WHO'S THE LEGISLATOR ANYWAY? HOW THE FATF'S GLOBAL NORMS RESHAPE AUSTRALIAN COUNTER TERRORIST FINANCING LAWS

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ABSTRACT

This article focuses on the Australian implementation of the Financial Action Task Force (FATF) Recommendations, so-called 'soft law' instruments, which represent the international standards in Counter Terrorist Financing (CTF) but which force legislators to conform. The article will fill the gaps existing in the literature today by focusing on the origins and motives of broad CTF legislation in Australia, then detailing each of the FATF's CTF Recommendations and the ways in which they are implemented in Australia. This approach differs significantly from other literature in the field, which deals solely with Australian implementation of one of the FATF's components. The current paper's examination will reveal the CTF regime in Australia, a decade after the FATF's first CTF Mutual Evaluation Report on Australia, and its decisive influence.

I INTRODUCTION

On 17 December 1996, the United Nations General Assembly (UNGA) adopted a resolution which urged all Member States to take steps to prevent and counteract, through appropriate domestic measures, the financing of terrorists and terrorist organisations.[1] Two years later, as a means of implementing the above-mentioned resolution, the UNGA decided to draft an International Convention for the Suppression of the Financing of Terrorism (otherwise known as the Terrorist Financing Convention);[2] hoping that it could complement the conventions already in place to counter terrorism. The convention contains provisions which declare terrorist financing a criminal act, orders which impose restrictions on financial institutions to prevent their use for the

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1 *Measures to Eliminate International Terrorism*, GA Res 51/210, UN GAOR, 51st sess, 88th plen mtg, UN Doc A/RES/51/210 (17 December 1996).

2 *International Convention for the Suppression of the Financing of Terrorism*, opened for signature 10 January 2000, 2178 UNTS 197 (entered into force 10 April 2002).

deposit and transfer of terrorist funds, and maintain that international cooperation is critical for an effective fight against terrorist financing.[3]

The Terrorist Financing Convention is an important tool with which States regulate their interactions with each other with regard to Counter Terrorist Financing (CTF), however, it is not the only tool used to do so. The international standard today in the field of CTF has been set by the Financial Action Task Force (FATF), a classic example of an inter-governmental body formulating soft law norms.[4] These norms are known as 'Recommendations', being detailed technical standards that cover regulatory, supervisory, law enforcement, and legal issues.[5]

The scholars of soft law (and hard) are many and varied, including ***Positivists***—for whom hard law refers to formally binding legal obligations, while soft law refers to non-binding legal obligations which may nevertheless lead to binding hard law';[6] ***Rationalists***—who contend that hard and soft law have distinct attributes that states choose for different contexts;[7] or ***Constructivists***—who often favour soft law instruments for their capacity to generate shared norms and a sense of common purpose and identity, without the constraints raised by concerns over potential litigation.[8] Regardless of their views about the strengths and weaknesses of hard and soft law as alternatives, all three schools depict the adoption of hard and soft law as issues of choice.[9] This literature offers rich accounts of why states opt for harder or softer legal agreements, and how hard and soft law can affect their behaviour and (possibly) their interests.

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3 Mark Pieth, 'Criminalizing the Financing of Terrorism' (2006) 4(5) *Journal of International Criminal Justice* 1074.

4 Kenneth S. Blazejewski, 'The FATF and Its Institutional Partners: Improving the Effectiveness and Accountability of Transgovernmental Networks' (2008) 22 *Temple International and Comparative Law Journal* 1, 10; Kenneth W. Abbott, Duncan Snidal and Bernhard Zangl (eds), *International Organizations as Orchestrators* (Cambridge University Press, 2015) 289 ('*Abbott*'); See also Kenneth W. Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54(3) *International Organization* 421 ('*Abbott and Snidal*'); Daniel W eDreznerDerzner, *All Politics is Global: Explaining International Regulatory Regimes* (Princeton University Press, 2007).

5 Financial Action Task Force, *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems* (February 2013) 2; Financial Action Task Force, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation* (February 2012, Updated June 2016) ('*FATF Recommendation*').

6 Gregory C. Shaffer and Mark A. Pollack, 'Hard vs Soft Law: Alternatives, Complements and Antagonists in International Governance' (2010) 94 *Minnesota Law Review* 706, 707 ('*Shaffer & Pollack*'); See also Dinah L Shelton, *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, 2003); Jan Klabbers, 'The Redundancy of Soft Law' (1996) 65(2) *Nordic Journal of International Law* 167, 168.

7 Shaffer & Pollack, above n 6, 707; See also Charles Lipson, 'Why Are Some International Agreements Informal?' (1991) 45 *International Organization* 495, 508; Andrew Guzman, *How International Law Works: A Rational Choice Theory* (Oxford University Press, 2008) 71–111.

8 Shaffer & Pollack, above n 6, 708; See also David M. Trubek, Patrick Cottrell and Mark Nance '"Soft Law," "Hard Law," and EU Integration', in Grainne De Burca and Joanne Scott (eds), *Law and New Governance in The EU and the US* (Bloomsbury Publishing, 2006) 65, 67.

9 Shaffer & Pollack, above n 6, 708.

In the case of the FATF, it seems that adoption is a question of 'when' rather than 'if' as there is no room for choice. The Recommendations are nonbinding (or 'soft law') and while they do not refer to legally binding obligations,[10] they are recognised as requiring a political commitment to adopt a common approach to prevent the support of terrorist activities by financial institutions from UN and FATF members. FATF Recommendations are not precise; rather they put forward a combination of precise and broad norms for implementation.[11] They do not delegate authority to interpret or implement the law, although they do enjoy enforcement in the way of Mutual Evaluation Reports (MER) and follow-up procedures, which no government or regulated sector can shirk, in addition to sanctions for noncompliance in the form of blacklisting and economic sanctions.[12]

The literature considers that the positive aspects of soft law include: lesser intrusion into state sovereignty when dealing with sensitive subject matter; greater flexibility for states to cope with uncertainty (which allows states to engage in 'deeper' cooperation than they would if they had to concern themselves with enforcement); and better ability to deal with diversity.[13] These positive aspects of soft law apply to the FATF and its Recommendations, but the explanation for the impressive implementation of its norms stems from two critical elements: the FATF and FATF member characteristics of a hard compliance framework (which extends from soft law), together with the fact that it operates side by side with binding norms: the Terrorist Financing Convention and the United Nation Security Council (UNSC) empowered by under chapter VII.[14] The

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10 Cf Kenneth W Abbott et al, 'The Concept of Legalization' (2000) 54(3) *International Organization* 401, 401 (Abbott and Snidal's approach goes beyond the binding/nonbinding distinction to classify laws as 'hard' or 'soft' in accordance with these three criteria: obligations, precise and delegate authority).

11 See FATF Recommendation, Recommendation 37 asks countries to rapidly, constructively and effectively provide the *widest possible range* of mutual legal assistance (broad implementation); yet according to Recommendation 5, countries should criminalise not only the financing of terrorist acts but also the financing of terrorist organisations and individual terrorists (precise implementation).

