly effective. On the other hand, Australia's failure to extend AML/CTF obligations to 'Tranche 2' entities, including lawyers, real estate agents, accountants and dealers in precious metals and stones, has been a notable shortcoming.

9. This shortcoming is important on its own terms but also because of the signal it sends to other countries. As a regional power and the host of the Secretariat of the Asia/Pacific Group on Money Laundering (APG), Australia is rightly investing significant efforts into raising AML/CTF standards in countries across the region. A conspicuous failure to implement a key element of the FATF Recommendations in relation to 'Tranche 2' entities undermines those efforts.

10. The introduction of 'Tranche 2' reforms is therefore important and overdue. However, Australia's real challenge will lie not in introducing the legislation, but in ensuring the effective supervision of many more thousands of regulated businesses in highly diverse, fragmented sectors. There is therefore a pressing need to ensure that AUSTRAC, as the AML/CTF supervisor, is ready to fulfill those additional responsibilities.

Connection with Australian Law Enforcement Needs

11. That being said, it is important to ensure that Australia's AML/CTF efforts serve genuine law enforcement needs. In some rare instances, that may involve prioritising local context over FATF expectations.

12. For instance, the FATF's Mutual Evaluation Review of Australia in 2015 highlighted 'the relatively low number of money laundering and terrorist financing investigations'.[2] While this is a fair concern in principle, the objectives of AML/CTF rules can also be achieved through the investigation and prosecution of predicate crimes, as distinct from money laundering. Australian courts have (rightly) spoken against the practice of bringing duplicative charges for both the predicate crime and related money laundering.[3]

13. Therefore, it is important that, regardless of the FATF's comments cited above, Australian law enforcement agencies should not seek to artificially increase the rate of money laundering prosecutions by bringing such prosecutions in cases where other charges would be more appropriate.

Regulation of Digital Currency

14. Another area in which Australia should bring its legislation in compliance with the FATF Recommendations is the regulation of digital currency exchanges (or, in the FATF's terminology, virtual asset service providers, or VASPs).

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[2] FATF and APG, *Anti-Money Laundering and Counter-Terrorist Financing Measures: Australia, Fourth Round Mutual Evaluation Report*, April 2015, 14.
[3] *Thorn v R* [2009] NSWCCA 294 and *Nahlous v R* [2010] NSWCCA 58.

15. Australian AML/CTF rules currently only applied to businesses that exchange digital currency into fiat currency or the other way around. By contrast, the FATF Recommendations define regulated VASPs as follows:

> Virtual asset service provider (VASP) means any natural or legal person who is not covered elsewhere under the FATF Recommendations, and as a business conducts one or more of the following activities or operations for or on behalf of another natural or legal person:
>
> i. exchange between virtual assets and fiat currencies;
> ii. exchange between one or more forms of virtual assets;
> iii. transfers of virtual assets;
> iv. safekeeping or administration of virtual assets or instruments enabling control over virtual assets;
> v. participation in and provision of financial services related to an issuer's offer and/or sale of a virtual asset.

16. Businesses engaged in other FATF-designated forms of virtual asset activities, such as crypto-to-crypto exchange, are widely used for money laundering purposes (e.g. in 'chain-hopping', or exchange of one virtual asset into another).[4] Overlooking those businesses in Australian AML/CTF legislation therefore deprives Australian law enforcement agencies of a potentially valuable source of financial intelligence. Consistent with this, the EU recently extended its regulation of VASPs to include all FATF-designated activities in May 2024.[5]

Territorial Applicability of Australian AML/CTF Legislation

17. The issue of regulating digital currency is related to the territorial applicability of Australian AML/CTF legislation.

18. Under section 6(6) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth)*, Australia's AML/CTF regulation only extends to businesses that, at a minimum, have a permanent establishment in Australia.

19. Some businesses, especially digital currency businesses, are likely to provide services to Australian customers without having a permanent establishment in Australia and, therefore, without being subject to Australian AML/CTF requirements.

[4] See Anton Moiseienko and Olivier Kraft, 'From Money Mules to Chain-Hopping: Targeting the Finances of Cybercrime', *RUSI Occasional Paper*, November 2018.
[5] Article 2(1)(7)-(9) of the Regulation of the European Parliament and of the Council on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing [2024] OJ L, 2024/1624 ('Single Rulebook Regulation'), cross-referencing the definitions of crypto-assets, crypto-asset services and crypto-asset service providers in Article 3(1)((16) of the Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937 ('MiCA').

20. Therefore, as an example, a digital currency exchange incorporated in and operating from an overseas country but marketing its services heavily to Australian customers is simply not covered by Australian AML/CTF requirements.

21. This creates a potential gap in Australia's AML/CTF regime whose implications must be explored and addressed as a matter of priority. If Australia's AML/CTF legislation were amended to cover the operations of businesses based outside Australia (e.g. where they market their services to Australian customers or have a substantial customer base in Australia), the need would arise to identify overseas businesses subject to AML/CTF regulation and Australia, as well as consider how such regulation can be enforced in practice. In addressing those issues, the experience of multiple other countries can be studied, both as relates to VASPs and in connection with other regulated sectors of the internet economy, such as online gambling.

22. Thank you for considering this submission, and I would be pleased to assist further if required.

Dr Anton Moiseienko
31 July 2024