NETWORKED GOVERNANCE, PEER REVIEW AND DEMOCRATIC ACCOUNTABILITY: REGULATING MONEY LAUNDERING IN AUSTRALIA

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Scholars have highlighted the advantages and risks of transnational regulatory networks for domestic lawmaking. This article examines Australia's adoption of the Financial Action Task Force ('FATF') anti-money laundering and counter-terrorism financing standards. Existing scholarship characterises the FATF as a coercive regime that dictates policy and empowers the executive to implement non-binding transnational standards into domestic law without legislative oversight, thereby precluding democratic participation and contestation. To address such critiques, we analyse the effects of the FATF's peer reviews on domestic legislative deliberation by examining the contributions to a parliamentary inquiry concerning money laundering from government departments and agencies, representatives of regulated entities and professional and civil society actors. Our analysis demonstrates that the FATF's peer review reports have prompted and facilitated, rather than supplanted, local deliberation by providing law reformers with richer evidence and arguments about reform options and their potential effects.

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I Introduction

Australian laws and regulatory practices have increasingly been shaped by international standards developed through transnational networks in various policy areas including the regulation of finance and medical devices as well as anti-money laundering ('AML') and counter-terrorism financing ('CTF').[1] Such standards do not constitute binding international law.[2] Instead, jurisdictions are urged to implement them domestically by reputational, economic and peer pressure and because they represent regulatory consensus about best practice.[3] Transnational networks facilitate international cooperation, the generation and sharing of regulatory knowledge and the development and possible harmonisation of effective responses to pressing and evolving global problems.[4] However, the making of standards by transnational networks is not subject to ordinary domestic legislative and public law processes and has been criticised for its lack of transparency, lack of public accountability and its potential to

[1] Stavros Gadinis, 'The Financial Stability Board: The New Politics of International Financial Regulation' (2013) 48(2) *Texas International Law Journal* 157, 169; Andrew Edgar, 'Transnational Regulatory Law: Domestic Implementation, Transparency and Scrutiny' (2022) 43(2) *Adelaide Law Review* 585, 586; Doron Goldbarsht and Hannah Harris, 'Check the Balance: Is the Doctrine of Separation of Powers Sufficient in the Context of Intergovernmental Organisations?' (2022) 50(4) *Federal Law Review* 527, 528–9.

[2] See Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2004) 6–7. See below nn 28, 46 and accompanying text.

[3] Joost Pauwelyn, 'Informal International Lawmaking: Framing the Concept and Research Questions' in Joost Pauwelyn, Ramses A Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press, 2012) 13, 26; Goldbarsht and Harris (n 1) 529.

[4] Slaughter (n 2) 7; Kal Raustiala, 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law' (2002) 43(1) *Virginia Journal of International Law* 1, 10–11; Gráinne de Búrca, Robert O Keohane and Charles Sabel, 'Global Experimentalist Governance' (2014) 44(3) *British Journal of Political Science* 477, 477; Tim Legrand, 'Transgovernmental Policy Networks in the Anglosphere' (2015) 93(4) *Public Administration* 973, 973, 975.

subvert democratic lawmaking, including through the oversight and accountability mechanisms of such networks.[5] Further, in the absence of local input by affected stakeholders, there is no guarantee that transnationally elaborated standards can be effectively implemented domestically so as to solve local regulatory problems.[6]

This article analyses the interaction between transnational standards and domestic lawmaking in Australia by focusing on the Financial Action Task Force ('FATF'), a transnational regulatory network for anti-money laundering and counter-terrorism financing. The FATF, which describes itself as 'the global money laundering and terrorist financing watchdog',[7] has developed global AML/CTF standards ('40 Recommendations').[8] It also oversees extensive regulatory peer review through its Mutual Evaluation Report ('MER') process and maintains lists of jurisdictions considered 'high risk' and under 'increased monitoring' that generate reputational and economic pressure for local reform.[9] While the FATF is a 'soft organisation' without a formal legal

[5] Richard B Stewart, 'The Global Regulatory Challenge to US Administrative Law' (2005) 37(4) *New York University Journal of International Law and Politics* 695, 704–8; Robert Howse, 'Transatlantic Regulatory Cooperation and the Problem of Democracy' in George A Bermann, Matthias Herdegen and Peter L Lindseth (eds), *Transatlantic Regulatory Co-Operation: Legal Problems and Political Prospects* (Oxford University Press, 2000) 469, 480.

[6] Slaughter (n 2) 30.

[7] 'Home', *FATF* (Web Page) <https://www.fatf-gafi.org/en/home.html>, archived at <https://perma.cc/JA7M-ZTW3>.

[8] See, eg, FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations* (Report, November 2023) 5–6 <https://www.fatf-gafi.org/content/dam/fatf-gafi/recommendations/FATF%20Recommendations%202012.pdf>, archived at <https://perma.cc/QT2J-5T58> ('*Recommendations*').

[9] 'Mutual Evaluations', *FATF* (Web Page) <https://www.fatf-gafi.org/en/topics/mutual-evaluations.html>, archived at <https://perma.cc/4T9P-Q4AA>; 'High-Risk Jurisdictions Subject to a Call for Action: 25 October 2024', *FATF* (Web Page, 25 October 2024) <https://www.fatf-gafi.org/en/publications/High-risk-and-other-monitored-jurisdictions/Call-for-action-october-2024.html>, archived at <https://perma.cc/48QD-WHTV> ('High-Risk Jurisdictions'); 'Jurisdictions under Increased Monitoring: 25 October 2024', *FATF* (Web Page, 25 October 2024) <https://www.fatf-gafi.org/en/publications/High-risk-and-other-monitored-jurisdictions/increased-monitoring-october-2024.html>, archived at <https://perma.cc/9GMQ-CK4E> ('Increased Monitoring'); Doron Goldbarsht, 'Who's the Legislator Anyway? How the FATF's Global Norms Reshape Australian Counter Terrorist Financing Laws' (2017) 45(1) *Federal Law Review* 127, 135–6 ('Who's the Legislator?'). See above n 3 and accompanying text.

instrument or structure supporting it,[10] it is viewed as highly effective in promoting the global implementation of its standards, including in Australia.[11]

A growing scholarly literature assesses the efficacy and legitimacy of the FATF's diffusion of policies in addressing money laundering and terrorism financing. The international literature presents diverse perspectives, ranging from positive assessments of the FATF as an example of participatory, flexible and potentially democracy-enhancing 'experimentalist' global governance (which we refer to as the 'experimentalist' view)[12] to critiques of the FATF as an illegitimate and coercive institution that empowers transnational technocrats and national executives to impose domestic laws by sidestepping ordinary legislative processes (which we refer to as the 'coercive compliance critique').[13] A growing Australian literature also addresses the domestic and international AML/CTF regimes, although it offers few detailed analyses of the interaction between the FATF and Australian policymaking processes and the implications of that interaction for the questions of efficacy, legitimacy and democracy mentioned above.[14]

[10] Nathanael Tilahun, 'The Re-Organization of the FATF as an International Legal Person and the Promises and Limits to Accountability' in Alessandra Arcuri and Florin Coman-Kund (eds), *Technocracy and the Law: Accountability, Governance and Expertise* (Routledge, 2021) 131, 135, citing Jan Klabbers, 'Institutional Ambivalence by Design: Soft Organizations in International Law' (2001) 70(3) *Nordic Journal of International Law* 403.

[11] See FATF, *Report on the State of Effectiveness and Compliance with the FATF Standards* (Report, April 2022) 5 <https://www.fatf-gafi.org/content/dam/fatf-gafi/reports/Report-on-the-State-of-Effectiveness-Compliance-with-FATF-Standards.pdf>, archived at <https://perma.cc/5DNW-A9MU>; Doron Goldbarsht, *Global Counter-Terrorist Financing and Soft Law: Multi-Layered Approaches* (Edward Elgar Publishing, 2020) 213 ('*Counter-Terrorist Financing*').

[12] See, eg, Mark T Nance, 'Re-Thinking FATF: An Experimentalist Interpretation of the Financial Action Task Force' (2018) 69(2) *Crime, Law and Social Change* 131, 132 ('Re-Thinking FATF').

[13] See, eg, Petrus C van Duyne, Jackie H Harvey and Liliya Y Gelemerova, *The Critical Handbook of Money Laundering: Policy, Analysis and Myths* (Palgrave Macmillan, 2018) 141–2; JC Sharman, *The Money Laundry: Regulating Criminal Finance in the Global Economy* (Cornell University Press, 2011) 103 ('*Money Laundry*').

[14] See, eg, Goldbarsht and Harris (n 1) 531–3; Goldbarsht, 'Who's the Legislator?' (n 9) 130; Anne Imobersteg Harvey, *Anti-Money Laundering and Counter-Terrorism Financing Law and Policy: Showcasing Australia* (Brill Nijhoff, 2019) 208–11 [6.3.1]. See generally Bill Fuggle and Shemira Jeevaratnam, 'Australia' in Arun Srivastava, Mark Simpson and Richard Powell (eds), *International Guide to Money Laundering Law and Practice* (Bloomsbury, 5th ed, 2019) 327; David Chaikin, 'A Critical Analysis of the Effectiveness of Anti-Money Laundering Measures with Reference to Australia' in Colin King, Clive Walker and Jimmy Gurulé (eds), *The Palgrave Handbook of Criminal and Terrorism Financing Law* (Palgrave Macmillan, 2018) 293.

The existing literature on the effects of the FATF on Australian public law and democratic oversight paints a concerning picture consistent with the coercive compliance critique of the FATF outlined above.[15] The FATF is presented as an informal body that dictates domestic policy, strictly monitors each jurisdiction's implementation and deploys what we would describe as a coercive 'hard compliance framework' to compel the domestic adoption of its standards.[16] On this view, the FATF leaves Australian policymakers 'no room for choice' but to comply with its standards,[17] thereby supplanting Parliament as the 'practical' legislative forum for Australian AML/CTF law,[18] vesting more legislative power in the executive and undermining the separation of powers.[19]

Given the foregoing concerns and the growing importance of anti-money laundering in the local context, in this article we probe this point further. We argue that the coercive compliance critique presents a limited picture of the FATF, Australia's role within the FATF and the domestic deliberative, consultative and legislative processes that bear on AML/CTF regulation.[20] Specifically, we wish to uncover the role that the FATF's peer review mechanism has played in triggering domestic contestation concerning law reform and providing the evidence and arguments that are deployed by reformers in the legislature, private sector and civil society.

Our analysis reveals several unique and potentially promising aspects of the FATF regime. First, the coercive compliance critique presents the FATF as a quasi-legislative body that imposes its desired policies on often unwilling and disempowered domestic legislators and actors.[21] It emphasises the importance of the 40 Recommendations and the FATF's capacity to place economic and reputational pressure on noncompliant jurisdictions (with peer review used as a surveillance tool to reveal noncompliance and trigger sanctions).[22] By contrast, in Part II we explore the experimentalist literature concerning the FATF that draws attention to its participatory, multi-level decision-making processes, the autonomy granted to domestic policymakers and the centrality

[15] See above n 13 and accompanying text.

[16] Goldbarsht and Harris (n 1) 541–3; Goldbarsht, *Counter-Terrorist Financing* (n 11) 104.

[17] Goldbarsht and Harris (n 1) 550, quoting Goldbarsht, 'Who's the Legislator?' (n 9) 129.

[18] Goldbarsht, 'Who's the Legislator?' (n 9) 150.

[19] Goldbarsht and Harris (n 1) 532, 542–3; Harvey (n 14) 230–3 [6.3.3.4].

[20] See below Part II(B).

[21] See below n 31 and accompanying text.

[22] See above n 3 and accompanying text. See also Goldbarsht, 'Who's the Legislator?' (n 9) 135–6.

of peer review in facilitating ongoing mutual learning at transnational and domestic levels.[23] In particular, we outline the active involvement of Australian government and regulatory officials as rule-makers and promoters within FATF since its foundation.[24]

Secondly, given legitimate concerns that the FATF's influence may 'warp the normal democratic legislative process', we interrogate Australia's domestic lawmaking processes in this field in more detail.[25] Our analysis shows that major reforms in AML/CTF policy in Australia over the last two decades have been *legislative* reforms, which have been attended by not only ordinary parliamentary processes but also by significant consultation and deliberation. Part III explores these domestic processes of lawmaking, including the 2021–22 Senate Legal and Constitutional Affairs References Committee's inquiry into the adequacy and effectiveness of Australia's AML/CTF regime ('2021–22 Senate Inquiry'), which contributed to legislative reforms enacted in late 2024.[26] Our textual analysis of the submissions to, transcripts from the hearings of, and final report of the 2021–22 Senate Inquiry reveals that, while influencing Australian policy in important ways, the FATF has not dictated specific desired policies or rules to a disempowered Parliament and Australian public. Instead, the FATF's detailed peer evaluations of Australia's domestic regime have prompted and informed *domestic* democratic contestation about AML/CTF law reforms by diverse stakeholders in the legislature, executive, industry and civil society.

Finally, Part IV explores the broader implications of this analysis for our understanding of the interaction between transnational peer review and domestic deliberation in shaping local lawmaking. Based on our socio-legal

[23] Nance, 'Re-Thinking FATF' (n 12) 135–7; Mark T Nance and M Patrick Cottrell, 'A Turn towards Experimentalism? Rethinking Security and Governance in the Twenty-First Century' (2014) 40(2) *Review of International Studies* 277, 289–90, 292, 299.

[24] See Financial Action Task Force, *Financial Action Task Force: 30 Years* (Report, 2019) 10 <https://www.fatf-gafi.org/content/dam/fatf-gafi/annual-reports/FATF30-(1989-2019).pdf>, archived at <https://perma.cc/KCU4-DS3M> ('*30 Years*').

[25] Harvey (n 14) 208 [6.3.1].

[26] See generally Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (Report, March 2022) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/AUSTRAC/Report>, archived at <https://perma.cc/J3PJ-A7A7> ('*Adequacy and Efficacy*'); *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth), as amended by *Anti-Money Laundering and Counter-Terrorism Financing Amendment Act 2024* (Cth) ('*AML/CTF Amendment Act 2024*').

study and tracing of governance and rule-making processes, we argue that transnational regimes, such as the FATF, need not displace domestic deliberative processes. In fact, our document-based analysis (of the submissions to, transcripts from the hearings of, and report of the 2021–22 Senate Inquiry) demonstrates that transnational peer review contributes to the contestation of regulatory responses to pressing global challenges at *both* domestic and transnational levels. While our analysis may not fully address all concerns about rule-making in informal transnational networks, it suggests a more optimistic account of a complementary relationship between transnational peer review and domestic rule-making and regulatory oversight.

II The FATF Framework and Australia's Role

The FATF is a transnational network formed in 1989 to develop and promote global standards to control money laundering, terrorism financing (since 2001) and proliferation financing (since 2012).[27] While its 40 Recommendations are non-binding, the FATF conducts peer reviews (or mutual evaluations) of domestic regulatory regimes.[28] It has also developed a mechanism for publicly listing jurisdictions found to have deficient AML/CTF regimes to exert reputational and economic pressure for reform.[29] Through these mechanisms of standard setting, peer review and public listing, the FATF has achieved widespread acceptance of its standards by over 200 jurisdictions and major international organisations including the International Monetary Fund ('IMF') and the World Bank.[30]

There is disagreement in the literature about the nature of the FATF and the degree of autonomy it allows to individual jurisdictions. On one view, represented by scholars such as Petrus C van Duyne, Jackie Harvey and Liliya Gelemerova, the FATF is a coercive institution that issues quasi-legislative commands disguised as recommendations, deploys invasive surveillance through peer review and can sanction and compel jurisdictions to comply with

27 Financial Action Task Force, *30 Years* (n 24) 6, 10, 12.

28 Goldbarsht and Harris (n 1) 531; Financial Action Task Force, *Mandate* (Mandate, 12 April 2019) 10 [48] <https://www.fatf-gafi.org/en/the-fatf/mandate-of-the-fatf.html>, archived at <https://perma.cc/V53T-PCQB>; 'Mutual Evaluations' (n 9).

29 See above n 3 and accompanying text.

30 'Members', *FATF* (Web Page) <https://www.fatf-gafi.org/en/countries/fatf.html>, archived at <https://perma.cc/H7MU-5GR3>; Goldbarsht and Harris (n 1) 530–1; Nance, 'Re-Thinking FATF' (n 12) 137.

its dictates.[31] Mark T Nance, by contrast, presents the FATF as an example of experimentalist global governance: a participatory network that specifies common framework goals while allowing local actors the autonomy to tailor domestic policies appropriately to their contexts.[32] On this view, peer review is used to inform and encourage ongoing processes of local reform.[33] In the event of a failure by domestic actors to engage with these processes to pursue commonly identified goals, the FATF can impose undesirable outcomes as a 'penalty default'.[34] The aim of such a default is to encourage engagement and meaningful *local* reform rather than impose predetermined policy outcomes on recalcitrant states.[35] This view depicts a more reciprocal relationship between the FATF and a jurisdiction like Australia that encourages active participation of domestic actors in shared problem-solving and mutual learning from locally generated knowledge about implementation experience.[36]

To illustrate the scope that the FATF allows for democratic experimentalism, and as an antidote to concerns about its effect on democratic lawmaking in Australia, this Part provides a general overview of the FATF framework. We highlight the autonomy that the framework grants to local actors and the centrality of peer review as a tool for inciting domestic deliberation about law reform. Further, we will explore how Australian governments and regulatory agencies have actively shaped the FATF framework's norms and policies. This provides important background for the analysis of the processes of *domestic* lawmaking in Australia concerning AML/CTF discussed in the following Part.