12 Petrus van Duyne, Jackie Harvey and Liliya Gelemerova 'The Monty Python Flying Circus of Money Laundering and the Question of Proportionality' in Georgios A. Antonopoulos (ed), *Illegal Entrepreneurship, Organized Crime and Social Control: Essays in Honor of Professor Dick Hobbs* (Springer, 2016) 161, 170; Todd Doyle, 'Cleaning Up Anti-Money Laundering Strategies: Current FATF Tactics Needlessly Violate International Law' (2002) 24(2) *Houston Journal of International Law* 279, 296–7; Guy Stessens, *Money Laundering: A New International Law Enforcement Model* (Cambridge University Press, 2000).

13 Abbott and Snidal, above n 4, 423; Shaffer & Pollack, above n 6, 719.

14 At the international level CTF consists of three pillars, of which the FATF is one. The other pillars are the UNSC Resolutions under chapter VII (mainly, Res 1267 and Res 1373), and the Terrorist Financing Convention. This article focuses on the FATF Recommendations dealing with CTF which are non-binding norms (as opposed to the binding norms produced by the other two pillars). The FATF Recommendations include, refer to, and complement the binding norms of the other two pillars. Examining the implementation of the Recommendations consists of examining the binding norms of the other two pillars. There is, allegedly, an inherent difficulty in diagnosing whether implementation of some FATF Recommendations stems from the Recommendations, or from the binding norms. The CTF Regime in Australia does follow the Recommendations however, as evidenced by: the dates

FATF's non-binding norms complement these binding norms and leverage them alongside its individual Recommendations, [15] resulting in impressive levels of compliance.

The FATF is both a global policy-making forum formulating soft law norms and an enforcement body. It sets global standards and uses several compliance mechanisms to ensure that they are implemented. One mechanism is the MER, under which countries are 'peer-reviewed' and assessed for compliance with the Recommendations which combine follow-ups and assistance in implementation. The available sanctions constitute the second mechanism.

Soft law norms generated within intergovernmental forums are not subject to the checks and balances present in the domestic hard law regulatory process.[16] As a result, soft law regulation can serve 'as an indirect means of pushing international policies unlikely to win direct approval through the regular domestic political process.'[17]

This Article argues that the non-binding nature of the norms allows the FATF Recommendations to be highly influential, formulated in Australia without the formal checks and balances of a hard law legislative process,[18] and that the unique character of the FATF, its Recommendations and compliance mechanisms, have predominately caused Australia to implement FATF Recommendations in the past, and will most likely prompt them to do so in the future.

To make this argument, this article focuses on the FATF's influence on Australia's CTF Regime, considering those two FATF reports which have reviewed Australia's implementation: the first published in 2005,[19] and the second published a decade later, in July 2015.[20] The discussion is divided into two parts. The *first part* will focus on the FATF's efforts in CTF and will outline its Recommendations pertaining to CTF and their powerful, albeit soft law influence. The *second part* will discuss the implementation of these Recommendations in relation to dealing with CTF in Australia. Conclusions will follow, providing an answer to the question posed by this article.

II FINANCIAL ACTION TASK FORCE

The FATF was first established in 1989 as an inter-governmental body during the Group of Seven (G7) Summit in Paris, to deal with the increasing problem of drug money laundering. In 1996, the FATF's focus changed from drug money laundering to dealing

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of updated rules, justifications during the revision of rules, and the fact that the rules continue to be revised from time to time, in accordance with the latest Recommendations as well.

15 Ben Saul, 'The Emerging International Law of Terrorism', *Indian Yearbook of International Law and Policy 2009* (October 29, 2010) 163.

16 James Thuo Gathii, 'The Financial Action Task Force and Global Administrative Law' (2010) *Journal of the Professional Lawyer* (forthcoming), 197 ('*Gathii*').

17 Ben Hayes, 'Counter-Terrorism, Policy Laundering, and the FATF' (2012) 14 *International Journal of Not-for-Profit Law* 5, 6 ('*Hayes*').

18 Ibid.

19 Financial Action Task Force, *Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism Australia* (October 2005) ('*MER 2005*').

20 Financial Action Task Force, *Anti-Money Laundering and Counter-Terrorist Financing Measures – Australia* (April 2015) ('*MER 2015*').

with money laundering of proceeds of any serious crimes or offences.[21] Two weeks after the attack of 9/11 the G7 announced that they:

> Called on the Financial Action Task Force to encompass terrorist financing into its activities. We will meet in the United States in early October to review economic developments and ensure that no stone goes unturned in our mutual efforts to wage a successful global campaign against the financing of terrorism. [22]

In early October 2001, the FATF extended its mandate to include efforts to CTF,[23] and today the objectives of the FATF are to: set standards and promote effective implementation of legal, regulatory and operational measures for combating terrorist financing, money laundering and the financing of proliferation of weapons of mass destruction.[24] The FATF is, therefore, a policy-making institution which works towards generating the required political motivation to reform national regulations and legislation in these areas.[25]

A The FATF Recommendations

The FATF developed forty Recommendations for Anti-Money Laundering (AML).[26] As the techniques, trends and methods utilised in money laundering evolved over time, these Recommendations, described as a 'crown jewel of soft law',[27] were revised in 1996,

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21 G7 Summit, *Economic Declaration* (Paris, 16 July 1989) G7 Information Centre, 52–3 <http://www.g8.utoronto.ca/summit/1989paris/communique/index.html>; Financial Action Task Force, 'Annual Report' (Annual Report, Financial Action Task Force, (2009–2010) 6; Louis De Koker and Mark Turkington, 'Anti-Money Laundering Measures and the Effectiveness Question' in Barry Rider (ed), *Research Handbook on International Financial Crime* (Edward Elgar Publishing, 2015) 520, 520–1. ('*De Koker and Turkington*').

22 *Statement of G7 Ministers of Finance* (25 September 2001) G7 Information Centre <http://www.g8.utoronto.ca/finance/fm010925.htm>. This announcement came after the G8 statement, issued on 19 September 2001 (eight days after the terrorist attacks of 9/11), called for 'expanded use of financial measures and sanctions to stop the flow of funds to terrorists' and 'the denial of all means of support to terrorism and the identification and removal of terrorist threat.' See *Statement by the Leaders of the G8 over last week's terrorist attacks in New York and Washington* (19 September 2001) G7 Information Centre <http://www.g8.utoronto.ca/terrorism/sept192001.html>; Hayes, above n 17, 21–2.

23 Financial Action Task Force, *25 Years and Beyond The Financial Action Task Force Setting the Standards to Combat Money Laundering and the Financing of Terrorism and Proliferation* (2014).

24 *FATF Recommendation*, above n 5, 7; See also Financial Action Task Force, *Mandate (2012–2020)* (20 April 2012).

25 Abott et al (eds), above n 4, 289.

26 Financial Action Task Force, *What is Money Laundering? Basic Facts about Money Laundering*. The FATF defines the term 'money laundering' succinctly as 'the processing of … criminal proceeds to disguise their illegal origin' in order to 'legitimize' the ill-gotten gains of crime. Money laundering predicate offense is the underlying criminal activity that generated proceeds, which when laundered, results in the offense of money laundering. The techniques used to launder money are essentially the same as those used to conceal the sources of, and uses for, terrorist financing, with the difference that funds used to support terrorism may originate from legitimate sources. This is why there is a need to criminalize the financing of terrorism and designate such offenses as money laundering predicate offenses (and expanding the scope of AML framework). See also Paul Schott, *Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism*, (The World Bank, 2nd ed, 2006) I-5.

27 Stessens, above n 12, 17.

2001, 2003 and 2012, to ensure that they remained up to date, relevant, and capable of universal application.[28]

By October 2001, the FATF issued eight Special Recommendations to deal with CTF and in October 2004 added a ninth,[29] which served to enhance the strength of agreed international standards for fighting terrorist financing and money laundering. These nine Special Recommendation on TF, read with the forty Recommendations on AML, became known as the 40+9 Recommendations, and have been endorsed by over 180 countries.[30]

The FATF 9 Special Recommendations on Terrorist Financing primarily urge States to:

- *International instrument:* Implement international treaties; among them, the Terrorist Financing Convention.[31]
- *Terrorist financing offences*: Criminalise terrorist financing on the basis of the Terrorist Financing Convention.[32]
- *Target financial sanctions related to terrorism and terrorism financing:* Implement targeted financial sanctions regimes to comply with UNSC resolutions relating to the prevention and suppression of terrorism and terrorist financing, primarily UNSC Resolutions 1267 (1999) and 1373 (2001).[33]
- *Suspicious Activity Reports:* When a financial institution suspects that funds are related to terrorist financing, it should be required, by law, to report promptly its suspicions to the financial intelligence unit.[34]
- *International Corporation:* Assist other States in their investigations into terrorist financing.[35]
- *Money or Value Transfer Services*: Take measures to ensure that natural or legal persons that provide Money or Value Transfer service are licensed and subject to effective systems for monitoring.[36]
- *Wire Transfer*: Ensure that financial institutions include required and accurate originator information, and required beneficiary information, on wire transfers and related messages, and that the information remains with the wire transfer or related message throughout the payment chain.[37]

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28 Kevin L. Shepherd, 'Risky Business: The Gatekeeper Initiative and the Risk-Based Approach to Client Due Diligence' (2011) 25(2) *Probate & Property* 83.

29 Financial Action Task Force, *International Best Practices Detecting and Preventing the Illicit Cross-Border TTransportation of Cash and Bearer Negotiable IInstruments* (19 February 2010).

30 FATF Recommendation, above n 5.

31 Ibid Recommendation 36 (old number R.35 & SR I).

32 Ibid Recommendation 5 (old number SR II).

33 SC Res 1267, UN SCOR, 54th sess, 4051st mtg, UN Doc S/RES/1267 (15 October 1999) ('*Res 1267*'); SC Res 1373, UN SCOR, 56th sess, 4385th mtg, UN Doc S/RES/1373 (28 September 2001) ('*Res 1373*'); FATF Recommendation, Recommendation 6 (old number SR III).

34 FATF Recommendation, above n 5, Recommendation 20 (old number R.13 & SRIV).

35 Ibid Recommendation 37 (old number R.36 & SRV).

36 Ibid Recommendation 14 (old number SRVI).

37 Ibid Recommendation 16 (old number SR VII).

- *Non-Profit Organisations*: Review the adequacy of laws and regulations that relate to entities that can be abused for the financing of terrorism.[38]
- *Cash couriers*: Should have measures in place to detect the physical cross-border transportation of currency and bearer negotiable instruments, including through a declaration system and/or disclosure system.[39]

In February 2012, the FATF completed a comprehensive review of its standards and subsequently published revised Recommendations.[40] The revision, which also integrated the 9 Special Recommendations on Terrorist Financing into the Recommendations, aimed to bolster global safeguards and further defend financial system integrity by granting governments more effective tools with which to act against financial crimes.

There exists no binding obligation to abide by these FATF recommendations.[41] However, they are considered to reflect the current international standards in the fight against terrorist financing.[42]

B Mutual Evaluation Report

To achieve global implementation of the FATF Recommendations, the FATF with relatively small membership, relies on a strong global network of nine FATF-Style Regional Bodies (FSRBs), in addition to its own 37 members. The eight FSRBs have an essential role in promoting the effective implementation of the FATF Recommendations by their membership, and in providing expertise and input in FATF policy-making. Over 180 jurisdictions around the world have committed to the FATF Recommendations through the global network of FSRBs and FATF memberships.

The FATF established informal networks together with the FSRBs (which are responsible for implementation of the Recommendation by countries within their region), conducts MER for almost every State in the world, and on an ongoing basis assesses whether a country is sufficiently compliant with the FATF standards; providing an in-depth description and analysis of each country's system for preventing abuse of the financial system. Over the past twenty years, the FATF has developed, used and refined rigorous compliance mechanisms to help ensure global compliance with its

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38 Ibid Recommendation 8 (old number SR VIII).

39 Ibid Recommendation 32 (old number SR IX).

40 FATF Recommendation, above n 5; 'Report to G20 Leaders By The Financial Action Task Force' (Report, Los Cabos Summit, June 2012) 2. The Recommendation adopted on 16 February 2012, and updated in February 2013, October 2015 and June 2016.

41 The UNSC has stopped short of adopting a chapter 7 resolution ordering states to enforce the FATF's recommendations, but it has 'strongly 'urged' them to do so in Resolution 1617 (SC Res 1617, UN SCOR, 60th sess, 5244th mtg, UN Doc S/RES/1617 (29 July 2005)).

42 Ilias Bantekas, 'The International Law on Terrorist Financing' in Ben Saul (ed), *Research Handbook on International Law and Terrorism* (Edward Elgar, 2014) 121; Matthew Levitt and Michael Jacobson, 'The Money Trail: Finding, Following, and Freezing Terrorist Finances' (2008) 89 *Washington Institute for Near East Policy* 19 ('*Levitt and Jacobson*'); Abbott et al (eds), above n 4, 286.

standards.[43] It assesses compliance through the MER; a stringent country evaluation and monitoring process.[44]

The MER sets out the specific requirements of each Recommendation as a list of criteria, which represent those elements that should be present in order to demonstrate full compliance with the mandatory elements of the Recommendations. For each Recommendation, the FATF's assessors reach a conclusion about the extent to which a country complies (or does not comply) with the standard. There are four possible levels of compliance: Compliant—no shortcomings are present; Largely compliant—only minor shortcomings exist; Partially compliant—moderate shortcomings exist; and Non-compliant—major shortcomings are present.