A *The FATF: An Overview*

The FATF was founded as a temporary task force in 1989 on the initiative of the G7 members due to concerns about the global drug trade and money

31 Van Duyne, Harvey and Gelemerova (n 13) 54, 142, 235. See also Goldbarsht and Harris (n 1) 529–30, 541–5.

32 Nance, 'Re-Thinking FATF' (n 12) 132.

33 Ibid 145.

34 Ibid 135. See also at 142–3.

35 Ibid 135. Experimentalist mechanisms, based on mutual learning through local implementation, are most identifiable in settings where there is considerable uncertainty about how to select the instruments that best advance an identified policy objective and where no single actor has sufficient power to impose their preferred solution on the other actors: Nance and Cottrell (n 23) 287.

36 See Nance, 'Re-Thinking FATF' (n 12) 143.

laundering undertaken to move and clean illicit funds.[37] The initial members were the members of the G7 and eight other invitees: Australia, Austria, Belgium, Luxembourg, the Netherlands, Spain, Sweden and Switzerland.[38] The task force participants included more than 130 regulatory 'experts' from 'ministries, law enforcement authorities, and bank supervisory and regulatory agencies' of member jurisdictions.[39] Its founding mandate was to inquire into existing legal and regulatory measures and international cooperation concerning money laundering and to 'consider additional preventive efforts in this field'.[40] The FATF's first report established and elaborated '40 Recommendations' as international standards for legal and regulatory responses to the problem of money laundering.[41]

In the following three decades, the FATF has continuously revised the 40 Recommendations while also establishing a peer review mechanism (the MERs) and developing its public listing mechanism for jurisdictions with deficient local laws.[42] The FATF's network has expanded from its original 16 members to include 37 member jurisdictions, 2 member regional organisations, 23 observer organisations and 9 associate members referred to as 'FATF-style regional bodies' that promote FATF standards and engage in peer review of non-member jurisdictions.[43] As a result, over 200 jurisdictions have committed to implementing FATF standards and the FATF has

[37] See generally G7, 'Economic Declaration' (Declaration, 16 July 1989) <https://g7g20-documents.org/fileadmin/G7G20_documents/1989/G7/France/Leaders/1%20Leaders'%20Language/Economic%20Declaration_16071989.pdf>, archived at <https://perma.cc/6R7X-JLA9>; Financial Action Task Force, *30 Years* (n 24) 6–7, 10.

[38] Financial Action Task Force on Money Laundering, *Report* (Report, 1990) 2 <https://www.fatf-gafi.org/content/dam/fatf-gafi/annual-reports/1990%20ENG.pdf>, archived at <https://perma.cc/E5ZZ-WX6G>. The G7 included, at the time, Canada, France, Germany, Italy, Japan, the United Kingdom, the United States and the Commission of the European Communities (represented by its President): Financial Action Task Force, *30 Years* (n 24) 10.

[39] Financial Action Task Force on Money Laundering, *Report* (n 38) 2.

[40] G7 (n 37) [53].

[41] Financial Action Task Force on Money Laundering, *Report* (n 38) 2, 14–26.

[42] Financial Action Task Force, *30 Years* (n 24) 11–12. Cf Financial Action Task Force on Money Laundering, *Report* (n 38) 14–26; FATF, *Recommendations* (n 8) 10–30 [1]–[40].

[43] 'Members' (n 30); 'FATF Global Network', *FATF* (Web Page) <https://www.fatf-gafi.org/en/countries/global-network.html>, archived at <https://perma.cc/X62N-L88K>. See also FATF, *High-Level Principles and Objectives for FATF and FATF-Style Regional Bodies* (Report, October 2012) 1 <https://www.fatf-gafi.org/content/dam/fatf-gafi/Global-Network/High-Level%20Principles%20and%20Objectives%20for%20FATF%20and%20FSRBs.pdf>, archived at <https://perma.cc/R9YP-F6F2>.

close relationships with international organisations including the IMF and the World Bank.[44] The FATF's remit was expanded following the terrorist attacks of 11 September 2001 to include the financing of terrorism and was expanded again in 2012 to include the financing of the proliferation of weapons of mass destruction.[45]

Notwithstanding that expansion, the FATF remains an informal network with no binding legal authority: it operates under a 'mandate' that expresses a political commitment by its members to address the issues of money laundering and terrorism financing and endorse the 40 Recommendations, but that mandate does not create 'any legal rights or obligations'.[46] It was only in 2019, after three decades of operating under time-limited mandates, that the FATF member jurisdictions granted the FATF an open-ended mandate.[47] The FATF makes decisions by consensus of all members in the FATF Plenary, which meets at least three times a year and appoints the FATF's presidency, vice presidency, steering group and working groups.[48] The FATF's secretariat of around 70 staff, housed in the Organisation for Economic Co-operation and Development's Paris headquarters, is relatively small compared to international organisations such as the World Health Organization or the IMF.[49] The

44 See above n 30 and accompanying text.

45 Financial Action Task Force on Money Laundering, *Annual Report 2001–2002* (Report, 21 June 2002) 4 [16]–[17] <https://www.fatf-gafi.org/content/dam/fatf-gafi/annual-reports/2001%202002%20ENG.pdf>, archived at <https://perma.cc/3SBN-NUGB>; Financial Action Task Force, *Annual Report 2011–2012* (Report, 2012) 10 <https://www.fatf-gafi.org/content/dam/fatf-gafi/annual-reports/FATF%20annual%20report%202011%202012%20website.pdf>, archived at <https://perma.cc/3W4G-2HG3>.

46 Financial Action Task Force, *Mandate* (n 28) 10 [48].

47 Ibid 3 [16]. Cf Financial Action Task Force on Money Laundering, *Report* (n 38) 3; Financial Action Task Force on Money Laundering, *Annual Report 1993–1994* (Report, 16 June 1994) 4 [10] <https://www.fatf-gafi.org/content/dam/fatf-gafi/annual-reports/1993%201994%20ENG.pdf>, archived at <https://perma.cc/D77F-7PFV>; Financial Action Task Force, *Mandate (2012–2020)* (Mandate, 20 April 2012) 8 [49] <https://www.fatf-gafi.org/content/dam/fatf-gafi/FATF/FINAL%20FATF%20MANDATE%202012-2020.pdf>, archived at <https://perma.cc/RUU8-H7PR>.

48 Financial Action Task Force, *Mandate* (n 28) 7–8 [18]–[21], 8 [24]–[26].

49 Ibid 10 [46]; FATF, *Annual Report 2021–2022* (Report, 30 January 2023) 54 <https://www.fatf-gafi.org/content/dam/fatf-gafi/annual-reports/Annual-Report-2021-2022.pdf>, archived at <https://perma.cc/47EV-BBRG>; 'Governance', *World Health Organization* (Web Page) <https://www.who.int/southeastasia/about/governance>, archived at <https://perma.cc/J88R-

secretariat has no vote in FATF Plenary meetings and, as Nance notes, has largely performed an 'organizational and facilitative role', although in recent years it has adopted a more active role in the peer review process.[50] Thus, to 'talk of "FATF doing" anything' is, in fact, to talk of the FATF member states acting by consensus.[51]

The FATF's 40 Recommendations set out 'a comprehensive and consistent framework of measures which countries *should* implement … to combat money laundering and terrorist financing, as well as the financing of proliferation of weapons of mass destruction'.[52] The recommendations are regularly updated and were comprehensively revised in 1996, 2003 and 2012.[53] They include both broadly stated goals or principles and more prescriptive measures that jurisdictions are encouraged to implement. For example, recommendation 9 states that 'countries should ensure that financial institution secrecy laws do not inhibit implementation of the FATF recommendations'.[54] By contrast, recommendations 22 and 23, which are supplemented by extensive interpretative notes, set out more detailed requirements on customer due diligence and suspicious transaction reporting for 'designated non-financial businesses and professions' ('DNFBPs', which include lawyers, accountants and real estate agents) and set out possible legal bases for those requirements.[55] Importantly, apart from using non-mandatory terms (such as noting what jurisdictions 'should' do), the recommendations explicitly acknowledge that jurisdictions should tailor their responses to their local conditions, including legal professional privilege as an exception to reporting requirements and the role of professional self-regulatory bodies.[56]

DREH>. The International Centre for the Settlement of Investment Disputes of the World Bank, which carries out just one of the World Bank's functions, has a secretariat of comparable size to the entire FATF: 'About ICSID: Secretariat', *ICSID* (Web Page) <https://icsid.worldbank.org/about/secretariat>, archived at <https://perma.cc/JBL3-QJ6X>.

50 Mark T Nance, 'The Regime That FATF Built: An Introduction to the Financial Action Task Force' (2018) 69(2) *Crime, Law and Social Change* 109, 116.

51 Nance, 'Re-Thinking FATF' (n 12) 138.

52 FATF, *Recommendations* (n 8) 7 (emphasis added).

53 Ibid 7, 141.

54 Ibid 14 [9].

55 Ibid 19–21 [22]–[23], 90–2. See also *Adequacy and Efficacy* (n 26) 9 [2.1]–[2.3].

56 FATF, *Recommendations* (n 8) 7. See generally at 10–30 [1]–[40].

Thus, while the recommendations are sometimes represented as transnational legislation with precise rules for jurisdictions to implement,[57] the view articulated by the FATF itself and scholars like Nance and Cheong-Ann Png is compelling: the 40 Recommendations provide framework goals, sometimes by way of minimum standards, and otherwise allow jurisdictions to design their own local measures.[58] Further, while some recommendations are anchored in binding international conventions and United Nations Security Council resolutions,[59] their ultimate basis remains the acceptance and political commitment by members to 'endorse and fully implement' them.[60]

The FATF has also developed an extensive system of peer review that began in 1990 and is now in its fifth round.[61] The mutual evaluation process involves an assessment team of regulatory and enforcement officials and other experts from member jurisdictions (or regional bodies for non-members) reviewing information provided by the jurisdiction under assessment, conducting onsite visits to consult with local public and private actors and preparing a report that assesses the jurisdiction's implementation of the 40 Recommendations and effectiveness in achieving the FATF's '11 Immediate Outcomes'.[62] The 11 Immediate Outcomes set out key substantive *goals* that a jurisdiction's

57 See, eg, van Duyne, Harvey and Gelemerova (n 13) 125–7, 159; Goldbarsht and Harris (n 1) 528, 541–5.

58 FATF, *Recommendations* (n 8) 7; Nance, 'Re-Thinking FATF' (n 12) 138; Cheong-Ann Png, 'International Legal Sources III: FATF Recommendations' in William Blair and Richard Brent (eds), *Banks and Financial Crime: The International Law of Tainted Money* (Oxford University Press, 2008) 87, 89 [5.06].

59 See, eg, FATF, *Recommendations* (n 8) 45 n 11, 53 nn 20–1. See also at 136; Goldbarsht and Harris (n 1) 543, citing Financial Action Task Force, *Mandate (2012–2020)* (n 47) 2 [3(f)]; SC Res 2462, UN SCOR, 74th sess, 8496th meeting, UN Doc S/RES/2462 (28 March 2019) 185 [4].

60 Financial Action Task Force, *Mandate* (n 28) 5 [6(a)]. See also FATF, *Annual Report 2021–2022* (n 49) 57–9; Tilahun (n 10) 132.

61 Financial Action Task Force on Money Laundering, *Annual Report 1990–1991* (Report, 13 May 1991) 17–18 <https://www.fatf-gafi.org/content/dam/fatf-gafi/annual-reports/1990%201991%20ENG.pdf>, archived at <https://perma.cc/VXR3-RYWD>; 'Global Assessment Calendar', *FATF* (Web Page) <https://www.fatf-gafi.org/en/calendars/assessments.html>, archived at <https://perma.cc/38SL-L5YP>.

62 Financial Action Task Force, *Annual Report 2012–2013* (Report, 2013) 17–18 <https://www.fatf-gafi.org/content/dam/fatf-gafi/annual-reports/FATF%20Annual%20Report%202012%202013.pdf>, archived at <https://perma.cc/653B-WHFZ>; FATF, *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CTF Systems* (Guide, August 2023) 8 [16], 11 [29], 15–16 [43] <https://www.fatf-gafi.org/content/dam/fatf-gafi/methodology/FATF%20Methodology%2022%20Feb%202013.pdf>, archived at <https://perma.cc/572C-D29X> ('*Methodology*').

AML/CTF system should achieve in pursuit of the 'High-Level Objective', which is to develop an effective system to combat money laundering and terrorism financing.[63] The draft report produced in the peer review process is discussed by the FATF Plenary, with the assessment team and assessed jurisdiction having the opportunity to contribute to that discussion, before a report is ultimately adopted by consensus.[64]

MERs are detailed documents that follow a common structure.[65] First, they summarise money laundering and terrorism financing risks and context in the assessed jurisdiction.[66] Secondly, they provide detailed assessments of a jurisdiction's 'national AML/CTF policies and coordination', including compliance ratings on relevant recommendations (noncompliant, partially compliant, largely compliant or compliant) and effectiveness ratings with respect to the 11 Immediate Outcomes (low, moderate, substantial or high levels of effectiveness).[67] They also set out the peer evaluation team's recommended actions to address identified deficiencies.[68] Finally, a technical compliance annex sets out in detail the reasons for the compliance ratings given with respect to each of the 40 Recommendations.[69]

Following the relevant FATF Plenary meeting, the report is published and jurisdictions are subject to 'follow-up' assessments of their progress in addressing identified deficiencies.[70] These 'unusually extensive monitoring

63 FATF, *Methodology* (n 62) 16 [44].

64 FATF, *Procedures for the FATF Fourth Round of AML/CFT Mutual Evaluations* (Guide, September 2022) 15 [56]–[59] <https://www.fatf-gafi.org/content/dam/fatf-gafi/publications/FATF-4th-Round-Procedures.pdf>, archived at <https://perma.cc/N8V5-M3FK> ('*Procedures*').

65 See, eg, FATF and APG, *Anti-Money Laundering and Counter-Terrorist Financing Measures: Australia* (Mutual Evaluation Report, April 2015) 1–3 <https://www.fatf-gafi.org/content/dam/fatf-gafi/mer/Mutual-Evaluation-Report-Australia-2015.pdf>, archived at <https://perma.cc/KQ87-NKMC> ('*Australia 2015*'); FATF and MENAFATF, *Anti-Money Laundering and Counter-Terrorist Financing Measures: Kuwait* (Mutual Evaluation Report, October 2024) 1 <https://www.fatf-gafi.org/content/dam/fatf-gafi/mer/Mutual-Evaluation-Kuwait-2024.pdf>, archived at <https://perma.cc/J68N-E86H>.

66 See, eg, FATF and APG, *Australia 2015* (n 65) 29–33 [1.1]–[1.16].

67 Ibid 36–44 [2.1]–[2.34].

68 Ibid 10–11 [26].

69 Ibid 123–91 [a2.1]–[a8.55].

70 FATF, *Procedures* (n 64) 16–17 [64], 18 [72], 22 [87], 24 [93].

processes' are applied beyond member states — for instance, regional bodies engage in the peer review and monitoring of non-members.[71]

Peer review is central to the experimentalist global governance model and plays two corresponding roles within the FATF. First, peer review monitors whether local actors are implementing *any* measures to pursue common framework goals such as those set out in the recommendations.[72] Secondly, experimentalist peer review facilitates mutual learning by diagnosing deficiencies in local implementation as well as the common framework goals, thereby encouraging ongoing reforms at both domestic and transnational levels.[73] By contrast, the coercive compliance critique views the FATF's MERs as a 'compliance' or 'enforcement' mechanism to detect noncompliance, issue directives for reform and, in combination with the threat of public listing, induce jurisdictions to adopt the FATF's desired policies.[74]

The concern about MERs as tools of coercive surveillance to detect and punish noncompliance is attenuated by several experimentalist aspects of the FATF's peer review mechanism.[75] First, the MER process has been regularly revised to focus on the 'effectiveness' of local AML/CTF measures to include broad consultation with public and private actors and to allow jurisdictions to explain and justify their regulatory framework (and contest their MERs) in front of the assessment team and the FATF Plenary.[76] Thus, rather than simply monitoring for compliance with the recommendations, peer reviews encourage active engagement by, and learning from, the assessed jurisdiction. Further, learning takes place in both directions given that MER rounds trigger and inform significant revisions to the recommendations themselves that reflect

71 Nance and Cottrell (n 23) 298. See also FATF, *Declaration of the Ministers of the Financial Action Task Force* (Declaration, 21 April 2022) [1] <https://www.fatf-gafi.org/content/dam/fatf-gafi/FATF/FATF-Ministerial-Declaration-April-2022.pdf>, archived at <https://perma.cc/UE2S-XQKD>. See above nn 43, 62 and accompanying text.

72 'Mutual Evaluations' (n 9). See generally FATF, *Procedures* (n 64) app 1.

73 See de Búrca, Keohane and Sabel (n 4) 477, 477; Charles F Sabel and Jonathan Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU' in Charles F Sabel and Jonathan Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture* (Oxford University Press, 2010) 1, 12.

74 Van Duyne, Harvey and Gelemerova (n 13) 143–6.

75 See above n 31 and accompanying text.

76 FATF, *Methodology* (n 62) 15 [56]–[59], 16 [44]; FATF, *Procedures* (n 64) 7 [20], 8 [24], 9 [27], 9–10 [30]. Cf FATF, *Third Round of AML/CFT Mutual Evaluations: Process and Procedures* (Report, October 2009) 4 [4], 14 [42]–[43] <https://www.fatf-gafi.org/content/dam/fatf-gafi/methodology/process%20and%20procedures.pdf>, archived at <https://perma.cc/26MH-QDUP>.