The MER summarises the CTF (and AML) measures in place as at the date of the FATF assessor's on-site visit in the country. It analyses the level of compliance with the FATF 40 Recommendations and the level of effectiveness of the CTF (and AML) system, and recommends how the system could be strengthened. Based on the results of the jurisdiction's MER, and where jurisdictions' MER reveals a significant number of key deficiencies, it is likely this jurisdiction will be referred for a review and when necessary, face sanctions.

C Sanctions

While the FATF does not have legal authority to impose decisions on its members or to impose sanctions for their failure to comply with its standards,[45] its mandate to CTF is tied to several very powerful international financial institutions like the IMF and UNSC, and it has the support of powerful governments like the U.S., international organisations such as the European Union, and, of course, its Members. As such, what may be referred to as the 'soft law' of the FATF is reinforced by strong connections.[46]

In addition to the FATF's and FSRB's Mutual Evaluation programmes and follow-up processes, the FATF uses other mechanisms by which to identify and respond to jurisdictions with strategic deficiencies in their CTF (and AML) regimes which pose a risk to the international financial system and impede efforts to combat money laundering and terrorist financing.

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43 The FATF also benefitted from the membership of various financial institutions, mainly the World Bank and the International Monetary Fund, whose Financial Sector Assessment Program, and Report on the Observance of Standards and Codes processes (together with their technical assistance), extended implementation of FATF Recommendations. See De Koker and Turkington, above n 21, 522.

44 For its 4th round of MERs, the FATF has adopted complementary approaches for assessing technical compliance with the FATF Recommendations, and for assessing whether and how the AML/CFT system is effective. The effectiveness assessment is beyond the boundaries of this article. For effectiveness assessments, see Financial Action Task Force, *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CTF Systems* (February 2013, updated February 2016) 5; for discussion focusing on the effectiveness question relating to AML/CTF measures, see De Koker and Turkington, above n 21.

45 Levitt and Jacobson, above n 42, 20.

46 Gathii, above n 16, 198.

The FATF urges non-cooperative jurisdictions, which the FATF enters on to a 'black list',[47] to adopt measures in order to remove the detrimental rules and practices that were found in the jurisdiction concerned. The FATF has, therefore, announced a number of measures to be taken in respect to countries that do not pay heed to the demand to remove the detrimental rules and practices. Pending the adoption of the appropriate laws and policies, the FATF demands that its members scrupulously apply FATF Recommendation 19,[48] which holds that '[f]inancial institutions should be required to apply enhanced due diligence measures to business relationships and transactions with natural and legal persons, and financial institutions, from countries for which this is called for by the FATF'.[49] The type of enhanced due diligence measures applied should be effective and proportionate to the risks. Countries should be able to apply appropriate countermeasures when called upon to do so by the FATF. Countries should also be able to apply countermeasures independently of any call by the FATF to do so. Such countermeasures should be effective and proportionate to the risks. Examples of the countermeasures that could be undertaken by countries include the following: [50]

- Refusing the establishment of subsidiaries, branches, or representative offices of financial institutions from (or in) the country concerned, or otherwise taking into account the fact that the relevant financial institution is from a country that does not have adequate AML/CTF systems;
- Limiting business relationships or financial transactions with the identified country or persons in that country;
- Prohibiting financial institutions from relying on third parties located in the country concerned to conduct elements of the Customer due diligence process; and
- Requiring increased supervisory examination and/or external audit requirements for branches and subsidiaries of financial institutions based in the country concerned.

The 'Black List' is the most drastic measure so far taken to as part of the FATF strategy to spread its Recommendations geographically, and Mr Feoktistov, Deputy Director of the Department on New Challenges and Threats of the Russian Foreign Ministry, explained why these countermeasures are so effective:

> For any individual country, being put on the FATF Black List is not just a blow to its international reputation. If a country remains on the Black List for a long period, other

47 The 'Black List' referred to a list of Non-Cooperative Countries and Territories (NCCT) exercise which began in 1998, and as of October 2006, there were no Non-Cooperative Countries and Territories in the context of the NCCT initiative. Since 2007, the FATF's International Co-operation Review Group (ICRG) has analysed high-risk jurisdictions and recommended specific action to address Money Laundering /Financing Terrorism risks emanating from them where initial referral to the ICRG is based primarily on the results of the jurisdiction's MER. See Financial Action Task Force, *Review to Identify Non-Cooperative Countries or Territories: Increasing The World Effectiveness of Anti-Money Laundering Measures* (22 June 2001) 5; See also Guy Stessens, 'The FATF Black List of Non-Cooperative Countries or Territories' (2001) 14 *Leiden Journal of International Law* 199 .

48 FATF Recommendations, above n 5, 19 (old number 21).

49 Ibid 19

50 Ibid 18.

> countries are asked to take financial countermeasures against the offender. It means that all banking operations with such a country will be meticulously X-rayed for anything suspicious. Strictly speaking, this does not amount to sanctions, but in practice, such a situation makes life for the country in question very difficult …[51]

When appraising the impact of the efforts of the FATF, it needs to be recognised that the reach of the FATF is global. As several regional FATF-Style Regional Body type organisations have fully endorsed the FATF's Recommendations,[52] its reach, in fact, extends far further than its 37 members.

While the FATF lacks the authority to directly enforce binding laws, its soft-law influence is quite profound, as members which fail to comply with the FATF's Recommendations or rejects its key aspects (i.e. decriminalising terrorist financing), will consequences a severe economic hardship from the FATF countermeasures as detailed above, and finally risking expulsion; an unattractive prospect for members in the current political climate.[53] The following section will detail how Australia has implemented the FATF 'soft law' Recommendations, in the period between two MER reports.

III AUSTRALIAN IMPLEMENTATION OF FATF'S COUNTER TERRORISM FINANCING STANDARDS

In Australia, the international legal order and that of the nation state are separate legal systems, so that developments in international law have no direct effect domestically unless a deliberate law is implemented by the Parliament, and the proper law-making authority has therefore 'transformed' the international rule into a rule of domestic law.[54] Further, the parliament has no formal role in convention-making in Australia, and the Australian Constitution vests convention-making power solely in the executive arm of government. As the act of joining the FATF is not classified as joining a convention 'treaty', it does not have to be tabled in Parliament and brought to the attention of the Parliament's Joint Standing Committee on Treaties,[55] and in fact, is only brought to the Parliament's attention when legislative implementation is required.

> [T]he FATF, though undoubtedly powerful, is not a legislative body. Its Recommendations and assessments are addressed to governments. If and when they affect natural and legal

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51 Dmitry Feoktistov, 'Iran, the Black List and Russia's Upcoming FATF Presidency' (2013) 19 *Russian Journal on International Security* 19, 19. Russia was listed on the Black List on 22 April 2000 because of lack of a comprehensive AML law and implementing regulations that meet international standards.

52 The criteria for admission as a member requires members to be fully committed at the political level, to implement the FATF Recommendations and to undergo regular mutual evaluations; See Financial Action Task Force, '*Annual Report 2003–2004*' (2004) 12.

53 Abbott et al (eds), above n 4, 290.

54 Anthony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 6th ed. Annandale, N.S.W, 2014) 885.

55 Joint Standing Committee on Treaties, Parliament of Australia, *Time to Put on the 3-D glasses: Is There a Need to Expand JSCOT's Mandate to Cover 'Instruments of Less than Treaty Status'?* (18 March 2016) 5; Joint Standing Committee on Treaties, Parliament of Australia, *Resolution of Appointment* (2013).

persons, as they undoubtedly do, that is because those governments have implemented them in their domestic laws.[56]

CTF in Australia, however, is an example of a government and its agencies entering into arrangements which can significantly affect the way the Australian Parliament works when it has, even if federal government might defer implementation for some time,[57] no practical choice but to conform to the FATF standards or risk its financial reputation under pressures which are unlikely to be indefinitely withstood.[58] This is so, despite it being soft law and there being no international legal obligations to uphold.

Australia has been a member of the FATF since 1990. It is a Financial Centre, but not considered a 'terrorist centre'. Even though more than 100 Australians have been killed in terrorist attacks overseas since 9/11,[59] the numbers diminish considerably *on Australian soil*, where three people have been killed in terrorist attacks (two in December 2014 during the Martin Place siege in Sydney, and one in October 2015 during the Parramatta shooting).[60] Another six have been injured (two in September 2014 in the Endeavour Hills stabbings, one in September 2016 in the Minto stabbing, and another three in the Martin Place siege, where they were injured by police bullets).[61] An objective assessment of recent attacks suggests that the terrorism threat and risk of being killed in a terrorist attack in Australia is low.[62] Despite a minimal yet persistent threat, the Australian government has proceeded to respond to terrorism in full force.

It has only been for a short period of time that Australia has enacted laws aimed at terrorism,[63] and prior to 9/11, dealt with terrorist financing with the *Crimes (Foreign*

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56 European Union Committee, Parliament of the United Kingdom, *Money Laundering and the Financing of Terrorism* (14 July 2009) 14 [27].

57 David Chaikin, *The Australian Accounting Profession's Response to Anti-Money Laundering Regulation,* Chartered Accountants Australia and New-Zealand <www.charteredaccountantsanz.com>.

58 Cf Saul, above n 15, 173.

59 Department of the Prime Minister and Cabinet, *Counter-Terrorism White Paper: Securing Australia, Protecting Our Community*, Parl Paper No 66 (2010) 7.

60 There is a debate whether these attacks can be classified as acts of terrorism. See Michael Wesley, 'Sydney Siege: Welcome to Jihad 3.0, the Third Wave of Terrorism and the Most Unpredictable' *The Australian* (Sydney), 20 December 2014. It is worth noting that the Australian government (Treasurer Joe Hockey) declared the siege in Sydney's Martin Place a terrorist incident for the purposes of the *Terrorism Insurance Act 2003* (Cth). David Wroe and Gareth Hutchens, 'Government declares Martin Place siege 'terrorism' for insurance' *The Sydney Morning Herald* (Sydney), 15 January 2015.

61 Cameron Houston et al, 'Terror Suspect Shot Dead after Two Police Officers Stabbed in Endeavour Hills', *The Age* (Melbourne), 24 September 2014; Rachel Massola and James Olding, 'Someone is going to die today: Man charged with committing terrorist act and attempted murder' *The Sydney Morning Herald* (Sydney), 11 September 2016.

62 Christopher Michaelsen, 'The Triviality of Terrorism' (2012) 66(4) *Australian Journal of International Affairs* 431, 437. For a different opinion, that finds Australia under terrorist target, and links the risk to the proximity to a number of Muslim countries that may enhance Australia's vulnerability, see Russell G Smith, Rob McCusker and Julie Walters, 'Financing of Terrorism: Risks for Australia' (2010) 1 *Trends & Issues in Crime and Criminal Justice* 2.

63 George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35(3) *Melbourne University Law Review* 1136, 1139 ('*Williams*'); George Williams, 'Anti-Terror Legislation in Australia and NZ' in Victor V Ramraj et al (eds), *Global Anti-Terrorism Law and Policy.*

Incursions and Recruitment) Act 1978,[64] which made it an offence to contribute to the preparation or promotion of entering a foreign state to engage, or intend to engage, in a hostile activity in that foreign state, and, at the state level, with the *Criminal Code Act 1983* (Northern Territory).[65] The attacks of 9/11 provided the catalyst for the introduction of Australia's first national anti-terror laws, and it appears that these new laws were required in order to deal with instances where existing criminal law could not adequately deal with, or prevent, the financing of terrorist acts overseas. As Professor Williams summarised, '[f]rom 2002 to 2007 under the conservative Howard Coalition government, Parliament enacted forty-eight separate anti-terrorism statutes—an average of one new law every seven weeks',[66] including legislation pertaining to terrorist financing.[67]

Australia indeed required contemporary legislation to deal with terrorist financing, but appears to have enacted new laws primarily in response to the FATF's Recommendations. The Australian government clarified, after the FATF revised its Recommendations following 9/11, that in order for Australia to maintain its internationally respected position, urgent action to implement the FATF Recommendations was necessary.[68] In the words of Chris Ellison, the then Minister for Justice and Customs: 'Australia will now commit to implementing FATF's revised 40 Recommendations which will require a significant review of Australia's anti-money laundering regime, including some new measures intended to counter terrorist financing'.[69] In October 2005, less than two years after Senator Ellison made this announcement, the FATF conducted a Mutual Evaluation Report of Australia's CTF (and AML) policies[70] and found that while Australia indeed legislated according to the standards, there were a number of perceived deficiencies in Australia's arrangements which meant a failure to comply with all accepted standards.[71] Many of these deficiencies were addressed, in accordance with FATF Recommendations, by the *Anti-*

(Cambridge University Press, 2nd ed, 2012) 541, 546 ('*Williams in Ramraj*'). For the history of terrorism laws in Australia, see Jenny Hocking, *Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy* (UNSW Press, 2004); for the influence of anti-money laundering measures on Australian CTF, see Nicholas Ryder, *The Financial War on Terrorism: A Review of Counter-Terrorist Financing Strategies Since 2001* (Taylor and Francis, 2005) 25.

64 *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) s 7, as repealed by *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) s 144.

65 *Criminal Code Act 1983* (NT) s 55(1).

66 *Williams*, above n 63, 1161.

67 *Williams in Ramraj*, above n 63, 547.

68 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, 99.

69 Australian Transaction Reports and Analysis Centre, 'Australia Endorses Global Anti-Money Laundering Standards', (Media Release, E176/03, 8 December 2003); See also 'Terrorism Financing in Australia 2014' (Report, Australian Transaction Reports and Analysis Centre, 2014) 11.

70 *MER 2005*, above n 19.

71 Alison Deitz, '*Anti-Money Laundering and Counter-Terrorism Financing Act 2006*' (Seminar Paper No 07/32, College of Law Sydney, 9 March 2007), 1-2; Stuart Ross and Michelle Hannan, 'Australia's New Anti-Money Laundering Strategy' (2007) 19 *Current Issues in Criminal Justice* 135, 140.