'the lessons learnt from implementing and evaluating' these standards locally.[77] Thus, MERs may be viewed as diagnostic tools that use learning from experience to contribute to the 'ratcheting up' of the quality of standards and regulatory responses over time.[78]

The final component of the FATF framework is the FATF's listing mechanism, which is relatively unique for a transnational network. It comprises a two-tiered public list of jurisdictions considered to have deficient AML/CTF policy: the 'blacklist' includes 'high-risk' jurisdictions (presently North Korea, Iran and Myanmar) whose deficient policies pose a risk to the global AML/CTF system while the 'grey list' includes jurisdictions under increased monitoring who have committed to improving their laws and are working with the FATF to do so.[79] Inclusion on the blacklist engages recommendation 19, which entails a requirement to apply enhanced due diligence to transactions with entities in a blacklisted jurisdiction.[80] The FATF can also call for additional 'countermeasures' such as targeted financial sanctions with respect to such jurisdictions.[81] The grey list does not engage recommendation 19 and FATF standards do not 'envisage de-risking, or cutting-off entire classes of customers' but, rather, it encourages other members to consider the deficiencies identified in a grey-listed jurisdiction when applying a 'risk-based approach' to enhance their AML/CTF responses.[82] Nonetheless, being included on the grey list can have reputational and economic consequences, particularly for less-developed jurisdictions, including the restriction of local actors' access to international capital markets.[83] Further, grey-listing can have consequences for the treatment

[77] Financial Action Task Force, *Annual Report 2011–2012* (Report, 2012) 15 <https://www.fatf-gafi.org/content/dam/fatf-gafi/annual-reports/FATF%20annual%20report%202011%202012%20website.pdf>, archived at <https://perma.cc/3W4G-2HG3>. See also at 14.

[78] Nance, 'Re-Thinking FATF' (n 12) 145.

[79] 'High-Risk Jurisdictions' (n 9); 'Increased Monitoring' (n 9).

[80] FATF, *Recommendations* (n 8) 19 [19], 88 [1]–[2].

[81] See ibid.

[82] 'Increased Monitoring' (n 9).

[83] Mizuho Kida and Simon Paetzgold, 'The Impact of Gray-Listing on Capital Flows: An Analysis Using Machine Learning' (Working Paper No 21/153, International Monetary Fund, May 2021) 5 <https://www.imf.org/en/Publications/WP/Issues/2021/05/27/The-Impact-of-Gray-Listing-on-Capital-Flows-An-Analysis-Using-Machine-Learning-50289>, archived at <https://perma.cc/R8MU-DLAS>; Caitlin Maslen, *The Impact of Grey Listing by the Financial Action Task Force (FATF): A Regional Focus on Sub-Saharan Africa* (Helpdesk Answer, 25 October 2023) 1 <https://www.u4.no/publications/the-impact-of-grey-listing-by-the-

of entities under the laws of some FATF member states and regional organisations: the United Kingdom ('UK'), for instance, requires the application of enhanced due diligence measures against jurisdictions on the grey list, going beyond the requirements of the FATF.[84] Similarly, the European Union has developed its own list of high-risk jurisdictions to which jurisdictions grey-listed by the FATF are usually (but not always) added.[85] The FATF's listing mechanism is central to the claim that it provides a hard compliance framework to enforce its (non-binding) recommendations.[86]

While public listing constitutes the 'most straightforward exercise of power' by the FATF, there are reasons to doubt that it plays a central role as a coercive compliance mechanism.[87] The FATF explicitly refused to adopt any blacklist until 2000 and listed only 23 jurisdictions in 2000–01 before closing the blacklist after the last jurisdiction was delisted in October 2006, and the last report was issued in October 2007.[88] The new listing procedure commenced in

financial-action-task-force-fatf.pdf>, archived at <https://perma.cc/Z94D-3KVQ>. See also Goldbarsht, 'Who's the Legislator?' (n 9) 135–6. See above n 3 and accompanying text.

84 *Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017* (UK) SI 2017/692, ord 33. See also Michele Riccardi, *Money Laundering Blacklists* (Routledge, 2022) 43–5; Maslen (n 83) 11.

85 *Commission Delegated Regulation (EU) 2016/1675 of 14 July 2016 Supplementing Directive (EU) 2015/849 of the European Parliament and of the Council by Identifying High-Risk Third Countries with Strategic Deficiencies* [2016] OJ L 254/1, art 1, annex. See also Louis de Koker, John Howell and Nicholas Morris, 'Economic Consequences of Greylisting by the Financial Action Task Force' (2023) 11(5) *Risks* 81:1–32, 7; Maslen (n 83) 11; Brigitte Unger, 'Reforming EU Blacklisting: How To Increase the Effectiveness and Avoid Politicisation of the EU List of High-Risk Jurisdictions for Anti-Money Laundering and Counter-Terrorism Financing' (Study No PE 740.091, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, July 2023) 15 <https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2023)740091>, archived at <https://perma.cc/7Y3B-EE4U>. See generally *Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing, Amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and Repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC* [2015] OJ L 141/73.

86 Goldbarsht and Harris (n 1) 545; Goldbarsht 'Who's the Legislator?' (n 9) 129, 135; Goldbarsht, *Counter-Terrorist Financing* (n 11) 14, 213–27.

87 Sharman, *Money Laundry* (n 13) 99.

88 Financial Action Task Force, *Annual Report 1990–1991* (n 61) 10–11, 16; Financial Action Task Force on Money Laundering, *Annual Report 2000–2001* (Report, 22 June 2001) 1 [3] <https://www.fatf-gafi.org/content/dam/fatf-gafi/annual-reports/2000%202001%20ENG.pdf>, archived at <https://perma.cc/TF7M-UPR5>, citing

2007 and the blacklist has only ever been deployed against three jurisdictions who operate largely outside international capital flows: North Korea, Iran and Myanmar.[89] The FATF's more expansive grey list, which presently includes 24 jurisdictions, is less punitive as it does not call for the application of enhanced due diligence, even if grey-listing sometimes has this consequence under the laws and regulations of FATF members, and it praises jurisdictions for their 'commitment' to reforms.[90]

Finally, the FATF's public-listing procedure provides that jurisdictions identified as having deficient AML/CTF policies in an MER are given a one-year observation period to work with the FATF (or a regional organisation) to address deficiencies.[91] It is only if a jurisdiction fails to address insufficiencies during this observation period that they may be publicly identified on the grey list or blacklist, which are revised three times a year after FATF Plenary meetings.[92] If a jurisdiction does not make sufficient improvements within this period, the International Cooperation Review Group of the FATF will formally

Financial Action Task Force on Money Laundering, *Review To Identify Non-Cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures* (Report, 22 June 2001) <https://www.fatf-gafi.org/content/dam/fatf-gafi/annual-reports/2000%202001%20NCCT%20ENG.pdf?>, archived at <https://perma.cc/XJ5Q-F3G6>; Financial Action Task Force, *Annual Report 2007–2008* (Report, 30 June 2008) 14 [51]–[52] <https://www.fatf-gafi.org/content/dam/fatf-gafi/annual-reports/2007-2008%20ENG.pdf>, archived at <https://perma.cc/E4W2-Y5Y6>. See generally Financial Action Task Force, *Annual Review of Non-Cooperative Countries and Territories 2006–2007: Eighth NCCT Review* (Report, 12 October 2007) <https://www.fatf-gafi.org/content/dam/fatf-gafi/annual-reports/2006%202007%20NCCT%20ENG.pdf>, archived at <https://perma.cc/39TB-N52S>; 'About the Non-Cooperative Countries and Territories NCCT Initiative', *FATF* (Web Page) <https://www.fatf-gafi.org/en/publications/Fatfgeneral/Aboutthenon-cooperativecountriesandterritoriesncctinitiative.html?>, archived at <https://perma.cc/S8BS-XSQS>.

89 Financial Action Task Force, *Annual Report 2007–2008* (n 88) 14 [53], citing Financial Action Task Force, *FATF Statement on Iran: Paris, 11 October 2007* (Statement, 11 October 2007) <https://www.fincen.gov/sites/default/files/shared/FATFOct2007.pdf>, archived at <https://perma.cc/W38R-CJPF>, Financial Action Task Force, *FATF Statement: 28 February 2008* (Statement, 28 February 2008) <https://www.fincen.gov/sites/default/files/shared/FATFeb2008.pdf>, archived at <https://perma.cc/J3J5-HQXY>; Sharman, *Money Laundry* (n 13) 105–8; Nance, 'Re-Thinking FATF' (n 12) 139. See above n 9 and accompanying text.

90 'Increased Monitoring' (n 9). See above nn 83–4 and accompanying text.

91 'High-Risk and Other Monitored Jurisdictions', *FATF* (Web Page) <https://www.fatf-gafi.org/en/topics/high-risk-and-other-monitored-jurisdictions.html>, archived at <https://perma.cc/6VBS-B5FK>.

92 Ibid.

review that jurisdiction, identify strategic deficiencies and formulate an 'action plan' for remedying those deficiencies within an agreed upon timeframe.[93] Successful completion of all or nearly all of the components of that action plan can lead to a jurisdiction, after a further onsite visit and review, being removed from the grey list at the next FATF Plenary meeting.[94] It is only in cases of noncooperation in these processes and/or exceptionally deficient AML/CTF regulation that a jurisdiction is at risk of being placed on the blacklist.[95]

These features suggest that the listing process is a mechanism of last resort, which even the FATF seeks to avoid engaging, rather than a coercive mechanism that is actively used to enforce compliance with the 40 Recommendations.[96] In experimentalist global governance, public listing can provide a form of 'penalty default' that encourages all parties to collaborate to achieve the framework goals, given that the default is an undesirable alternative for all participants including states, local stakeholders and the FATF and its membership.[97] The fact that listing a jurisdiction is seen as undesirable by the FATF itself provides a compelling explanation for the abandonment of the initial blacklist of 2000–06: while that blacklist was apparently effective in securing shallow compliance, it did not serve the FATF's overall goal, which is to encourage deeper engagement and proactive policy reform to substantively address problems of money laundering and terrorism financing.[98] This perceived undesirability also explains the FATF's extensive engagement with jurisdictions whose policies are deficient, both prior to listing and when they are on the grey list, which seeks to encourage the design of effective local AML/CTF policies.[99]

This section has emphasised that rather than being a top-down quasi-legislative body that dictates policies (under the guise of recommendations) and coercively ensures compliance, the FATF, through its peer reviews, encourages proactive engagement in processes of experimentation, learning from experience and ongoing reform; public listing operates as a background penalty default. Whether the FATF lives up to that ambition depends on how

93 Ibid.

94 Ibid.

95 Ibid.

96 See also Nance and Cottrell (n 23) 290; Nance, 'Re-Thinking FATF' (n 12) 143.

97 Nance, 'Re-Thinking FATF' (n 12) 135, 142–3.

98 See Rainer Hülsse, 'Even Clubs Can't Do without Legitimacy: Why the Anti-Money Laundering Blacklist Was Suspended' (2008) 2(4) *Regulation and Governance* 459, 459–60.

99 Ibid 472–3; Nance, 'Re-Thinking FATF' (n 12) 142–3; Nance and Cottrell (n 23) 290.

domestic processes of consultation, deliberation and legislation are informed and shaped by MERs (which will be discussed in Part III). It also depends on the extent to which FATF members can use their own experiences and policies to influence the FATF framework itself — an issue to which we turn next.

B *Australia in the FATF*

In this section, we explore the role that Australian government officials, regulatory authorities, industry and civil society stakeholders have played in the transnational FATF regime. We examine the extent to which Australian actors participate in shaping the FATF framework to understand whether the FATF reflects Australian policy preferences. We argue that an exclusive focus on the implementation of FATF standards in Australia can obscure the more complex and reciprocal interactions between Australian domestic choices and interests and the FATF's transnational framework. If Australian governments, agencies and other stakeholders have a significant influence in shaping the FATF framework, this may attenuate concerns about Australia's eventual compliance with FATF standards.

One obvious way in which Australia has influenced the FATF regime is, as a founding member, by having been an early proponent of, and exemplar for, global policy responses to the problem of money laundering. Domestically, Australian governments had identified the goal of addressing money laundering prior to the 1989 establishment of the FATF through royal commissions in the 1980s[100] and in the enactment of legislative reforms to counter money laundering in 1987.[101] When the FATF was convened, Australia was one of the eight non-G7 jurisdictions invited to participate and Australian delegates played a role in shaping the initial recommendations.[102] In particular, Australian legislation informed specific recommendations of the FATF and was referred to several times in the FATF's first report.[103] At the time of the first report, Australia was: one of seven members that had already criminalised

100 See, eg, *Royal Commission of Inquiry into Drug Trafficking* (Report, February 1983) 629–37; *Royal Commission on the Activities of the Federated Ship Painters and Dockers Union* (Final Report, November 1984) vol 5, 159–60.

101 Commonwealth, *Parliamentary Debates*, House of Representatives, 30 April 1987, 2314–17 (Lionel Bowen, Attorney-General). See generally *Proceeds of Crime Act 1987* (Cth); *Proceeds of Crime Act (Miscellaneous Amendments) Act 1987* (Cth). See above n 27 and accompanying text.

102 See Financial Action Task Force on Money Laundering, *Report* (n 38) 2.

103 See, eg, ibid 11–13.

money laundering; one of three that had already imposed obligations on banks to identify the beneficial owners of bank accounts; and one of two members (alongside the United States) with a regulatory regime for reporting suspicious transactions and gathering and analysing information relating to large cash transactions to identify potentially suspicious activity.[104] Australia's role in FATF's early development is reflected in the FATF's annual reports of 1991–92 and 1996–97, which respectively described Australia as a 'learning laboratory' for money laundering policy and possessing a 'well-balanced, comprehensive and in many ways exemplary system'.[105]

Australia's role as an exemplar for money laundering policy was tarnished somewhat in subsequent decades as reflected in the more critical 2005 and 2015 MERs.[106] This change in the FATF's assessment of Australia, from early praise to more recent critique, reflects various dynamics including the FATF's increasing autonomy and capacity to critique even its founding members, a possible broader de-alignment of Australia from multilateral governance regimes or even an expected outcome in an experimentalist 'ratcheting up' of standards as the FATF has sought to refine and improve policy in a forward-looking way while early leaders fall behind.[107] Nonetheless, Australia was still considered to be either highly, substantially or moderately effective with respect to each of the 11 Immediate Outcomes in the most recent 2015 MER.[108]

Despite critical assessments in its recent MERs, Australia remains one of only 37 member states of the FATF and is directly represented in the FATF Plenary (which decides principally by consensus) by a delegation presently led

[104] Ibid 14. The influence of Australia's regulatory regime is reflected in recommendations 4, 13 and 16 of the FATF's first report: at 17, 20.

[105] Financial Action Task Force on Money Laundering, *Annual Report 1991–1992* (Report, 25 June 1992) 11 [53] <https://www.fatf-gafi.org/content/dam/fatf-gafi/annual-reports/1991%201992%20ENG.pdf>, archived at <https://perma.cc/9CFS-2FSN>; Financial Action Task Force on Money Laundering, *Annual Report 1996–1997* (Report, June 1997) 13 [43] <https://www.fatf-gafi.org/content/dam/fatf-gafi/annual-reports/1996%201997%20ENG.pdf>, archived at <https://perma.cc/D5ZL-TY42>.

[106] See, eg, Financial Action Task Force, *Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism: Australia* (Report, 14 October 2005) 6 [9], 10 [39], 13 [55], 89 [388] <https://www.imf.org/external/pubs/ft/scr/2006/cr06424.pdf>, archived at <https://perma.cc/4KJY-D2UD> ('*Australia 2005*'); FATF and APG, *Australia 2015* (n 65) 7 [7], 12–17.

[107] Gabriele Abbondanza, 'Australia the "Good International Citizen"? The Limits of a Traditional Middle Power' (2021) 75(2) *Australian Journal of International Affairs* 178, 185–6; Nance, 'Re-Thinking FATF' (n 12) 132, 145, 149.

[108] FATF and APG, *Australia 2015* (n 65) 12–17.

by a representative of the Attorney-General's Department.[109] Such representation of Australia within FATF's decision-making processes arguably mitigates some democratic loss occasioned by ceding policymaking functions to FATF.[110] Further, Australia continues to play a major role as a regional leader and rule-promoter with respect to global AML/CTF law: Australia is a founding member and permanent co-chair of the Asia/Pacific Group on Money Laundering ('APG') (which, with 42 members, is the largest FATF-style regional body and FATF associate member) through which it engages in regional peer review and provides technical assistance.[111]

It follows that Australia has been involved extensively in the design and promulgation of the FATF regime not as a passive rule-taker but as an active rule-maker and promoter both regionally and globally. This suggests the existence of a considerably more reciprocal relationship between the FATF and Australia that is not captured by the existing literature. As such, Australia's relationship with the FATF is different from that of smaller, less-developed non-member jurisdictions. For such jurisdictions, an absence of domestic enforcement experience, lack of representation in FATF Plenary and greater dependence on global financial markets create a much greater risk of asymmetrical imposition of FATF policies regardless of respective domestic interests and policy preferences.[112]

III The FATF in Australia: Domestic Deliberation and Parliamentary Oversight

The preceding Part presents the FATF as a global standards regime that leaves individual jurisdictions the freedom to design local measures and encourages

[109] 'FATF Heads of Delegation', *FATF* (Web Page) <https://www.fatf-gafi.org/en/the-fatf/who-we-are/Heads-of-delegation.html>, archived at <https://perma.cc/NQ5J-AREN>. See above nn 48, 51, 64 and accompanying text.

[110] See Michael C Dorf, 'Dynamic Incorporation of Foreign Law' (2008) 157(1) *University of Pennsylvania Law Review* 103, 156–8.

[111] 'Members and Observers: Australia', *APG* (Web Page) <https://apgml.org/members-and-observers/members/details.aspx?m=6278f5df-9ff0-4163-8e36-33f5f14a2661>, archived at <https://perma.cc/DGZ7-XNNH>; 'Members and Observers: Overview of APG Members', *APG* (Web Page) <https://apgml.org/members-and-observers/page.aspx?p=8c32704a-5829-4671-873c-7b5a23ced347>, archived at <https://perma.cc/2W84-CKBJ>. See also Sandra Lavenex, Omar Serrano and Tim Büthe, 'Power Transitions and the Rise of the Regulatory State: Global Market Governance in Flux' (2021) 15(3) *Regulation and Governance* 445, 456.