Money Laundering and Counter-Terrorism Financing Act 2006,[72] as reported by the *MER 2015*.[73] Australia's creation of legislation, in order to comply with the International standards set by the FATF, pertaining solely to terrorism financing (i.e. money laundering is excluded), will be made apparent below.

A International Instrument

Australia signed the Financing Convention on 15 October 2001, just two weeks after the adoption of Res 1373, and ratified it on 26 September 2002. Following the announcement of Daryl Williams—the then federal Attorney-General on 18 December 2001, that the government will introduce amendments to the *Criminal Code Act*[74] to make funding of terrorism a specific criminal offence,[75] Australia introduced a package of national anti-terrorism legislation in March 2002. This was also executed in response to Res 1373, and to implement the Financing Convention. The most important statutes in this package were the *Security Legislation Amendment (Terrorism) Act*,[76] which amended or inserted provisions into the *Criminal Code*, and the *Suppression of the Financing of Terrorism Act*,[77] which amended the *Charter of the United Nations Act*,[78] the *Extradition Act*,[79] and the *Financial Transaction Reports Act*.[80] According to the *MER 2005*, Australia had fully implemented the measures stipulated in the Financing Convention, except for establishing requirements for financial institutions to adopt customer due diligence measures identifying beneficial owners.[81]

In addition, Australia appears to have fully implemented all the measures required in Res 1267 and Res 1373. The asset-freezing requirements contained in the Security Council Resolutions are implemented in Australia under the *Charter of the United Nations*

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72 *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) ('*AML/CTF Act*'). One of the objects of the *AML/CTF Act* is to address matters of international concern, including: the FATF Recommendations. See s 3(3)(a).

73 *MER 2015*, above n 20. See also David Rees, 'Money Laundering and Terrorism Financing Risks Posed by Alternative Remittance in Australia' (*Research and Public Policy Series Report No 106*, *Australian Institute of Criminology*, 2010) ('*Rees*').

74 *Criminal Code Act 1995* (Cth) ('*Criminal Code*').

75 Daryl Williams, 'Upgrading Australia's Counter-Terrorism Capabilities' (News Release, 1080, 18 December 2001); *Letter Dated 21 December 2001 from the Permanent Mission of Australia to the United Nations Addressed to the Chairman of the Security Council Committee Established Pursuant to Resolution 1373 (2001) Concerning Counter-Terrorism*, UN Doc S/2001/1247 (21 December 2001), 4.

76 *Security Legislation Amendment (Terrorism) Act 2002* (Cth). The other legislations in this package were the *Suppression of the Financing of Terrorism Act 2002* (Cth) ('*Suppression of the Financing of Terrorism Act*'); Criminal Code Amendment (Suppression of Terrorist Bombing) Bill 2002 (Cth); Border Security Code Legislation Amendment Bill 2002 (Cth); Telecommunication Interception Legislation Amendment Bill 2002 (Cth).) See *Williams in Ramraj*, above n 63, 547.

77 *Suppression of the Financing of Terrorism Act*.

78 *Charter of the United Nations Act 1945* (Cth) ('*CotUN Act*').

79 *Extradition Act 1988* (Cth).

80 *Financial Transaction Reports Act 1988* (Cth) ('*FTR Act*').

81 *MER 2005*, above n 19, 129. Required under s 18 to the *Terrorist F*inancing Convention.

Act and its subsequent regulation.[82] Furthermore, the *Criminal Code Amendment (Terrorist Organisations) Act 2004*,[83] amended the Criminal Code to enable Australia to list terrorist organisations not referred to within the list compiled by the 1267 Committee, by giving the Attorney-General the power to determine that a body is a terrorist organisation.[84]

B Terrorist Financing Offences

The *Suppression of the Financing of Terrorism Act*, which came into force in July 2002, amended a number of existing Acts. The amended acts include the *Criminal Code*, the *FTR Act*, the *Mutual Assistance in Criminal Matters Act*,[85] and the *Charter of the United Nations Act*. In its amended form, the *Criminal Code* contains several offences related to the financing of terrorism and criminalises the receipt of funds from, or making funds available to, a terrorist organisation, whether directly or indirectly.[86]

The definition of 'funds' in the *Criminal Code*[87] matches the definition found in Article 1(1) of the Financing Convention, and the *Criminal Code* extends criminal responsibility to the attempting, aiding or abetting, or incitement of committing an offence, and to conspiracy to commit an offence.[88] The *Criminal Code* also defines terrorist organisations, asserting that these are organisations which directly or indirectly engage in preparing, planning, fostering, or assisting in, a terrorist activity, irrespective of whether one occurs, or which have been proscribed as terrorist organisations by the Attorney-General.[89] In addition, the *Criminal Code* created another terrorist financing offence, where a penalty of life imprisonment applies when a person is found guilty of intentionally providing or collecting funds to or from a terrorist organisation,[90] and recklessness in relation to whether the funds would be used to facilitate or engage in a terrorist act.[91]

The *MER 2005* found that, although the range of offences and definitions were quite broad, the Australian legislation did not specifically criminalise the collection or provision of funds for an individual terrorist. The Australian authorities noted to the

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82 *Charter of the United Nations (Dealing with Assets) Regulations 2008* (Cth) ('*Dealing with Assets Regulations*'). These regulations replaced the *Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002* (Cth), which replaced the *Charter of the United Nation (Anti-Terrorism Measures) Regulations 2001* (Cth). Cl 10(1), to the *Charter of the United Nations (Anti-Terrorism Measures) Regulations*, made it an offence to directly or indirectly, make an asset available to a person or entity listed by the minister for Foreign Affairs in the Commonwealth Gazette for being a person or entity mentioned in paragraph 1(c) or Res 1373. See *Letter Dated 21 December 2001 from the Permanent Mission of Australia to the UN Addressed to the Chairman of the Security Council Committee Established Pursuant to Resolution 1373 (2001) Concerning Counter-Terrorism*, UN Doc S/2001/1247 (21 December 2001), 6.

83 *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth).

84 *MER 2005*, above n 19, 130; *Williams*, above n 63, 550.

85 *Mutual Assistance in Criminal Matters Act 1987* (Cth) ('*MA Act*').

86 *Criminal Code* s 102.6.