[112] James Thuo Gathii, 'The Financial Action Task Force and Global Administrative Law' [2010] *Journal of the Professional Lawyer* 197, 202–3. See, eg, Sharman, *Money Laundry* (n 13) 53–60.

mutual learning through peer evaluation and the penalty default of listing within which Australia — through its executive — has played an influential role. While this paints a more participative and less coercive picture of the FATF, it does not address the central concern of the coercive compliance critique: that the FATF undermines the role of the domestic *legislature* by empowering the executive to incorporate the FATF's desired policies without ordinary parliamentary processes and consultation.[113]

To address this concern, we analyse the role of the FATF recommendations and peer reviews in informing domestic contestation about, and the tailoring of, AML/CTF policies. We investigate the FATF's influence on Australian legislative and deliberative processes, including the roles of the executive, legislature and other stakeholders, with respect to AML/CTF law and how such actors use or contest FATF recommendations and peer reviews. Part III(A) shows that Australian AML/CTF law has generally been made through ordinary legislative processes with extensive consultation of the private sector and civil society and without extraordinary delegation of lawmaking power to the executive to directly incorporate FATF norms into domestic law. Given that finding, Part III(B) analyses the quality of parliamentary deliberation and consultation in the most recent 2021–22 Senate Inquiry into the adequacy of Australia's AML/CTF regime based on a qualitative textual analysis of all submissions, hearings transcripts and the Senate inquiry report.

We show that the FATF's peer reviews have prompted and informed domestic deliberative processes to design Australia's AML/CTF policy responses without dictating outcomes or preventing the incorporation of domestic circumstances and concerns. Specifically, we show that the executive has not simply downloaded FATF standards or recommendations into domestic law. Instead, it has been legislators themselves, alongside different stakeholders such as civil society, who have been the strongest advocates for reform; they often use the FATF's MERs to critique government inaction. This reveals a more dialogic interaction between the transnational regime and domestic AML/CTF law reform and attenuates some of the concerns in the critical literature.

[113] See, eg, Goldbarsht and Harris (n 1) 531; Harvey (n 14) 210 [6.3.1.1.1]. See above n 13 and accompanying text.

A *Legislative and Executive Lawmaking*

One representation of Australian lawmaking with respect to money laundering and terrorism financing goes as follows: rules that reflect FATF standards are adopted by the executive, acting through government departments and regulatory agencies (such as the Australian Transaction Reports and Analysis Centre ('AUSTRAC')), without regard to domestic policy preferences, for example through delegated legislation, rather than through ordinary processes of parliamentary scrutiny and debate.[114]

But as we show, major AML/CTF policy reforms in Australia have primarily taken place through changes to legislation made via ordinary legislative procedures and attended by substantial parliamentary inquiries and public consultation. For example, the most significant reform to Australia's AML/CTF policy in recent decades was the new legislative scheme set out in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) ('*AML/CTF Act*'). This Act was the culmination of a process beginning in 2003 when the government announced a review of AML/CTF legislation that was informed by criticisms in the FATF's 2005 MER on Australia.[115] In response, the government consulted with relevant industries including financial services, gambling providers and the accounting and legal professions and produced 'issues papers' for public comment and discussion at roundtable meetings with stakeholders.[116] The Attorney-General's Department, together with AUSTRAC, received over 120 submissions from the public on the Exposure Draft of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2005 (Cth) ('Exposure Bill').[117] The Senate then referred the Exposure Bill to the Senate

[114] Goldbarsht and Harris (n 1) 531, 551; Harvey (n 14) 210 [6.3.1.1.1].

[115] Replacement Explanatory Memorandum, Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 (Cth) 5–7 ('AML/CTF Explanatory Memorandum'); Neil Jensen, 'Creating an Environment in Australia Hostile to Money Laundering and Terrorism Financing: A Changing Role for AUSTRAC' (2008) 5 *Macquarie Journal of Business Law* 93, 98–100.

[116] AML/CTF Explanatory Memorandum (n 116) 13–14; Jensen (n 115) 99.

[117] Attorney-General's Department (Cth), *Anti-Money Laundering and Counter-Terrorism Financing Bill 2005* (Exposure Draft, 13 December 2005); Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 [Provisions]* (Report, November 2006) 1 [1.5] <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2004-07/aml_ctf06/report/index>, archived at <https://perma.cc/9Z9J-XQPM> ('*AML/CTF Bill Report*'); Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Exposure Draft of the Anti-Money Laundering*

Legal and Constitutional Legislation Committee, which produced its report in early 2006.[118] The Exposure Bill was amended on the basis of this consultation process and in late 2006 the Senate Standing Committee on Legal and Constitutional Affairs held a further inquiry on the revised Exposure Bill: this inquiry received 42 submissions, included three days of public hearings and recommended further amendments.[119]

The Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 (Cth) was debated in the House of Representatives in November 2006 and in the Senate in December 2006.[120] In these debates, the then opposition Labor Party made more extensive reference to the FATF's recommendations and the 2005 MER than the government did.[121] The 40 Recommendations and 2005 MER were used to criticise the government for its inaction and delay and for proposing an incomplete reform package.[122] As will be explored in the more detailed analysis of the 2021–22 Senate Inquiry below, this pattern of the opposition using the FATF framework to critique the government is a common feature of political debates on AML/CTF law reform in Australia.

Subsequent reforms to the *AML/CTF Act* have also been made by Parliament in the exercise of its ordinary legislative function and been attended by consultative and deliberative processes. Such democratic processes have been prompted and informed, as opposed to stifled, by the FATF's MERs. The most recent wave of reforms followed the FATF's 2015 MER and dovetailed with a domestic statutory review of the *AML/CTF Act* by the Attorney-

and Counter-Terrorism Financing Bill 2005 (Report, April 2006) 1 [1.1]–[1.2] <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2004-07/anti-money_laundering/report/index>, archived at <https://perma.cc/KR2L-KRHG> ('*Exposure Draft Report*').

118 *Exposure Draft Report* (n 117) 1 [1.1].

119 *AML/CTF Bill Report* (n 117) 1 [1.5], 2 [1.7]–[1.9], 42–4 [5.21]–[5.34]. See generally Attorney-General's Department (Cth), *Anti-Money Laundering and Counter-Terrorism Financing Bill 2006* (Exposure Draft, 28 June 2006), archived at <https://perma.cc/VC5S-CL69>.

120 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 2006, 90–110 ('*Parliamentary Debates 28 November 2006*'); Commonwealth, *Parliamentary Debates*, Senate, 7 December 2006, 71–80, 135–56, 174–5 ('*Parliamentary Debates 7 December 2006*'). For the first and second readings of the Bill, see Commonwealth, *Parliamentary Debates*, Senate, 29 November 2006, 95–7 (Richard Colbeck).

121 See, eg, Commonwealth, *Parliamentary Debates 28 November 2006* (n 120) 92–6 (Archibald Bevis, Shadow Minister for Homeland Security and Shadow Minister for Aviation and Transport Security), 97–101 (Michael Danby), 103–5 (Christopher Hayes); Commonwealth, *Parliamentary Debates 7 December 2006* (n 120) 71–5 (Joseph Ludwig).

122 Ibid.

General's Department in 2016 ('2016 Statutory Review').[123] These reports led to legislative amendments in 2017 and 2020,[124] which were subject to scrutiny by parliamentary committees[125] and also passed through ordinary legislative processes.[126] In both cases, it was non-government members of Parliament who criticised the limited scope of the legislative reforms by referring extensively to Australia's failure to comply with the FATF recommendations.[127] Most recently, the extensive 2021–22 Senate Inquiry into Australia's AML/CTF regime, which we will explore in detail below, prompted the announcement in April 2023 of a

123 See generally FATF and APG, *Australia 2015* (n 65); Attorney-General's Department (Cth), *Report on the Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 and Associated Rules and Regulations* (Report, April 2016) <https://www.austrac.gov.au/about-us/corporate-information-and-governance/reports-and-accountability/report-statutory-review-amlctf-act-and-associated-rules-and-regulations>, archived at <https://perma.cc/5ZKT-QTJF> ('*Statutory Review*').

124 *Anti-Money Laundering and Counter-Terrorism Financing Amendment Act 2017* (Cth); *Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Act 2020* (Cth). See below n 126.

125 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017 [Provisions]* (Report, October 2017) 1 [1.1]–[1.2] <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/MoneyLaundering2017/Report>, archived at <https://perma.cc/63RU-9BE9>; Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill 2019 [Provisions]* (Report, March 2020) 1 [1.1]–[1.2], 5–6 [1.18]–[1.23] <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Anti-moneylaunder2019/Report>, archived at <https://perma.cc/FXW9-D2TE> ('*Amendment Bill 2019 [Provisions]*'); Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 10 of 2019, 5 December 2019) 34–6 <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Scrutiny_Digest/2019>, archived at <https://perma.cc/N73S-J9QJ>; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Report No 4 of 2020, 9 April 2020) 31–9 <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2020/Report_4_of_2020>, archived at <https://perma.cc/7PG4-KKMQ>.

126 See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 24 October 2017, 11780–3; Commonwealth, *Parliamentary Debates*, House of Representatives, 5 December 2017, 12723–31, 12732–42 ('*Parliamentary Debates 5 December 2017*'); Commonwealth, *Parliamentary Debates*, House of Representatives, 6 December 2017, 12768–9; Commonwealth, *Parliamentary Debates*, Senate, 7 December 2017, 10116–20, 10157–9; Commonwealth, *Parliamentary Debates*, House of Representatives, 11 November 2020, 9460–2, 9514–34; Commonwealth, *Parliamentary Debates*, Senate, 10 December 2020, 7405–20 ('*Parliamentary Debates 10 December 2020*').

127 See above n 126.

consultation process for reforms to the *AML/CTF Act* that would eventually be passed into law in late 2024.[128]

Our account further suggests that Parliament has not been merely 'rubber-stamping' the desires of the executive (that in turn reflect those of the FATF) on AML/CTF policy; it also illustrates the heterogeneous alignment of positions and interests of different actors.[129]

B *Legislative Deliberation: The 2021–22 Senate Inquiry*

The foregoing discussion established that Australian AML/CTF law has been made through ordinary mechanisms of parliamentary lawmaking attended by extensive consultative and deliberative processes that were prompted by MERs. This still leaves open the possibility that these processes have been, as Doron Goldbarsht and Hannah Harris suggest, 'procedural rather than substantive, with outcomes reflecting the original executive position'.[130] If this is the case, then there may be a valid basis for concern that the executive has been empowered by the FATF, with Parliament reduced to a rubber stamp, and that public consultation has been made irrelevant or disregarded in making Australia's AML/CTF law.

As mentioned earlier, the most recent deliberative parliamentary process canvassing significant legislative reform was the 2021–22 Senate Inquiry.[131] A central issue in the inquiry was whether the *AML/CTF Act* reporting obligations should be extended to lawyers, accountants and real estate agents.[132] These highly contested reforms relate to FATF recommendations 22 and 23, which provide relatively precise implementation directions and were the basis

[128] Mark Dreyfus, 'Consultation on Major Reform of Australia's Anti-Money Laundering and Counter-Terrorism Financing Laws' (Media Release, Attorney-General's Department (Cth), 20 April 2023) <https://ministers.ag.gov.au/media-centre/consultation-major-reform-australias-anti-money-laundering-and-counter-terrorism-financing-laws-20-04-2023>, archived at <https://perma.cc/FXD3-3G8K>. See generally *Adequacy and Efficacy* (n 26). See below Part III(B).

[129] Cf Goldbarsht and Harris (n 1) 552.

[130] Ibid 531.

[131] See generally 'The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime', *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/AUSTRAC>, archived at <https://perma.cc/M3PZ-DM68>; *Adequacy and Efficacy* (n 26).

[132] *Adequacy and Efficacy* (n 26) 1–2 [1.2].

of the extensive critique of Australia by the FATF in its 2005 and 2015 MERs.[133] In April 2023, the Australian Government announced public consultations to consider the most significant potential changes to the Australian AML/CTF regime since the introduction of the *AML/CTF Act* in 2006.[134] Following two further rounds of consultations with affected stakeholders, Parliament enacted these reforms at the end of 2024.[135]

Thus, analysing the conduct and content of the 2021–22 Senate Inquiry, including the quality of deliberation about reform options, provides a valuable case study of the interaction between the FATF recommendations and domestic concerns about the appropriate reform of Australian law.

1 *Background*

The issue of a second tranche of reforms first arose in 2005 when the FATF's 2005 MER found that Australia was 'not compliant' with the recommendations concerning reporting obligations for lawyers, accountants and real estate agents.[136] The 2006 *AML/CTF Act* did not apply to these professions — it focused instead on the financial and gambling sectors and on bullion dealers; this focus was described by the Attorney-General as the 'first tranche' of the intended reforms and was to be followed by a 'second tranche' of reforms covering real estate agents, lawyers and accountants ('tranche two').[137] Tranche two was not forthcoming, however, and in *both* the FATF's 2015 MER and the 2016 Statutory Review the failure to regulate these so-called 'gatekeeper professions' was criticised as a 'significant gap in Australia's AML/CTF regime that provides opportunities for criminals to misuse DNFBP services to launder illicit funds'.[138] The 2015 MER noted that DNFBPs were at risk of being used to launder money in Australia and recommended that Australia regulate these

133 Financial Action Task Force, *Australia 2005* (n 106) 94, 106; FATF and APG, *Australia 2015* (n 65) 22–3; FATF, *Recommendations* (n 8) 19–20 [22]–[23].

134 Dreyfus (n 128).

135 'Overview of the AML/CTF Amendment Bill', *Attorney-General's Department* (Web Page, September 2024) <https://www.ag.gov.au/crime/anti-money-laundering-and-counter-terrorism-financing/anti-money-laundering-and-counter-terrorism-financing-amendment-bill/overview-amlctf-amendment-bill>, archived at <https://perma.cc/Z36G-QHC8>. See generally *AML/CTF Amendment Act 2024* (n 26).

136 Financial Action Task Force, *Australia 2005* (n 106) 110–17 [484]–[519].

137 Commonwealth, *Parliamentary Debates*, House of Representatives, 1 November 2006, 2 (Philip Ruddock, Attorney-General); *Adequacy and Efficacy* (n 26) 9 [2.1]–[2.3].

138 FATF and APG, *Australia 2015* (n 65) 10–11 [26]; Attorney-General's Department (Cth), *Statutory Review* (n 123) 40–2; *Adequacy and Efficacy* (n 26) 9 [2.1].

industries as a 'prioritised recommended action'.[139] Australia's failure to impose reporting requirements was referred to throughout the 2015 MER as having detracted from its effective achievement of Immediate Outcomes 1 (risk, policy and coordination), 3 (supervision) and 4 (preventive measures) and as having led to 'non-compliant' ratings with respect to recommendations 22 and 23.[140] Australia was again rated 'non-compliant' with respect to recommendations 22 and 23 in the FATF's 2018 follow-up report.[141] Tranche two was also raised in parliamentary debates concerning the 2017 and 2020 amendments to the *AML/CTF Act* with the Greens even seeking, unsuccessfully, to add those reforms to the 2020 Bill.[142]

With respect to the substantive risks posed by DNFBPs, FATF's 2015 MER argued that unregulated DNFBPs contribute to AML/CTF risks in Australia by referring to domestic evidence from AUSTRAC's (classified) 2011 National Threat Assessment concerning money laundering.[143] The 2015 MER stated that lawyers and accountants could facilitate the establishment of legal structures and provide advice to facilitate money laundering and also pointed to evidence of Australian real estate being purchased by international criminal actors to launder money.[144] The 2015 MER referred to Project Wickenby, which was a Commonwealth cross-agency taskforce that investigated international tax evasion from 2006–15: it netted $2.29 billion in tax liabilities, convicted 46 individuals and uncovered cases where accounting firms set up and

139 FATF and APG, *Australia 2015* (n 65) 6 [1], 10–11 [26], 33 [1.16], 83 [5.5], 110 [7.26], 111 [7.30], 167 [5.101], 168 [a5.105].

140 Ibid 12–14, 85 [5.12], 168 [a5.102]–[a5.108].

141 FATF, *Anti-Money Laundering and Counter-Terrorist Financing Measures: Australia* (Follow-Up Report & Re-Rating, November 2018) 9 tbl 2 <https://www.fatf-gafi.org/content/dam/fatf-gafi/fur/FUR-Australia-2018.pdf>, archived at <https://perma.cc/24V9-GVJ9>. DNFBPs and recommendations 22 and 23 were not assessed in the FATF's 2024 follow-up report: see FATF, *Anti-Money Laundering and Counter-Terrorist Financing Measures: Australia* (Follow-Up Report & Re-Rating, March 2024) 25 <https://www.fatf-gafi.org/content/dam/fatf-gafi/fur/Australia-FUR-2024.pdf>, archived at <https://perma.cc/658R-53GB>.

142 See, eg, Commonwealth, *Parliamentary Debates 5 December 2017* (n 120) 12723–7 (Julian Hill), 12734–5 (Peter Khalil); *Amendment Bill 2019 [Provisions]* (n 125) 19–20; Commonwealth, *Parliamentary Debates 10 December 2020* (n 126) 7406–9 (Nicholas McKim). See generally Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill 2020 (Cth).

143 FATF and APG, *Australia 2015* (n 65) 29–31 [1.5]. See also 'Money Laundering in Australia 2011', *AUSTRAC* (Web Page) <https://www.austrac.gov.au/business/how-comply-guidance-and-resources/guidance-resources/money-laundering-australia-2011>, archived at <https://perma.cc/2J2C-D44C>.

144 FATF and APG, *Australia 2015* (n 65) 33 [1.16].

administered offshore tax avoidance schemes.[145] Subsequently, in early 2023, the Australian Federal Police ('AFP') restrained $150 million in Sydney real estate, cash and luxury goods connected to charges brought against an international money laundering syndicate operating in Australia.[146] Moreover, AUSTRAC's 2024 National Risk Assessment assessed lawyers and accountants as being at a high risk of being used for money laundering and, while real estate itself is highly vulnerable to money laundering, real estate agents as being at a medium risk.[147]

By early 2022, after the Senate had referred an inquiry concerning the 'adequacy and effectiveness' of Australia's AML/CTF regime to the Senate Legal and Constitutional Affairs References Committee ('Committee') in June 2021, tranche two was a central focus for potential AML/CTF law reform.[148] Specifically, the terms of reference for the Committee instructed it to inquire into the regulatory impact, costs and benefits of tranche two reforms, the extent to which tranche two professions contribute to AML/CTF risks and the compatibility of possible AML/CTF reporting obligations with professional obligations.[149] The terms of reference also included general questions to be answered about the effectiveness of Australia's AML/CTF regime, Australia's compliance with the FATF recommendations (including any possible consequences of noncompliance) and the government's response to the MERs and the 2016 Statutory Review.[150]

The Committee received extensive evidence, including 52 written submissions and oral evidence from 33 witnesses in 14 blocks of public hearings in November 2021: evidence was provided by the government, regulatory and law enforcement agencies, industry stakeholders, AML

[145] Ibid 50 [3.15]; 'Project Wickenby', *CDPP* (Web Page) <https://www.cdpp.gov.au/crimes-we-prosecute/fraud/project-wickenby>, archived at <https://perma.cc/2MQT-EQGN>.

[146] AFP, 'Property and Cash Restrained as Alleged Money Laundering Group Charged' (Media Release, 8 August 2023) <https://www.afp.gov.au/news-centre/media-release/property-and-cash-restrained-alleged-money-laundering-group-charged>, archived at <https://perma.cc/6AUZ-XXCA>.

[147] AUSTRAC, *Money Laundering in Australia: National Risk Assessment* (Report, 2024) 7–8 <https://www.austrac.gov.au/business/how-comply-guidance-and-resources/guidance-resources/money-laundering-australia-national-risk-assessment-2024>, archived at <https://perma.cc/KM9K-MR6U>.

[148] *Adequacy and Efficacy* (n 26) 1 [1.1], 7 [1.20], 9, [2.3].

[149] Ibid 1–2 [1.2].

[150] Ibid.

compliance professionals, civil society groups and academics.[151] As such, diverse stakeholders were consulted and were given an opportunity to be heard in the inquiry. In the following sections, we outline the evidence presented by different groups to the inquiry (and by the Senators who comprised the Committee) to reveal the diversity of views on tranche two by reference to domestic concerns and their more granular alignment with the FATF framework. Our qualitative analysis seeks to identify common themes and differences in the evidence across different participants and to trace the influence of the FATF recommendations and MERs, vis-a-vis other considerations, on the outcome of the inquiry. This analysis reveals a substantive deliberation process about available AML/CTF law reform options and a complex relationship between the FATF, the executive, Parliament, the private sector and civil society: these findings may attenuate the concerns expressed in the literature outlined earlier.[152]

2 *AML Compliance Professionals*

Notably, the first set of committee hearings was dedicated to evidence given by AML compliance professionals, an emerging profession that provides services to the private and public sectors to design and implement compliance systems for their legal obligations and to address money laundering and terrorism

[151] Ibid 2 [1.4], apps 1–2; Senate Legal and Constitutional Affairs References Committee, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime: Public Hearing* (Schedule, 9 November 2021) <https://www.aph.gov.au/DocumentStore.ashx?hearingid=30280&submissions=false>, archived at <https://perma.cc/2652-ZGUK> ('*Public Hearing 9 November 2021*'); Senate Legal and Constitutional Affairs References Committee, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime: Public Hearing* (Schedule, 10 November 2021) <https://www.aph.gov.au/DocumentStore.ashx?hearingid=30281&submissions=false>, archived at <https://perma.cc/8WYR-ZBGX> ('*Public Hearing 10 November 2021*').

[152] See above nn 12, 16–19 and accompanying text.

financing risks more broadly.[153] These witnesses strongly advocated for the need for Australia to comply with the FATF framework as such.[154]

The AML compliance professionals that made submissions to the inquiry made extensive reference to the FATF recommendations and MERs to justify their support for tranche two.[155] As Anthony Quinn, Founder/Director of Arctic Intelligence, said in the inquiry's hearings:

> [T]he Australian government has repeatedly failed to take the necessary actions to meet the [FATF's] recommendations and has disappointingly lacked the political will and resolve to take action to address the many deficiencies the FATF has highlighted in various [MERs] going back many years. As a result, Australia is simply not meeting its international commitments …[156]

[153] *Public Hearing 9 November 2021* (n 151); Antoinette Verhage, 'Between the Hammer and the Anvil? The Anti-Money Laundering-Complex and Its Interactions with the Compliance Industry' (2009) 52(1) *Crime, Law and Social Change* 9, 30. See generally AML Experts, Submission No 6 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (26 August 2021) <https://www.aph.gov.au/DocumentStore.ashx?id=523da429-87bc-4ba2-832b-b59e0a4c8e35&subId=712219>, archived at <https://perma.cc/39DF-4MWU>; Initialism, Submission No 8 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (26 August 2021) <https://www.aph.gov.au/DocumentStore.ashx?id=c9dc7d7d-3e9a-4871-9a6e-e2f5585c6e4c&subId=712227>, archived at <https://perma.cc/4LPN-JTDN>; Arctic Intelligence, Submission No 12 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (26 August 2021) <https://www.aph.gov.au/DocumentStore.ashx?id=f4148f95-322d-469d-8be7-8b9023cdc3b4&subId=712240>, archived at <https://perma.cc/V9UA-XXD6>.

[154] AML Experts (n 153); Initialism (n 153); Arctic Intelligence (n 153). See also Malkara Consulting, Submission No 28 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (27 August 2021) <https://www.aph.gov.au/DocumentStore.ashx?id=42ecd7ad-15dc-4a29-a061-818fa1cd94b5&subId=715327>, archived at <https://perma.cc/Y4SL-P8BE>.

[155] See, eg, AML Experts (n 153) 6; Initialism (n 153) 5; Arctic Intelligence (n 153) 2–3; Malkara Consulting (n 154) 4–6.

[156] Evidence to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, Canberra, 9 November 2021, 2 (Anthony Quinn, Founder and Director, Arctic Intelligence) <https://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/25284/toc_pdf/Legal%20and%20Constitutional%20Affairs%20References%20Committee_2021_11_09_Official.pdf>, archived at <https://perma.cc/VZ6F-FQ4L> ('Evidence 9 November 2021').

Another of the compliance professionals similarly characterised Australia as an 'international outlier' in its failure to regulate tranche two professions[157] and as a jurisdiction 'increasingly [being] considered a laggard in the area of AML/CTF and consequently [being] perceived as an attractive haven for criminal proceeds'.[158]

The compliance professionals were the only witnesses who characterised the FATF framework as prescriptive, seeing the 40 Recommendations as strict rules, backed by the threat of sanction, that Australia is obliged to implement.[159] One submission observed that Australia, '[a]s a FATF founding member' has 'a responsibility, and it is expected to comply with ALL FATF 40 Recommendations',[160] that compliance with FATF requirements is 'black and white' and that the FATF is 'very prescriptive around what [it] expect[s] countries to do'.[161] The compliance professionals also emphasised the risk of grey-listing due to noncompliance and the 'significant cost' of listing[162] as being a potential 'political disaster' with substantial 'economic ramifications'.[163] During the hearings, one witness acknowledged the difficulty of predicting a 'political process' like grey-listing, but they asserted that further delay 'would undoubtedly increase the likelihood'.[164] Notably, this view was not unanimous, with John Chevis, a former AFP officer working as an AML expert, suspecting that 'it's highly unlikely that Australia is going to be placed on the grey list, based on the countries that have been placed on the grey list in the past'

157 Initialism (n 153) 11.

158 Evidence 9 November 2021 (n 156) 3 (Neil Jeans, Principal, Initialism).

159 See, eg, AML Experts (n 153) 6; Initialism (n 153) 11; Arctic Intelligence (n 153) 2; Malkara Consulting (n 154) 6–7. Cf Australian National University Law Reform and Social Justice Research Hub, Submission No 14 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (23 August 2021) 3 <https://www.aph.gov.au/DocumentStore.ashx?id=61c7b831-499f-4d02-bcec-80ba35f8bcc1&subId=712244>, archived at <https://perma.cc/HY7Q-EP9S>.

160 Malkara Consulting (n 154) 6.

161 Evidence 9 November 2021 (n 156) 7 (Anthony Quinn, Founder and Director, Arctic Intelligence).

162 AML Experts (n 153) 6; ibid 2 (Anthony Quinn, Founder and Director, Arctic Intelligence), 10 (Neil Jeans, Principal, Initialism), 10 (Patrick Oliver, Director, AML Experts).

163 Malkara Consulting (n 154) 6. See also AML Experts (n 153) 6; Evidence 9 November 2021 (n 156) 2 (Anthony Quinn, Founder and Director, Arctic Intelligence), 10 (Neil Jeans, Principal, Initialism), 10 (Patrick Oliver, Director, AML Experts).

164 Evidence 9 November 2021 (n 156) 10 (Neil Jeans, Principal, Initialism).

and that, even if this were to occur, he was 'not sure it would have much of an impact at all'.[165]

The need to implement the FATF's recommendations and the risk of sanction were not, however, the only reasons articulated in favour of implementing tranche two. Some compliance professionals also emphasised the substantive benefits of tranche two in serving to 'level the playing field and enhance Australia's ability to detect and prevent money laundering, terrorist financing, and other predicate crimes'.[166] One AML compliance firm, GOVLAW, even expressed critiques of the FATF regime, suggesting that FATF compliance encourages a '"cookie cutter" approach' that Australia should go beyond, noting further that

> [i]t is important not to place FATF Standards on pedestal. These to some extent represent the lowest common denominator standards which could be agreed among disparate member countries each with their own internal political dynamics.[167]

3 *Financial Institutions*

Tranche one entities already subject to regulation under the *AML/CTF Act*, specifically financial institutions, were another group that strongly supported tranche two.[168] Their evidence reveals how the FATF regime enlists financial institutions as unofficial market enforcers who advocate for compliance with the FATF recommendations due to their interest in maintaining access to international financial markets.[169]

The financial institutions that made submissions to the inquiry supported tranche two on the basis that compliance with the FATF recommendations would secure the international reputation and access to capital for Australian

[165] Ibid 18 (John Chevis). See also 'Personnel Continued', *AML Solutions International* (Web Page) <https://amlsi.com.au/personnel/personnel-continued/>, archived at <https://perma.cc/JW68-QHNZ>.

[166] Initialism (n 153) 11. See also AML Experts (n 153) 5–6; Arctic Intelligence (n 153) 1–2; Malkara Consulting (n 154) 8–9.

[167] GOVLAW, Submission No 25 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (27 August 2021) 2 <https://www.aph.gov.au/DocumentStore.ashx?id=6c033ea7-31a1-4102-a4e5-d03e3e695f7d&subId=712273>, archived at <https://perma.cc/D77L-2RU6>.

[168] See *Adequacy and Efficacy* (n 26) 9 [2.2].

[169] See Julia C Morse, *The Bankers' Blacklist: Unofficial Market Enforcement and the Global Fight against Illicit Financing* (Cornell University Press, 2021) 5, 43–51, 73–8.

businesses. The Australian Banking Association ('ABA') expressed strong support, stating that '[i]t is vital that Australia addresses gaps in the Australian AML/CTF regime as identified in the FATF Mutual Evaluation Report'.[170] The ABA's representative noted that having Australia's noncompliant MER ratings changed to compliant would make meeting FATF obligations 'certainly … more efficient for banks as they seek funds overseas' and that, in lieu of these reforms, Australian banks were 'meeting [FATF] obligations through [their] own efforts to work with [their] investors in overseas markets to show how [they] comply with both the letter of the law and the objectives of the money laundering legislation'.[171] Bendigo and Adelaide Bank, the Australian Financial Markets Association and illion, a consumer and commercial credit bureau, expressed similar sentiments about potential economic and reputational risks arising from noncompliance with recommendations 22 and 23.[172]

As with the compliance professionals, however, the FATF recommendations were seen by the financial institutions that made submissions to the inquiry neither as the only reason for law reform nor as ends in themselves. As the ABA noted:

> The alignment of the Australian regime to international standards will only enhance the ability of banks and Australian law enforcement agencies to detect,

[170] Australian Banking Association, Submission No 22 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (27 August 2021) 1 <https://www.aph.gov.au/DocumentStore.ashx?id=ed1c4b0b-687d-47aa-9efe-e5d976dfa4a3&subId=713704>, archived at <https://perma.cc/3J4C-JPSA>.

[171] Evidence 9 November 2021 (n 156) 37 (Aidan O'Shaughnessy, Executive Director, Policy, Australian Banking Association).

[172] See Bendigo and Adelaide Bank, Submission No 15 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (27 August 2021) 3 <https://www.aph.gov.au/DocumentStore.ashx?id=44ec0bea-dc1b-4e74-bd41-f7dc9330d666&subId=712258>, archived at <https://perma.cc/2V7T-STV8>; Australian Financial Markets Association, Submission No 26 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (27 August 2021) 2–3 <https://www.aph.gov.au/DocumentStore.ashx?id=e75d64d2-20f2-4fe6-99cc-804b5ccdc9b6&subId=712268>, archived at <https://perma.cc/96QL-GR64>; illion, Submission No 35 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (30 August 2021) 2–3 <https://www.aph.gov.au/DocumentStore.ashx?id=4f407858-0fbc-430d-9c7d-561ae420c017&subId=716624>, archived at <https://perma.cc/DMK4-7SD4>.

> deter and disrupt financial crime — helping to keep Australians safe from financial and other serious crime'.[173]

Thus, substantive concern for addressing financial crime was the ultimate reason given by these bodies for supporting tranche two. Further, other tranche one entities, including the Financial Planners Association, and representatives of remittance providers and online gambling providers made submissions that did not extensively concern tranche two or rely on the FATF framework — they instead reflected those bodies' specific interest in mitigating regulatory burdens that might hinder the competitiveness of their activities.[174]

4 *Civil Society and Academics*

Apart from private sector stakeholders with economic interests in the scope of AML/CTF regulation or access to global financial markets, the Committee heard from several civil society groups concerned with public policy and representing dispersed interests that included corruption, child exploitation, civil liberties and national security policy as well as from academics.

Civil society groups concerned with issues such as corruption (Transparency International Australia and the Uniting Church in Australia) and child exploitation (International Centre for Missing and Exploited Children Australia ('ICMEC Australia')) expressed strong support for tranche

[173] Australian Banking Association (n 170) 1.

[174] See generally Financial Planning Association of Australia, Submission No 11 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (27 August 2021) <https://www.aph.gov.au/DocumentStore.ashx?id=ad824650-1440-4511-9791-f6d6b2720343&subId=712233>, archived at <https://perma.cc/N9MC-M8G4>; Australian Remittance and Currency Providers Association, Submission No 13 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (26 August 2021) <https://www.aph.gov.au/DocumentStore.ashx?id=82005912-01e3-474d-834f-2563b571f318&subId=712239>, archived at <https://perma.cc/JB6D-9VQR>; Responsible Wagering Australia, Submission No 19 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (27 August 2021) <https://www.aph.gov.au/DocumentStore.ashx?id=40b0c0b4-4dbd-4d42-b36d-8ebfa778fdf5&subId=713701>, archived at <https://perma.cc/W5EJ-BG3X>. See also Evidence 9 November 2021 (n 156) 44 (Ben Marshan, Head of Policy, Financial Planning Association of Australia).

two with differing degrees of reliance on the FATF.[175] Transparency International presented Australia as a 'laggard' in AML/CTF due to its failure to comply with the FATF recommendations and MER recommendations.[176] Grey-listing was, however, presented by Transparency International as 'highly unlikely' to occur or to have significant economic or reputational consequences for Australia given its large and internationally well-integrated economy and financial system.[177] Instead, Transparency International's representative noted that the organisation supported tranche two on the basis that those reforms would progress the substantive goal of making it more difficult to launder the proceeds of corruption, while using Australia's MERs to support this position: '[i]t's not just Transparency International that has this view; the Financial Action Task Force has confirmed that Australia is an attractive destination for dirty money'.[178] Transparency International referred to specific examples of money laundering in Australia in connection with DNFBPs including a Sudanese general who purchased a $1.5 million house for his son in Victoria in 2014, a Malaysian banker incarcerated in Singapore for money laundering who reportedly used a foreign company to purchase $8.2 million of real estate in the Gold Coast, Australian companies allowing international companies to purchase nominee directorships to circumvent director residency rules and

[175] See generally Transparency International Australia, Submission No 17 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (23 August 2021) <https://www.aph.gov.au/DocumentStore.ashx?id=5c32e516-912a-46c0-8446-10a35661934b&subId=713699>, archived at <https://perma.cc/D8MD-39T2>; Synod of Victoria and Tasmania, Uniting Church in Australia, Submission No 29 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (27 August 2021) <https://www.aph.gov.au/DocumentStore.ashx?id=83afe683-aff2-4f14-b965-e0a76a65b830&subId=715325>, archived at <https://perma.cc/RKA8-6BUX>; International Centre for Missing and Exploited Children Australia, Submission No 7 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (25 August 2021) <https://www.aph.gov.au/DocumentStore.ashx?id=cf63a778-e686-44a5-9355-46ed4ff05b02&subId=712223>, archived at <https://perma.cc/QZT4-YJ7L>.