87 Ibid s 100.1.

88 Ibid pt 2.4.

89 Ibid s 102.1.

90 Ibid s 103.1.

91 Ibid s 103.1(1)(b).

FATF evaluation team that Section 103.1 of the *Criminal Code* refers not only to recklessness in funds being used to engage in a terrorist act, but also to facilitate a terrorist act.[92] Therefore, according to Australian authorities, providing or collecting funds where the person is reckless as to whether they will be used to facilitate a terrorist act, covers 'the collection of funds for a terrorist organisation' and 'the collection or provision of funds for an individual terrorist.'[93] However, the evaluation team did not agree that this sufficiently covered the provisions of the standard, and recommended that Australia specifically criminalise the collection of funds for an individual terrorist.[94] Australia, despite asserting that there was no need to change the *Criminal Code*, proceeded to implement the FATF recommendation and amendments two months later in the *Criminal Code* (in December 2005), explaining that the amendments strengthen the existing terrorist financing offences and confirm Australia's commitment to the principles behind the FATF's Special Recommendations on Terrorist Financing,[95] to which the Security Legislation Review Committee's replied that 'it is difficult [on the above analysis] to see how this could be so'.[96]

This is a direct example of the effectiveness of the FATF when it is clear that '[i]t is hard to see where section 103.2 adds anything of substance over and above section 103.1',[97] 'sec 103.2 does not capture any conduct not already captured by sec 103.1 and is in fact more limited in scope than sec 103.1',[98] and '[t]he inclusion of both of these offences might be justified if there was evidence to suggest that it increased national security by enabling law enforcement authorities and prosecutors to pursue those who would otherwise escape prosecution for the financing of terrorism'.[99] The Independent National Security Legislation Monitor and the Council of Australian Governments Committee recommended in 2013 that this 103.2 section be repealed. It is evident that the primary reason for amending the *Criminal Code* in response to an FATF recommendation (and later at the FATF's specific request), was not concern for the CTF regime, as Professor Williams summarises, that 'having … parallel offences in fact only muddies the waters. These offences complicate the domestic terrorist financing regime and make it more difficult for people to understand their legal obligations',[100] but rather concern for legislating in accordance with the FATF Recommendation.

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92 *MER 2005*, above n 19, 33.
93 Ibid 17.
94 Ibid 33.
95 Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2005 (Cth) sch 3 item 3.
96 House of Representatives Security Legislation Review Committee, Parliament of Australia, *Report of the Security Legislation Review Committee* (2006) 160.
97 Ibid 162.
98 Brett Walker, 'Annual Report' (Report, Independent National Security Legislation Monitor, 7 November 2013) 76.
99 Andrew Lynch, Nicola McGarrity and George Williams, *Inside Australia's Anti-Terrorism Laws and Trials* (New South Publishing, 2015) 67; For further discussion regarding the wording "individual terrorist" requested by the FATF and "a person" that was adapted by the Australian Government, see Nicola McGarrity, 'The Criminalisation of Terrorist Financing in Australia' (2012) 38(3) *Monash University Law Review* 55, 63 ('McGarrity').
100 Ibid.

C Target Financial Sanctions Related to Terrorism and Terrorism Financing

Australia was considered to be largely compliant for freezing of terrorist assets in the *MER 2005*.[101] The primary shortcoming detected was the failure of Australian law to explicitly cover funds of terrorists, and those who finance terrorism or terrorist organisations, outside of specific terrorist acts.

The *Charter of the United Nations (Sanctions – The Taliban) Regulation 2013*[102] and the *Charter of the United Nations (Sanctions – Al-Qaida) Regulations 2008*[103] contain provisions that prohibit dealing with, or making available, assets of designated persons and entities. Designated persons and entities are any person or entity listed by the UN under UNSCRs 1267/1988/1989.[104] In the case of listings under Res 1373, a listing takes effect as soon as the person or entity is listed in the Gazette, which takes place as soon as practicable after the Minister's decision.[105] The definition of a 'controlled asset' pertains to an asset of a designated person or entity, and funds derived from an asset owned or controlled, directly or indirectly, by a designated person or entity, or a person acting on behalf, or at the direction of, a designated person or entity. [106] 'Freezable assets' are then defined as either assets owned and controlled by a proscribed person or entity, or as 'listed assets' (assets listed by the Minister)[107] and those derived or generated from those assets, either directly or indirectly. [108] Prohibition requirements are outlined in the different Regulations for the different designations (Al-Qaida, Taliban, or under Res 1373).[109] It is an offence for a person or a body corporate who holds a 'controlled asset' (under *Taliban Regulations* and *Al-Qaida Regulations*) or 'freezable asset' (under the *Charter of the United Nations Act*), to use or deal with the asset, allow the asset to be used or dealt with, or facilitate the use of, or dealing with, the asset, [110] where the use or dealing has not been permitted.[111] An offence is punishable by imprisonment for not more than 10 years, a fine, or both.[112]

In accordance with Charter of the United Nations Regulation, [113] Australia's Department of Foreign Affairs and Trade maintains a Consolidated List of designated individuals and entities which is subject to SC Res. In March 2015, the list contained 5098

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101 *MER 2005*, above n 19, 40.
102 *Charter of the United Nations (Sanctions – The Taliban) Regulation 2013* (Cth) regs 9-, 10 ('*Taliban Regulations*').
103 *Charter of the United Nations (Sanctions – Al-Qaida) Regulations 2008* (Cth) regs 10-11 ('*Al-Qaida Regulations*').
104 *Taliban Regulations* reg 3; *Al-Qaida Regulations* reg 4.
105 *CotUN Act* s 15(6).
106 *Al-Qaida Regulations* reg 4; *Taliban Regulations* reg 3.
107 *CotUN Act* s 15.
108 Ibid s 14.
109 *Al-Qaida Regulations* reg 10; *Taliban Regulations* reg 9; *CotUN Act* s 21.
110 *Al-Qaida Regulations* reg 11; *Taliban Regulations* reg 10; *CotUN Act* s 20.
111 *Al-Qaida Regulations* reg 12; *Taliban Regulations* reg 11; *CotUN Act* s 22.
112 *CotUN Act* ss 20-21 (until March 2008 was 5 years imprisonment). See also Julie Walters et al, 'Anti-Money Laundering and Counter-Terrorism Financing Regime in Australia: Perceptions of Regulated Businesses in Australia' (Research and Public Policy Series Report No 117, Australian Institute of Criminology, 2012) 83.
113 *Dealing with Assets Regulations* reg 40.

names,[114] whereas in June and August 2015, the Minister for Foreign Affairs listed two individuals and their associated companies under the *Charter of the United Nations Act*, pursuant to Australia's obligations under Res 1373.[115] Since Australia amended its legislation, the *MER 2015* deemed Australia to be fully Compliant with the FATF's requirements.[116]

D Suspicious Activity Reports

All financial institutions captured under the 'cash dealer' definition in the FTR[117] are subject to the obligations under this Act and compliance monitoring by the Australian Transaction Reports and Analysis Centre (AUSTRAC).[118] A Suspicious Transaction Report (STR) must be filed if the cash dealer has reasonable grounds to suspect that a transaction 'may be relevant to the investigation of an evasion, or attempted evasion, of taxation law',[119] or of an offence against any Commonwealth or Territorial law,[120] or which may assist the enforcement of the proceeds of crime legislation and related regulations.[121] The *Suppression of the Financing of Terrorism Act* introduced section 16(1A) of the FTR, which sets out the terms of STR regarding terrorist activities and the financing of terrorism. Therefore, in addition to the abovementioned reporting requirements, a cash dealer must report where they are a party to a transaction and have reasonable grounds to suspect that the transaction is preparatory to the commission of a financing of terrorism offence, or where the information they hold concerning a transaction may be relevant to the investigation, or prosecution of, a person suspected of involvement in a terrorism financing offence.[122]