[176] Transparency International Australia (n 175) 9.

[177] Ibid 16.

[178] Evidence 9 November 2021 (n 156) 32 (Serena Lillywhite, Chief Executive Officer, Transparency International Australia). See also at 28–9 (Serena Lillywhite, Chief Executive Officer, Transparency International Australia).

Australian law firms advertising 'back door' ASX listing services.[179] Transparency International further recommended that Australia 'develops a mentality beyond just compliance with the FATF recommendations (which themselves need to be updated), and instead focuses on keeping out criminally derived monies'.[180] In fact, it queried the effectiveness of FATF in addressing the problem of corruption.[181]

ICMEC Australia and the Uniting Church also each supported tranche two without making extensive reference to the FATF. Instead, they focused on providing domestic examples of money laundering and suggested legislative reforms to address specific issues such as child exploitation.[182] The Uniting Church, for example, referred to: the AFP restraining $17.3 million in assets of Chinese nationals who were suspected of money laundering through the purchasing of Australian real estate, cases of Papua New Guinean politicians and politically connected individuals who had used allegedly laundered funds related to corruption and misappropriation to purchase real estate in Australia (these politicians and individuals were later convicted and sentenced to prison for their crimes in Papua New Guinea) and other overseas officials alleged to have used Australian real estate to launder money.[183]

Among civil society witnesses, Civil Liberties Australia opposed not only tranche two but also the *AML/CTF Act* and the FATF system altogether on the basis that the Act was 'the wrong legislation applied as the wrong solution to problems or opportunities that could be much better handled in other ways'.[184] In the submission, the FATF was described as

> a club of unelected bureaucrats, mainly from tax offices, who gather to enjoy themselves in Paris from time to time and dream of ways to subvert the liberties

179 Transparency International Australia (n 175) 5, 15.

180 Ibid 15.

181 Ibid 15–16.

182 Synod of Victoria and Tasmania, Uniting Church in Australia (n 175) 12–17; International Centre for Missing and Exploited Children Australia (n 175) 3–5.

183 Synod of Victoria and Tasmania, Uniting Church in Australia (n 175) 12–17.

184 Civil Liberties Australia, Submission No 2 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (16 August 2021) 3 <https://www.aph.gov.au/DocumentStore.ashx?id=e40f7105-8c22-453a-bf26-e2f7e99becc6&subId=712374>, archived at <https://perma.cc/Y2RY-MTJT>.

> of their peoples and oppress businesses with obnoxious requirements to report on their customer's private affairs.[185]

Several academics supported tranche two with differing degrees of reference (positive and negative) to the FATF. Goldbarsht presented Australia as being generally amenable to compliance with FATF standards and noted the reputational and economic risks of noncompliance.[186] Goldbarsht did not, however, suggest that the FATF would apply countermeasures to Australia for failing to comply with recommendations 22 and 23 and concluded that 'the main reason for Australia to expand its regime to apply to legal professionals is to provide relevant information that can assist with mitigating the risks of money laundering and terrorist financing'.[187] The Australian National University Law Reform and Social Justice Research Hub advocated for tranche two as the 'next logical step' in addressing AML/CTF concerns without making specific reference to the FATF.[188] Louis de Koker, by contrast, criticised the FATF's lack of evidence-based analysis of effectiveness and lack of transparency in its processes but supported tranche two, suggesting further that Australia could learn from the international experience of other G20 jurisdictions that were already implementing FATF standards in relation to DNFBPs.[189]

Some academics expressed stronger criticism of the FATF and scepticism about the added value of tranche two that was specifically noted in the Committee's report.[190] For example, Jason Sharman criticised Australia's AML

[185] Ibid.

[186] Doron Goldbarsht, Submission No 1 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (2021) 5–6 <https://www.aph.gov.au/DocumentStore.ashx?id=6e55cf6c-15e8-47cb-a68c-03939ed57ee3&subId=712174>, archived at <https://perma.cc/94KJ-6XWM>.

[187] Ibid 6. It is to be noted that Goldbarsht concluded his submission by stating: 'Given Australia's record of compliance with the FATF regime, it is clearly a question of when — not if — Australian [sic] will extend its AML/CTF obligations to legal professionals'.

[188] Australian National University Law Reform and Social Justice Research Hub (n 159) 3.

[189] Louis de Koker, Submission No 23 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (27 August 2021) 1–3 <https://www.aph.gov.au/DocumentStore.ashx?id=7e47ca57-70f0-415b-a70d-694281785e32&subId=712264>, archived at <https://perma.cc/37EK-UMPV>.

[190] *Adequacy and Efficacy* (n 26) 19–20 [2.38]–[2.41], quoting Evidence 9 November 2021 (n 156) 13 (John Chevis), de Koker (n 189) 1–2, Jason Sharman, Submission No 36 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Adequacy*

system for having 'strong laws, weak enforcement, and hence low effectiveness'.[191] He tied this to a 'focus on laws on the books, and formal assessments of these in FATF [MERs]', suggesting that Australia move away from 'achieving good grades with the FATF, and collecting financial information for its own sake [towards] convicting money launderers, reducing money laundering and predicate crimes'.[192] Additionally, Michael Levi expressed similar views, noting that the FATF may encourage an 'appearance of compliance and formal structures' as 'the central (though not usually the only) objective' and might distract from effective evidence-based local policy reform.[193] Finally, Lynda Crowley-Cyr and Carole Caple provided a submission that used the FATF MERs to articulate a critique of AUSTRAC's failure to provide sufficient guidance to DNFBPs about the risk of money laundering and contended that this failure should be addressed before any extension of reporting requirements occurs.[194]

5 *Accountants, Lawyers and Real Estate Agents*

The final group of consulted stakeholders were from the industries — accountancy, law and real estate — that would be directly affected by tranche two. The Committee dedicated three out of 14 blocks of hearings to sectoral representatives and referred extensively to their evidence in the final report.[195]

Accountancy bodies' representatives were broadly supportive of tranche two (or at least accepted its inevitability). The Institute of Public Accountants'

and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime (2021) 1 <https://www.aph.gov.au/DocumentStore.ashx?id=96ecc767-0177-4e52-bfa1-a3e0fb2a5d21&subId=716625>, archived at <https://perma.cc/8FPL-45LZ> ('Submission No 36').

191 Sharman, 'Submission No 36' (n 190) 1.

192 Ibid 1–2.

193 Michael Levi, Submission No 44 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (2021) 7, 16 <https://www.aph.gov.au/DocumentStore.ashx?id=4ce5e28b-3d5f-4fdd-9b8f-70c007478f96&subId=720559>, archived at <https://perma.cc/XTC9-7R76>.

194 Lynda Crowley-Cyr and Carole Caple, Submission No 31 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (2021) 3–4, 8–9 <https://www.aph.gov.au/DocumentStore.ashx?id=bb06b0a0-4e02-4766-a2b1-e0a7d61b3f17&subId=716611>, archived at <https://perma.cc/CF9H-EMUC>.

195 *Public Hearing 9 November 2021* (n 151); *Public Hearing 10 November 2021* (n 151). See also *Adequacy and Efficacy* (n 26) 20–1 [2.42].

representative stated that accountancy bodies 'support the global initiatives to combat [money laundering] and recognise the importance of Australia meeting its obligations as a member of [the FATF]'.[196] She noted 'an expectation that tranche 2 will be introduced' and 'that it is just a case of "when" rather than "if"'.[197] The accountancy body representatives acknowledged the benefits of tranche two, including increased visibility of suspicious transactions, greater consistency in regulatory obligations and improved efficiency of customer due diligence requirements.[198] The central focus of the accountancy bodies' submissions was ensuring that tranche two laws are designed in ways that avoid unnecessary regulatory burdens on small businesses: they envisaged substantial autonomy for Parliament in fashioning the Australian rules and advocated for a cost-benefit analysis, consultation and collaboration between government and industry in that process to avoid unnecessary duplication and excessive compliance burdens.[199]

The Real Estate Institute of Australia was ambivalent with respect to tranche two. While expressing support in principle for 'working with all stakeholders

[196] Evidence 9 November 2021 (n 156) 42 (Vicki Stylianou, Group Executive, Advocacy and Policy, Institute of Public Accountants).

[197] Ibid 46–7 (Vicki Stylianou, Group Executive, Advocacy and Policy, Institute of Public Accountants).

[198] Ibid 42 (Vicki Stylianou, Group Executive, Advocacy and Policy, Institute of Public Accountants), 42 (Keddie Waller, Head of Public Practice and SME, CPA Australia), 43 (Karen McWilliams, Business Reform Leader, Chartered Accountants Australia and New Zealand), 50 (Keddie Waller, Head of Public Practice and SME, CPA Australia).

[199] See Evidence 9 November 2021 (n 156) 42, 44 (Keddie Waller, Head of Public Practice and SME, CPA Australia), 43–4 (Karen McWilliams, Business Reform Leader, Chartered Accountants Australia and New Zealand), 44–5 (Vicki Stylianou, Group Executive, Advocacy and Policy, Institute of Public Accountants); Chartered Accountants Australia and New Zealand, Submission No 5 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (27 August 2021) 2–3 <https://www.aph.gov.au/DocumentStore.ashx?id=a5611c52-b446-45e6-8514-fb954958c47d&subId=712371>, archived at <https://perma.cc/G59E-6SDQ>; CPA Australia, Submission No 37 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (27 August 2021) 1 <https://www.aph.gov.au/DocumentStore.ashx?id=db38f961-d644-4a62-9c6c-f1a9636f0dfb&subId=716830>, archived at <https://perma.cc/ENN4-TL2S>; Institute of Public Accountants, Submission No 9 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (27 August 2021) 4–5 <https://www.aph.gov.au/DocumentStore.ashx?id=dada6da3-067a-4951-8379-3c8f9429aaf7&subId=712231>, archived at <https://perma.cc/FB6J-GGDR>.

involved, principally the relevant Commonwealth agencies' to address money laundering, one of its representatives contended that tranche two would 'not [be] fit for purpose and represent[ed] an undue burden for small real estate agency businesses'.[200] Its representatives made no reference to the FATF recommendations or MERs.[201] They also emphasised the potential compliance burden and supported a cost-benefit analysis, including an examination of whether reporting obligations on real estate agents would actually catch money launderers and an audit of how existing regulation could be leveraged to 'provide effective alternatives to burdensome compliance activities'.[202]

The Law Council of Australia ('LCA') expressed the strongest opposition to tranche two. It presented various arguments, including the incompatibility of reporting obligations with legal professional privilege, the existing regulation of the profession, concerns about regulatory burden and disagreement with the view that lawyers are at high risk of being exploited for money laundering.[203] The LCA was familiar with the FATF framework, noting that 'the Australian legal profession is distinguishable from many other FATF jurisdictions and

[200] Evidence to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, Canberra, 10 November 2021, 2 (Adrian Kelly, President, Real Estate Institute of Australia) <https://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/25287/toc_pdf/Legal%20and%20Constitutional%20Affairs%20References%20Committee_2021_11_10_Official.pdf>, archived at <https://perma.cc/2WEH-TSUV> ('Evidence 10 November 2021'); Real Estate Institute of Australia, Submission No 18 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (27 August 2021) <https://www.aph.gov.au/DocumentStore.ashx?id=caff8231-afaf-429b-bfde-696bec34b5ff&subId=713700>, archived at <https://perma.cc/WKH3-477G>.

[201] See generally Evidence 10 November 2021 (n 200).

[202] Ibid 1 (Adrian Kelly, President, Real Estate Institute of Australia).

[203] Law Council of Australia, Submission No 30 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (15 September 2021) 6–36 [6]–[135] <https://www.aph.gov.au/DocumentStore.ashx?id=abfd9eb7-3d7a-42c4-a5e0-4874c70c096f&subId=716612>, archived at <https://perma.cc/8DX4-UNBA>. See also Evidence 10 November 2021 (n 200) 33–41 (Jacoba Brasch, President, Law Council of Australia), 34–9 (Steven Stevens, Chair, Professional Ethics Committee, Law Council of Australia). Cf Victorian Legal Services Board and Commissioner, Submission No 45 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (23 December 2021) 1–2 <https://www.aph.gov.au/DocumentStore.ashx?id=2f573bd9-24d1-4043-b912-c6714c082c30&subId=720561>, archived at <https://perma.cc/P3DK-Q429>.

other DNFBPs by [virtue of its] robust safeguards built into the admission to practice'.[204] It made reference to the experience of other FATF jurisdictions, pointing out that 'regulation of legal practitioners has not [been] met with unanimous support in FATF member countries including the United States and Canada'.[205] The President of the LCA, Jacoba Brasch, referred to the Supreme Court of Canada's striking down of AML/CTF regulation of lawyers to refute 'the idea that we may find ourselves on the receiving end of greylisting'.[206] Further, the LCA cited an American law journal article that contended that 'the FATF's evidence that lawyers contribute significantly to global money laundering is inadequate to justify imposing costs of billions of dollars on US law firms'.[207]

The most significant concern raised by the LCA was the effect of customer due diligence and suspicious transaction reporting on legal professional privilege.[208] Its supplementary submission on this point attached a statement by the International Bar Association Presidential Task Force on Lawyer–Client Confidentiality stating that

> the scope of national legislation based on the FATF recommendations, and application of this exemption to lawyer–client confidentiality, is inconsistent. Although FATF explicitly recognises that the requirement for lawyers to report their clients' suspicious transactions does not apply where the information is subject to 'privilege', this type of legislation has led to further troubling exceptions to the broader protection given by lawyer–client confidentiality.[209]

[204] Law Council of Australia (n 203) 13 [30].

[205] Ibid 30 [107].

[206] Evidence 10 November 2021 (n 200) 33, 66 (Jacoba Brasch, President, Law Council of Australia). See also *A-G (Canada) v Federation of Law Societies of Canada* [2015] 1 SCR 401, 408–9 [1], 448 [117] (Cromwell J for LeBel, Abella, Cromwell, Karakatsanis and Wagner JJ, McLachlin CJ and Moldaver J agreeing at 449–50 [118]).

[207] Law Council of Australia (n 203) 36 [133], citing Scott Rothstein, 'They're Watching You: An Examination of whether the United States Should Impose Anti-Money Laundering Regulations onto US Lawyers' (2020) 43(5) *Fordham International Law Journal* 1389, 1426.

[208] Law Council of Australia (n 203) 23–7 [77]–[97]. See also Evidence 10 November 2021 (n 200) 33 (Jacoba Brasch, President, Law Council of Australia).

[209] Letter from Tass Liveris to Kim Carr, 28 January 2022, 1 <https://www.aph.gov.au/DocumentStore.ashx?id=522cb2c8-24c7-48eb-a896-a31360ac4643>, archived at <https://perma.cc/7VX2-R2N6>; International Bar Association, *IBA Statement in Defence of the Principle of Lawyer–Client Confidentiality* (Statement, January 2022) 19 <https://www.ibanet.org/document?id=/IBA-Statement-in-Defence-of-the-Principle-of-Lawyer-Client-Confidentiality>, archived at <https://perma.cc/XJ28-B5ER>.

In advancing the LCA's strong opposition to tranche two legislation, Brasch also envisaged that Australia had substantial autonomy to design its laws and indicated that the LCA's membership would participate in the design of any such reforms: 'we're happy to work with government and to amplify our position'.[210]

Summarising the input from the private sector and civil society, we can observe that compliance professionals, as well as financial institutions already subject to regulation and requiring ongoing access to international capital markets, provided the strongest support for implementing tranche two.[211] While these groups referenced the importance of disrupting money laundering, crime and terrorism, their position was arguably consistent with their economic interests. This position was counterbalanced by the input of tranche two professional bodies in accountancy, law and real estate; these bodies expressed concerns about regulatory burden and the potential cost of AML/CTF law reform for small businesses. Importantly, however, these bodies emphasised the scope for collaborative design to ensure law reform is proportionate. In fact, from among the three tranche two professions, only the LCA expressed strong opposition to reporting obligations for lawyers by reference to the importance of lawyer–client privilege, and even on that point the LCA referred to international experience that Australia could draw on. While civil society groups and academics expressed diverse views, their input brought to attention the more dispersed and often invisible interests of victims, for example of corruption or child exploitation, that are harmed by AML/CTF activities. They also highlighted, to a much greater extent than other witnesses, the fact that meeting FATF standards should not be an end in itself and that those standards may not always reflect current best practice mechanisms.

6 *The Executive*

The Committee also heard from representatives of the executive including the Department of Home Affairs ('DHA'), regulatory agencies such as AUSTRAC and law enforcement bodies including the AFP and the Australian Criminal Intelligence Commission ('ACIC'). Significantly, these representatives expressed only moderate support for tranche two, potentially countering the concerns expressed in the literature about the FATF empowering executive

[210] Evidence 10 November 2021 (n 200) 37 (Jacoba Brasch, President, Law Council of Australia).

[211] See above Parts III(B)(2)–(3).

actors.[212] The FATF's recommendations and MERs were not regarded as a central reason to implement such reforms but rather as one factor among many to consider in addressing money laundering and terrorism financing.

Representatives of the DHA and AUSTRAC presented an account of the FATF and Australia's role in shaping its framework that aligns with our findings in Part II. The DHA emphasised that, as the department that led Australia's engagement with the FATF at the time, it played 'an active role in that forum to influence any changes in standards, interpretation and criteria for remedial action' which meant 'that Australia [could] shape the global standards in a way that [met its] domestic settings, context and interests'.[213] Further, AUSTRAC explained that the 'priorities and emerging challenges' identified by the FATF are 'derived from the experiences of its member countries' and that engagement with the FATF 'allows AUSTRAC and other partner agencies to share experiences, learn from the experiences of others, and develop relationships and contacts for future operational and policy cooperation'.[214] The FATF's influence was highlighted as having shaped AUSTRAC's analytical task of risk assessment, a diagnostic exercise that seeks to better understand the actual risks of money laundering both generally and with respect to particular industries and products.[215] Further, the DHA referred to the 2015 MER, alongside the 2016 Statutory Review, as a source of 'recommendations to further enhance Australia's regime'[216] and noted that the AML/CTF regime is 'continually reviewed to proactively manage emerging risks, improve consistency with

[212] See above nn 13, 16–19.

[213] Department of Home Affairs, Submission No 32 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (10 September 2021) 5 <https://www.aph.gov.au/DocumentStore.ashx?id=e8eb8461-3fff-4cdb-b7ec-8565a2242466&subId=716616>, archived at <https://perma.cc/F6WC-52JK>.

[214] AUSTRAC, Submission No 33 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (August 2021) 27 [157]–[158] <https://www.aph.gov.au/DocumentStore.ashx?id=c0dde5c1-5d9e-436d-b5a8-03cc2a3e511b&subId=716617>, archived at <https://perma.cc/52SJ-QMP8> ('Submission No 33').

[215] Ibid 12 [56]–[57].

[216] Department of Home Affairs (n 213) 9, citing FATF and APG, *Australia 2015* (n 65) 32 [1.15], 86 [5.18], Attorney-General's Department (Cth), *Statutory Review* (n 123) 14.

international standards and best practice as set by [the FATF], and enhance the operation[al] effectiveness of the regime'.[217]

The DHA and AUSTRAC also pushed back against the claim that Australia is significantly noncompliant with the FATF framework, expressing only moderate support for the need for tranche two. One of the DHA's representatives claimed that 'Australia compares favourably with many jurisdictions on the assessment of the effectiveness of our regime by FATF' although the FATF has 'obviously called out the fact that tranche 2 hasn't been implemented'.[218] AUSTRAC similarly argued against the view of Australia as significantly noncompliant with the FATF: one of its representatives noted that '[t]he Australian regime in some areas is actually a lot stronger than the FATF requirements' with AUSTRAC having access to a 'richer dataset' than many other financial intelligence agencies.[219]

Ultimately, the DHA cautiously supported tranche two. In relation to the legal profession, one of the DHA's representatives noted that legal services are 'vulnerable to abuse for money laundering' and based this conclusion on the evidence provided for the profession's inclusion in the FATF's recommendations as well as 'international typologies and collective international experience'.[220] Further, the DHA acknowledged the problems associated with DNFBP sectors not being under an obligation to 'understand their money laundering or terrorist financing risks [or] implement specific money laundering or terrorist financing risk mitigation policies'.[221] AUSTRAC, by contrast, while acknowledging that tranche two rules might generate more information, also noted the problem and cost of excessive reporting obligations: if the quality and relevance of additional reports is not ensured,

[217] Department of Home Affairs and AUSTRAC, Answers to Questions on Notice to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (received 3 December 2021) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/AUSTRAC/Additional_Documents?docType=Answer%20to%20Question%20on%20Notice>, archived at <https://perma.cc/P2SM-Z83A>.

[218] Evidence 10 November 2021 (n 200) 56–7 (Ciara Spencer, First Assistant Secretary, Aviation and Maritime Security and Executive Director, Transport Security, Department of Home Affairs).

[219] Ibid 70 (Peter Soros, Deputy CEO, Regulation, Education and Policy, Australian Transaction Reports and Analysis Centre).

[220] See ibid 64 (Daniel Mossop, Assistant Secretary, Transnational Crime Policy and TSOC, Department of Home Affairs).

[221] Department of Home Affairs (n 213) 12.

AUSTRAC could find itself 'drowning' in useless reports that would require additional resourcing to process.[222] As such, AUSTRAC denied that tranche two would transform the AML/CTF system or lead to more investigations of tranche two professionals.[223]

Finally, both the DHA and AUSTRAC emphasised the importance of collaborating and consulting with industry, underscoring Australia's autonomy in designing any tranche two laws. As the DHA noted,

> [a]ny expansion of the regime would need to be co-designed with industry and ensure that an appropriate balance could be reached between mitigating the risk of money laundering or terrorist financing and not unnecessarily increasing the regulatory burden on industry.[224]

Both the DHA and AUSTRAC further agreed that a collaborative approach with industry would be necessary for effective tranche two implementation: AUSTRAC noted that it adopts a 'flexible and tailored approach'[225] and the DHA emphasised the importance of regulatory co-design and 'collaboration with industry' in designing regulations suited to the local context.[226]

The representatives of law enforcement agencies indicated much stronger support for tranche two. The AFP supported tranche two, alongside other reforms to strengthen AML/CTF laws, and referred to the FATF to support its

[222] Evidence 10 November 2021 (n 200) 63 (Ciara Spencer, First Assistant Secretary, Aviation and Maritime Security and Executive Director, Transport Security, Department of Home Affairs). See also at 61 (Peter Soros, Deputy CEO, Regulation, Education and Policy, Australian Transaction Reports and Analysis Centre); AUSTRAC, 'Submission No 33' (n 214) 26 [149]–[150].

[223] Evidence 10 November 2021 (n 200) 59 (Peter Soros, Deputy CEO, Regulation, Education and Policy, Australian Transaction Reports and Analysis Centre), 62–3 (Bradley Brown, National Manager, Education, Capability and Communications, Australian Transaction Reports and Analysis Centre).

[224] Department of Home Affairs (n 213) 12.

[225] AUSTRAC, 'Submission No 33' (n 214) 26 [148].

[226] Evidence 10 November 2021 (n 200) 65 (Ciara Spencer, First Assistant Secretary, Aviation and Maritime Security and Executive Director, Transport Security, Department of Home Affairs). See also AUSTRAC, 'Submission No 33' (n 214) 21 [116]–[117]; Department of Home Affairs (n 213) 7, 11; Evidence 10 November 2021 (n 200) 65–6 (Peter Soros, Deputy CEO, Regulation, Education and Policy, Australian Transaction Reports and Analysis Centre), 66 (Daniel Mossop, Assistant Secretary, Transnational Crime Policy and TSOC, Department of Home Affairs).

position.[227] It supported expanding reporting requirements to DNFBPs to 'harden' these professions and 'stop them from being exploited for money laundering purposes'.[228] Its emphasis was, however, on the substantive domestic risks of organised crime and money laundering, including those arising from information held by tranche two professions and businesses, and the AFP's experience concerning the vulnerability of these sectors to money laundering; it also highlighted a specific investigation of the use of a solicitor's trust to conceal cash deposits.[229] Tranche two, as well as the FATF, were referred to as part of a larger 'jigsaw puzzle that [had to be solved] in targeting organised crime'[230] and it was emphasised that such reforms would not be 'the panacea' for the AML/CTF issues confronted by law enforcement in Australia.[231] Beyond discussion of tranche two, the AFP also referred to the FATF as providing 'internationally accepted benchmarks for the assessment of countries' AML/CTF regimes'.[232] The AFP noted that its recent enforcement operations with respect to money laundering and its development of new tools to maximise effective criminal asset confiscation have 'demonstrated a continued commitment to the implementation of the FATF recommendations'.[233]

ACIC also supported tranche two on the basis of its own domestic intelligence on the risks of money laundering in tranche two industries and without any reference to the FATF.[234] One of its representatives noted that the ACIC was conducting 'a number of intelligence operations that [involved] professional facilitators involved in the laundering of the proceeds of crim[e]'

[227] Australian Federal Police, Submission No 34 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (August 2021) 10 [39], 11 [43], 11–12 [45], 13 [54]–[57] <https://www.aph.gov.au/DocumentStore.ashx?id=37ae9ab2-90da-43f4-813f-60af7321968e&subId=716618>, archived at <https://perma.cc/4RFV-8XEM>.

[228] Ibid 13 [54].

[229] Ibid 13 [55]–[57].

[230] Evidence 10 November 2021 (n 200) 52 (Ian McCartney, Deputy Commissioner, Investigations, Australian Federal Police).

[231] Ibid 49 (Ian McCartney, Deputy Commissioner, Investigations, Australian Federal Police).

[232] Australian Federal Police (n 227) 10 [39].

[233] Ibid 10 [40]. See also at 10 [39], 10–11 [41]–[44].

[234] See generally Australian Criminal Intelligence Commission, Submission No 38 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (2021) <https://www.aph.gov.au/DocumentStore.ashx?id=fca4afe3-2281-4e1e-a928-e59dc4286535&subId=716837>, archived at <https://perma.cc/PHV3-T4PW>.

and that these facilitators had been 'revealed in [its] investigations as a component in the criminal business model'.[235] That representative also made reference to a 'protected submission' to the Committee that included detailed information concerning the involvement of tranche two professions in money laundering that could not be revealed publicly.[236] In response to the questions that it took on notice, the ACIC submitted that approximately one-quarter of the 185 individuals that it identified as, at the time, facilitating the actions of '16 current and/or former' priority target organisations engaging in transnational crime were lawyers, financial advisors, accountants or real estate agents.[237] The ACIC representative also dismissed any apparent inconsistency between the ACIC's statements and those of the FATF as to whether Australia is an attractive location for laundered money from overseas or merely a source of money to be laundered — he noted: 'All I can do is point you to [the ACIC's] knowledge of the environment. The FATF's statements are the FATF's statements'.[238] In the inquiry's hearings, that same ACIC representative was hesitant to characterise Australia's absence of tranche two reporting requirements as 'something that is stopping us having an understanding of the insights that are occurring in money laundering and global [organised crime] ventures'.[239] Nonetheless, he expressed the view that the ACIC would be 'very happy to receive any additional intelligence, information or powers that would

[235] Evidence 10 November 2021 (n 200) 42–3 (Matt Rippon, Deputy Chief Executive Officer, Intelligence Operations, Australian Criminal Intelligence Commission).

[236] Ibid 45.

[237] Australian Criminal Intelligence Commission, Answers to Questions on Notice to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (received 10 December 2021) 2 <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/AUSTRAC/Additional_Documents?docType=Answer%20to%20Question%20on%20Notice>, archived at <https://perma.cc/8K66-KZY3>.

[238] Evidence 10 November 2021 (n 200) 44 (Matt Rippon, Deputy Chief Executive Officer, Intelligence Operations, Australian Criminal Intelligence Commission). See also at 43 (Matt Rippon, Deputy Chief Executive Officer, Intelligence Operations, Australian Criminal Intelligence Commission), 43–4 (Nicholas McKim), discussing Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Commonwealth, Canberra, 25 October 2021, 27 (Michael Phelan, Chief Executive Officer, Australian Institute of Criminology).

[239] Evidence 10 November 2021 (n 200) 46 (Matt Rippon, Deputy Chief Executive Officer, Intelligence Operations, Australian Criminal Intelligence Commission).

help [the ACIC] to better shape the picture of serious and organised crime in this country, particularly around professional facilitators'.[240]

Thus, to the extent that they expressed support for tranche two, representatives from the executive principally referenced domestic policy and intelligence concerns, giving the FATF's recommendations and reports a less prominent role in their submissions. The FATF's recommendations and reports provided important context for the reforms being discussed but the evidence that these representatives provided to the Committee was principally based on their experiences illustrating the need for law reform. Importantly, there was divergence among the views expressed to the inquiry's hearings, with some witnesses expressing reservations about tranche two with reference to both its importance and practicality. Representatives of the executive also disputed the notion that Australia is noncompliant with the FATF recommendations, emphasising the mutual learning from experience that is facilitated by the FATF's network without expressing much (if any) concern about the possibility of grey-listing. All witnesses from the executive envisaged substantial tailoring of tranche two to domestic and industry-specific conditions including through collaborative co-design with stakeholders.

7 *The Legislators*

The foregoing analysis of the input to the Committee suggests that the executive has not been a key instrument (or even advocate) for aligning Australian AML/CTF policy with FATF recommendations. Further, all witnesses consulted by the Committee envisaged that Australia had considerable autonomy to design tranche two reforms in line with local conditions and policy preferences.[241] Such findings are buttressed by an analysis of the questions posed, as well as by the views and conclusions expressed, by the Senators on the Committee as elected members of the Parliament. While it is important to note that parliamentary committees do not necessarily represent the full range of views in ordinary parliamentary debate, the Committee did include representatives of both the then Coalition government, the then Labor opposition and also the Greens. On 30 March 2022, the

[240] Ibid.

[241] See above nn 223–5.

Committee reported back to the Senate with respect to its terms of reference with concrete recommendations.[242]

A key theme in the Committee's questioning, which is consistent with our earlier findings, was that it was not Senators in government who used the FATF to support or justify reforms that were substantively aligned with the FATF's recommendations. Instead, it was opposition Labor Senators that used the FATF's outputs to criticise the gap between the government's stated domestic and international commitment to implementing tranche two and its legislative inaction.[243] As Labor Senator Deborah O'Neill said,

> [t]he government has made a number of assertions in public fora and continues to state that it supports tranche 2 reforms. It did some work in 2015; it came up with a plan in 2016 with 84 recommendations, of which 49 were not implemented; and in Rome a couple of weeks ago the Prime Minister signed off on 'I agree with tranche 2 and everything with FATF.' Yet here we are, one of three remaining nations — along with Haiti and Madagascar — who are supposedly committed to tranche 2 but have not implemented tranche 2 …[244]

Senator O'Neill noted that the government's failure to act on the FATF recommendations and MERs *and* the 2016 Statutory Review had meant that Australia was 'recalcitrant in terms of international citizenship'.[245] Senator Kim Carr likened the tranche two process to '*Waiting for Godot*'[246] and explicitly sought to link failures of regulatory action, in questions to the DHA and AUSTRAC, to 'a lack of backup from government'.[247] Senator Paul Scarr, from the then governing Liberal Party, was less explicit in his criticism of the government's lack of action and did not reference the FATF recommendations

242 'Anti-Money Laundering and Counter-Terrorism Financing', *Attorney-General's Department* (Web Page) <https://www.ag.gov.au/crime/anti-money-laundering-and-counter-terrorism-financing>, archived at <https://perma.cc/TK72-25TG>. See also *Adequacy and Efficacy* (n 26) 70–2 [4.31]–[4.36].

243 See *Adequacy and Efficacy* (n 26) 69 [4.22], 70 [4.27], 71 [4.34].

244 Evidence 10 November 2021 (n 200) 49 (Deborah O'Neill). See also at 2–3 (Deborah O'Neill).

245 Evidence 9 November 2021 (n 156) 23 (Deborah O'Neill).

246 Evidence 10 November 2021 (n 200) 59 (Kim Carr), discussing Samuel Beckett, *Waiting for Godot* (Grove Press, 1954).

247 Evidence 10 November 2021 (n 200) 59 (Kim Carr), quoting 'How Forgiving Is Australia when It Comes to the Gambling Industry?', *Life Matters* (ABC Radio National, 28 October 2021) 0:06:24–0:06:33 <https://www.abc.net.au/listen/programs/lifematters/what-is-the-future-of-the-gambling-industry-in-australia/13605748>, archived at <https://perma.cc/DL23-S4WE>.

and MERs in his questioning.[248] However, the unanimous view of the inquiry's bipartisan committee, as expressed in its report, was that 'Australia [was] a laggard on the world stage', and the Committee noted further that

> [a]s a founding member of FATF, Australia has committed to the implementation of its recommendations and has reaffirmed its commitment as recently as the G20 summit in Rome in October 2021. The government's failure to enact tranche 2 reforms call into question these commitments. It is difficult to ignore the gap between the Commonwealth government's words and its actions.[249]

The Committee's report referred to the risk of grey-listing as one reason to implement AML/CTF law reforms.[250] Senator O'Neill, for example, posed questions about the risk of grey-listing to several witnesses[251] and suggested that a failure to implement tranche two 'not only puts us at risk in terms of … being a honey pot for organised crime and financial crime more broadly, but it puts us at risk of going onto the grey list'.[252] The report made note of the risk of Australia being grey-listed without expressing a view as to the likelihood of that outcome: it observed that '[r]egardless of the likelihood' of grey-listing, there were already 'real-world consequences' of Australia's failure to implement tranche two with Australian banks being required to take additional steps to 'prove Australia's suitability to receive credit'.[253]

Several Senators on the Committee emphasised domestic concerns arising from gaps in Australia's AML/CTF regime that would prevent regulators and enforcement agencies from detecting, disrupting and deterring money laundering and terrorism financing,[254] would facilitate continuing criminal and terrorist activity[255] and would place Australians with income from legitimate sources at a disadvantage in both purchasing real estate and

[248] See generally Evidence 9 November 2021 (n 156) 4–6, 11, 29–31, 40–1, 43–6 (Paul Scarr); Evidence 10 November 2021 (n 200) 5–7, 9, 12, 16–17, 28–30, 33–5, 37–8, 65–7 (Paul Scarr).

[249] *Adequacy and Efficacy* (n 26) 69 [4.22].

[250] Ibid 69 [4.23].

[251] Evidence 9 November 2021 (n 156) 7, 14, 18, 37 (Deborah O'Neill); Evidence 10 November 2021 (n 200) 15 (Deborah O'Neill).

[252] Evidence 9 November 2021 (n 156) 7 (Deborah O'Neill).

[253] *Adequacy and Efficacy* (n 26) 69 [4.23].

[254] See, eg, Evidence 9 November 2021 (n 156) 15 (Deborah O'Neill).

[255] See, eg, ibid 17 (Deborah O'Neill).

shouldering the burden of taxation.[256] The observation that AML/CTF is not just a remote issue of interest to specialist enforcement or compliance professionals but has real distributional consequences and effects for Australians was also reflected in the Committee's report.[257] While the Senators referred to the FATF's recommendations and MERs as evidence about the substantive risks and benefits of tranche two, they were not the sole evidence — they were cited alongside the work of AUSTRAC and the ACIC and other evidence presented.[258]

The Senators on the Committee engaged substantively with diverse viewpoints expressed by stakeholders, especially those from tranche two industries, including thorny questions posed about regulatory burden and the potential corrosion of legal professional privilege. Senator Scarr suggested caution 'about extending [the AML/CTF] regulatory regime both to the legal profession and also more broadly to accounting and real estate businesses'[259] so as to 'get the proportionality right and not impose … an unreasonable burden upon what, in many cases, are small businesses'.[260] In Senator Scarr's view, striking this balance would require a careful cost-benefit analysis, consultation with industry and a 'bespoke' solution to extending AML/CTF requirements to tranche two industries.[261] The Senators also emphasised the importance of collaboration and consultation between industry and regulators and cost-benefit analyses (as recommended in the 2016 Statutory Review).[262] The substantive engagement of the Senators was also evident from their extensive questions about contradictory evidence concerning regulatory burden provided by the LCA and AML compliance professionals.[263]

In sum, the foregoing analysis suggests that the Senators engaged in detailed consideration and contestation of the domestic desirability and potential consequences of tranche two regulatory expansion. The Committee's deliberations involved wide consultation in a robust parliamentary process that allowed stakeholders from industry and civil society, different parts of the

[256] See, eg, ibid 33 (Nicholas McKim); Evidence 10 November 2021 (n 200) 7 (Nicholas McKim), 22 (Deborah O'Neill).

[257] *Adequacy and Efficacy* (n 26) 69 [4.24].

[258] Ibid 16 [2.26]–[2.27].

[259] Evidence 9 November 2021 (n 156) 5 (Paul Scarr).

[260] Evidence 10 November 2021 (n 200) 5 (Paul Scarr); ibid.

[261] Evidence 10 November 2021 (n 200) 7 (Paul Scarr).

[262] Ibid 19 (Deborah O'Neill), 66 (Paul Scarr).

[263] Evidence 9 November 2021 (n 156) 9 (Nicholas McKim); ibid 38–9 (Nicholas McKim).

executive and legislators themselves the opportunity to express, interrogate and contest substantive questions on the desirability and potential nature of tranche two. The FATF's recommendations and peer reviews and the risk of grey-listing played important roles in prompting the Senate to refer the subject of AML/CTF to the Committee and were deployed by Senators and witnesses to criticise Australia's lack of action on tranche two and to evidence the risk of money laundering in tranche two professions. This did not, however, preclude the consideration of other perspectives, different reform options and arguments against tranche two.

Further, rather than seeking to push through the FATF's desired policies without significant legislative involvement, the representatives of the executive were reserved in their references to the FATF and expressed mixed views about the need for reform. Importantly, the deliberation described above revealed the *political* content of AML/CTF law reform, such as the trade-offs between different policy goals (eg prosecuting crime, minimising the effect of crime proceeds on housing prices and the tax burden, and avoiding excessive and duplicative compliance burdens) and professional values (eg legal professional privilege and confidentiality). Finally, all participants proceeded on the assumption that Australia had considerable leeway to design and tailor its laws to make choices about those trade-offs, as other jurisdictions had done before. As such, our analysis suggests that Australia's FATF peer reviews triggered and informed local debate about law reform without necessarily predetermining its final outcome. As the DHA submission to the 2021–22 Senate Inquiry explained, 'Australia can shape the global standards in a way that meet[s] our domestic settings, context and interests'.[264]

These conclusions are fortified by the Committee's report, which did not recommend the immediate implementation of tranche two or any rigid importation of the FATF's peer review recommendations.[265] Instead, the Committee's first two recommendations were that the Government should accelerate 'its consultation with stakeholders on the timely implementation of tranche 2 reforms in line with the [FATF's] recommendations' and should consider matters including regulatory burden, opportunities arising from technological innovation and the relevance of existing regulatory and professional obligations for tranche two industries.[266] The Committee's report

264 Department of Home Affairs (n 213) 5.

265 See generally *Adequacy and Efficacy* (n 26) 63–72 [4.1]–[4.36].

266 Ibid 70 [4.28]–[4.29].

also emphasised concerns about legal professional privilege, referred to lessons that could be learned from the diverse approaches of other jurisdictions including the UK, New Zealand and Canada and noted that 'the model proposed must be context-specific and compatible with Australian law'.[267] Thus, the Committee's third recommendation was to consider whether the *AML/CTF Act* should 'be amended to ensure the proper operation of legal professional privilege'.[268]

These recommendations were accepted by the 2022–25 Labor government which, in April 2023, announced that further public consultation would take place on the implementation of significant reforms to Australia's AML/CTF policy.[269] This included consultation on how to make the existing domestic AML/CTF regime more efficient as well as on the design and implementation of tranche two (as enacted through ordinary legislative processes).[270] As a result, legislation amending the *AML/CTF Act*, which was introduced and passed through Parliament in November 2024, streamlines existing obligations and extends Australia's regulatory framework to include designated services provided by real estate professionals, lawyers, accountants, trust and company service providers and dealers of precious metals and stones.[271] These new legislative changes address the requirements of the FATF recommendations 22 and 23 but have been tailored to fit into the existing Australian approach of regulating designated services as opposed to entire business sectors or professions.[272] They also include the addition of provisions for exempting low-risk services and clarifying the protection of legal professional privilege.[273] Details of the relevant obligations and possible exemptions for low-risk services provided by affected professions were to be worked out by AUSTRAC through changes to the AML/CTF rules based on further consultations on an exposure

[267] Ibid 70 [4.31]. See also at 70–1 [4.29]–[4.30].

[268] Ibid 71 [4.32].

[269] Dreyfus (n 128).

[270] Ibid.

[271] *AML/CTF Amendment Act 2024* (n 26) sch 3; Explanatory Memorandum, Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024 (Cth) 2–3 [7] ('AML/CTF Amendment Explanatory Memorandum').

[272] AML/CTF Amendment Explanatory Memorandum (n 271) 2–3 [7].

[273] *AML/CTF Amendment Act 2024* (n 26) sch 2 pt 1 s 3, schs 4, 10. See AML/CTF Amendment Explanatory Memorandum (n 271) 49 [168]–[171].

draft of these rules.[274] While the Coalition opposed the Bill due to concerns about the regulatory burden on small businesses, it was passed through both Houses of Parliament with the support of the Labor Party (in government) and the Greens.[275] As such, the FATF's principles-based standards and peer review recommendations have clearly shaped deliberation and legislative action. But it does not appear to be the case that the FATF has compelled or empowered the executive to push through specific rules by undermining ordinary legislative processes and precluding democratic participation or consideration of the efficacy of reforms for the local context.

IV Conclusion

Australian law and regulatory practice concerning money laundering and terrorism financing have been significantly influenced by the transnational standards regime established under the FATF. The importance of this informal network, populated by unelected regulatory officials and experts (including from Australia), in shaping domestic lawmaking has given rise to understandable concerns that the FATF regime might encourage the local adoption of potentially ill-fitting rules and may be at odds with fundamental democratic commitments to parliamentary lawmaking and the separation of executive and legislative power.

Through a close analysis of the FATF regime (and Australia's role within it) and domestic processes of lawmaking, this article has sought to show the persistence of Australia's ordinary parliamentary lawmaking and consultation processes in which public and private actors have a significant degree of agency, participation and opportunity for contestation notwithstanding the influence of the FATF regime. Rather than dictating Australian policy from afar, thereby supplanting the legislature and empowering the executive, the FATF has established an experimentalist global governance framework within which

[274] 'Public Consultation on New AML/CTF Rules' (Web Page, December 2024) <https://www.austrac.gov.au/business/consultation-industry/public-consultation-new-amlctf-rules>, archived at <https://perma.cc/52NQ-R3ZM>.

[275] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 October 2024, 123–4 (Jason Wood, Shadow Minister for Community Safety, Migrant Services and Multicultural Affairs), 124–5 (David Gillespie), 125–6 (Mark Dreyfus, Attorney-General and Cabinet Secretary); Commonwealth, *Parliamentary Debates*, Senate, 28 November 2024, 57 (Michaelia Cash, Shadow Attorney-General and Shadow Minister for Employment and Workplace Relations), 75–7 (David Shoebridge), 104 (Susan Lines, President of the Senate).

Australia has played an influential policymaking role from the outset.[276] In Part II, we highlighted the experimentalist aspects of the FATF regime, suggesting that the FATF's system of peer review has a central role to play as a tool in monitoring jurisdictions' reform progress, in fashioning local policies that advance the broad framework goals expressed in the FATF's recommendations and in engendering mutual learning between jurisdictions. Its efficacy is bolstered by the undesirable consequences of public listing that arise from a failure to engage in meaningful processes of local reform. Further, Australia was revealed to have played an active role within the FATF as an exemplar, rule-maker and promoter of the FATF regime.

In Part III, we explored the quality of domestic legislative, deliberative and consultative processes attending major Australian reforms to reveal a different relationship between Australia and the FATF compared to the relationship suggested by the coercive compliance critique. Instead of the FATF dictating policies that are subsequently incorporated domestically by the executive, our analysis suggests that the FATF's standards and system of peer review have prompted and informed domestic deliberation about the substantive domestic problems arising from money laundering. Thus, rather than empowering the executive, the FATF's peer reviews of Australia have in fact armed reformers in Parliament and the public, including industry stakeholders and civil society, with arguments and evidence that enrich local deliberations. Further, representatives of the executive have not characterised the FATF recommendations and MERs as compelling specific solutions, focusing instead on the domestic issues of addressing money laundering, terrorism financing and related predicate crimes.

Our analysis of the interaction between the FATF and domestic lawmaking processes in Australia provides support for the claim, made in the experimentalist literature, that transnational peer review can aid democracy by destabilising existing understandings and claims to authority and by encouraging broad participation and contestation with respect to the formulation of public policy.[277] A focus on policy experimentation, acknowledging the revisability of not only the means but also the ends of regulation, combined with the participation of diverse actors can facilitate public questioning and contestation of previously settled solutions and undermine claims to authority including by (both local and international)

[276] See above n 36 and accompanying text.

[277] See Sabel and Zeitlin (n 73) 17–18.

technocratic experts.[278] The diverse deployment of FATF peer reviews by different actors in government, industry and civil society to support different positions on tranche two in Australia is consonant with this notion of democracy-enhancing destabilisation. Further, the wide consultation of Australian stakeholders both in the FATF's own peer review processes and in domestic processes (including the day-to-day conduct of AUSTRAC) indicates that one of the central requirements of experimentalist democratisation — broad participation in the policymaking process — is present in this field.[279]

The potentially democratising influence of transnational peer review is further illustrated by the involvement of Australian stakeholders in the local design and implementation of AML/CTF policy. Australian financial sector and civil society actors have participated in FATF consultations and peer reviews and, together with representatives of the affected professions, have been actively involved in public debate and collaborative policy design with regulators in Australia. Apart from a democracy reinforcing effect, the consideration of a wider set of policy options and the incorporation of transnational peer benchmarking vis-a-vis domestic implementation and enforcement experience may facilitate the co-design of rules that respond more effectively to local problems and conditions.[280]

Notwithstanding these generally optimistic findings, we also acknowledge several points of caution emerging from our analysis. First, while stakeholder involvement that includes relevant private actors can be seen as a promising expansion of the policymaking discourse, the extensive involvement of industry stakeholders in the processes of policy design (as suggested by witnesses before the 2021–22 Senate Inquiry) might give rise to regulatory capture.[281] In a similar vein, our analysis of the 2021–22 Senate Inquiry highlights the peculiar prominence afforded to the emerging AML compliance profession in shaping and implementing Australian AML/CTF law.[282] These 'foot soldiers' of the AML/CTF regime, who have emerged in banks' compliance departments and compliance service providers, have become increasingly professionalised and play a central role in the day-to-day

[278] See above n 198 and accompanying text.

[279] Sabel and Zeitlin (n 73) 17–18.

[280] Dorf (n 110) 156–8.

[281] See ibid. See also Eleni Tsingou, 'New Governors on the Block: The Rise of Anti-Money Laundering Professionals' (2018) 69(2) *Crime, Law and Social Change* 191, 201.

[282] Tsingou (n 281) 192–3.

implementation of AML/CTF policy.[283] In fact, Eleni Tsingou has argued that compliance professionals tend to interpret AML/CTF policy more rigidly and expansively than either the FATF member jurisdictions or their parliaments intended.[284] As such, the emergence of an epistemic community of regulatory experts, arguably facilitated by transnational peer networking, can contribute to 'regulatory creep' by creating self-interested advocates seeking the expansion of AML/CTF rules and the implementation of burdensome compliance programs that might not be justified by law or reasonable risk assessments.[285]

Such tendencies for regulatory capture could, of course, be counterbalanced by input from other stakeholders. In the 2021–22 Senate Inquiry, representatives of affected professions and civil society raised arguments about the cost and compliance burdens of new AML/CTF rules and the extent to which existing domestic laws might achieve the FATF's policy objectives. Senators on the Committee not only called for the development of proportionate rules to advance those objectives through input and consultation but also allowed the more dispersed interests affected by AML/CTF activities to be placed centrestage in the inquiry even if those interests were not represented by specific organised civil society representatives. While many of the victims of money laundering by criminal organisations and terrorism financing are difficult to identify and are often beyond Australia's borders, Senators on the Committee pointed out that these activities also affect those who run a legitimate business or seek to purchase real estate in Australia and place a disproportionate burden on Australian taxpayers. It remains an open question, however, whether such deliberation allows lawmaking processes to absorb public perspectives in all their variety and nuance including those of 'regular' people impacted by public regulation.[286]

Further, while our analysis indicates that the interactions between Australia and the FATF do not ineluctably support the coercive compliance account, the FATF regime may constrain policy autonomy in other jurisdictions. Australia is a highly developed and wealthy jurisdiction with a financial system that is well-integrated into global financial flows.[287] It was a founding member of the

283 Ibid 195. Cf Christine Parker, 'Compliance Professionalism and Regulatory Community: The Australian Trade Practices Regime' (1999) 26(2) *Journal of Law and Society* 215, 217.

284 Tsingou (n 281) 201–2.

285 Ibid.

286 Cristie Ford, 'Regulation as Respect' (2023) 86(3) *Law and Contemporary Problems* 133, 135, 139.

287 See above n 91 and accompanying text.

FATF, it is represented within the FATF Plenary and it acts as a rule-promoter within the Asia-Pacific region through its leadership in the regional APG network.[288] As such, it engages with the FATF from a position of relative strength: this may not be the experience of smaller, less-developed jurisdictions who are not members of the FATF and whose local regulatory institutions and expertise are less elaborate.

Even with respect to Australia, our argument has not been that the FATF does not constrain domestic lawmaking. It is clear from our analysis that the FATF's standards and peer review system play an important role in setting the agenda for domestic law reform, in influencing Australian lawmakers to address substantive AML/CTF issues and in enlisting Australian financial institutions, who are interested in maintaining their access to international capital, as promoters of the FATF's policy agenda.

However, our findings also suggest that, in light of the experimentalist character of the FATF regime, the FATF's recommendations may be viewed as broadly formulated minimum standards that leave significant room for domestic tailoring. Moreover, the discussion in Part III reveals substantial domestic consultation and contestation among Australian legislators, stakeholders and civil society about the design of Australia's local legal and regulatory framework to address substantive problems, which are of interest to Australians, including the economic and human loss in connection to transnational crime. While it is possible to argue that any constraints on parliamentary lawmaking arising as a result of transnational cooperation efforts undermine democracy, to do so may reflect an unrealistic view of the nature of lawmaking in a modern democracy. Parliament is never unconstrained in its lawmaking, whether this be by reason of transnational cooperation, a constitution made over a century ago or by virtue of international economic and political interdependence. The effect of the FATF is not unique in this respect.

Finally, our analysis raises some doubts about a normative claim about experimentalist global governance: that networked governance relying on peer review and penalty defaults to engender local policy change contributes to effective and rapid policy innovation. While we observe that FATF peer reviews have played a role in prompting domestic reforms, such reforms have been subject to significant delay. Tranche two in Australia was not passed into law until 2024 with the majority of those reforms not commencing until 2026,

[288] See above nn 102–5 and accompanying text.

almost twenty years later than when they were originally meant to be implemented (following the initial 2006 reforms).[289] Notwithstanding the fact that FATF peer reviews have kept these reforms on the policy agenda in Australia, in the absence of domestic political will and in light of opposition from vested interests, an experimentalist global governance regime may not produce fast or effective policy reform — this is possibly the price to be paid for respecting domestic processes and actors.[290]

By interrogating in detail the interactions between the FATF regime and domestic lawmaking processes, we present a complex and nuanced account of a transnational network that has furthered domestic deliberative and consultative processes for reforming Australia's AML/CTF law without mandating outcomes or necessarily leading to efficient and effective policy change. While many of the existing legitimate critiques of the FATF focus on the problem of accountability in transnational governance and its effect on democratic lawmaking, we have sought to highlight evidence that may attenuate those concerns. We have argued that the FATF's experimentalist global governance regime, particularly its system of peer review, can complement, rather than supplant, domestic democratic and deliberative processes in designing responses to pressing policy concerns. At the same time, our analysis suggests that the role of the private sector in shaping policy, the assessment of regulatory efficacy and failure and the possible trade-off between democratic and effective policy reform may be of greater concern in rethinking existing mechanisms of review and consultation at both the domestic and transnational levels.[291]

289 See generally *AML/CTF Amendment Act 2024* (n 26).

290 William E Scheuerman, 'Democratic Experimentalism or Capitalist Synchronization? Critical Reflections on Directly-Deliberative Polyarchy' (2004) 17(1) *Canadian Journal of Law and Jurisprudence* 101, 118.

291 See Pierre-Hugues Verdier, 'Transnational Regulatory Networks and Their Limits' (2009) 34(2) *Yale Journal of International Law* 113, 163.