While the STR requirements are quite broad, the *MER 2005* found that there were limitations in the definition of 'cash dealer' which do not apply to all financial institutions as defined in the FATF Recommendations. In addition, as the reporting obligation pertains to suspected terrorist financing offences, the evaluation team was concerned about the limited scope of terrorist financing offences, as Australia did not, at the time of the report, specifically criminalise the collection or provision of funds for an individual terrorist. Eventually, the *MER 2005* deemed Australia to be Largely Compliant.[123]

Just more than a year after the *MER 2005* was adopted by the FATF, Australia legislated on 12 December 2006 the *AML/CTF Act* as a legislative response to the *MER*

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114 The list is publicly available on the Department of Foreign Affairs and Trade's website, Department of Foreign Affairs and Trade, *Consolidated List* (10 March 2017) <http://dfat.gov.au/international-relations/security/sanctions/pages/consolidated-list.aspx#list>.

115 This listing will cease to have effect 3 years after listing, unless extended in accordance with *CotUN Act* s 15A.

116 *MER 2015*, above n 20, 145.

117 *FTR Act* s 3(1).

118 Ibid.

119 Ibid s 16(1)(b)(i).

120 Ibid s 16(1)(b)(ii).

121 Ibid s 16(1)(b)(iii)–(iv).

122 Ibid s 16(1A)(b)(i)–(ii).

123 *MER 2005*, above n 19, 91.

2005 report;[124] 'a major step in bringing Australia in line with international best practice which included standards set by the FATF',[125] and, according to the Explanatory Memorandum to the Anti-Terrorism Bill, these changes were inserted 'to better implement the requirements of the Financial Action Task Force on Money Laundering's (FATF's) Special Recommendations'.[126] The objective of the *AML/CTF Act* was to fulfil Australia's international obligations, including obligations to combat money laundering and financing of terrorism, and to address matters of international concern, including the need to combat money laundering financing of terrorism.[127] Relevant international obligations include obligations under Res 1267 and Res 1373,[128] and the FATF Recommendations are the first international priority.[129]

AUSTRAC, as stated above, is the Australia's AML/CTF financing regulator and financial intelligence unit.[130] In order to perform its functions in accordance with the AML/CFT Act, AUSTRAC must consider any relevant FATF Recommendations,[131] collect financial transaction reports information from a range of prescribed cash dealers who submit a range of financial transaction reports, including reports on suspicious transactions, international funds transfers (regardless of amount) and significant cash transactions. *MER 2015* ranked Australia as Compliant with Recommendation 20.[132]

E International Co-Operation

Australia's mutual legal assistance mechanisms are set out in the *MA Act*,[133] and operationally, mutual legal assistance is coordinated under the central authority of the Attorney-General's Department. Commonwealth, State, or Territory agencies may seek legal assistance through the Attorney-General's Department for a range of criminal, regulatory or revenue matters, or be required to provide such assistance as requested. This involves conducting the various elements of an investigation, including the collection of evidence, taking of statements, and freezing and seizure of criminal assets or proceeds of crime. Statistical data on mutual assistance and other forms of international cooperation are maintained and reported by all relevant, competent authorities. In the *MER 2005*, the evaluation team was concerned that the discretionary grounds of the MA Act could be used to refuse certain legal assistance requests involving the collection of funds for terrorist organisations, or the provision/collection

124 Mark Sidel, 'Counter-Terrorism and the Enabling Legal and Political Environment for Civil Society: A Comparative Analysis of "War on Terror" States' (2008) 10(3) *International Journal of Not-for-Profit Law* 7, 41.

125 Arun Srivastava, Mark Simpson and Nina Moffatt, *International Guide to Money Laundering Law and Practice* (Bloomsbury Professional, 3rd ed, 2010) 255.

126 Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2005 (Cth) 97.

127 *AML/CTF Act* s 3(1).

128 Ibid s 3(2).

129 Ibid.

130 Australian Transaction Reports and Analysis Centre, ''Anti-Money Laundering and Counter-Terrorism' Financing Reporting Obligations of Legal Practitioners' (2011) 33(7) *Bulletin of the Law Society of South Australia* 26.

131 *AML/CTF Act* s 212(4). See also Department of the Prime Minister and Cabinet, *Review of Australia's Counter-Terrorism Machinery* (January 2015) < https://www.dpmc.gov.au/sites/default/files/publications/190215_CT_Review_0.pdf>.

132 *MER 2015*, above n 20, 166.

133 *MA Act*.

of funds involving individual terrorists. The FATF was not satisfied that these aspects were sufficiently covered in terrorist financing offence definitions in Australia,[134] and therefore, rated Australia as being Largely Compliant.

The Australian Government provides technical legal assistance to countries to develop anti-money laundering and terrorist financing arrangements, and supports countries in their efforts to confiscate the financial proceeds of terrorism and other crime,[135] but it is particularly due to Australia finally criminalising the collection or provision of funds for an individual terrorist, fulfilling the FATF's request, that its FATF ranking improved, when the *MER 2015* found Australia to be fully Compliant with this standard.[136]

F Money or Value Transfer Services

Money or Value Transfer service operators in Australia must hold an Australian financial services licence in accordance with the provision of financial services under the Corporations Act 2001,[137] however, this does not cover all remittance businesses and there are no general obligations under this Act that such entities be licensed or registered. [138] Money or value transfer service operators are subject to the CFT requirements in the *FTR Act*, and AUSTRAC has made significant progress in identifying and bringing alternative remittance dealers into the compliance regime.[139] Both alternative remittance dealers and formal money or value transfer service operators in Australia are reporting entities, as stated within the cash dealer definition under the *FTR Act*, and are therefore subject to the full range of reporting and record keeping obligations under that Act.

The *MER 2005* declared that Australia should require all money or value transfer service operators to be licensed or registered. Australia should, according to the report, revise the *FTR Act* and subject these operators to comprehensive CFT requirements, and require Money or Value Transfer service operators to maintain a current list of their agents and make these available to AUSTRAC. Australia was rated Partially Compliant with this standard, primarily with respect to the licensing/registration of Money or Value Transfer service and limitations of the *FTR Act*.[140]

Progress was later made through the adoption in 2006 of the *AML/CTF Act*, and in 2007, the AML/CTF Rules.[141] The *AML/CTF Act*, which was introduced to deal with Alternative Remittance, and which brought Australia's AML/CTF regime into accordance with the FATF Recommendations,[142] provides that a person must not provide a registrable remittance network service or designated remittance service unless they are registered as a remittance network provider, a remittance affiliate of a registered

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134 *MER 2005*, above n 19, 133.
135 Department of the Prime Minister and Cabinet, above n 59, 50.
136 *MER 2015*, above n 20, 185.
137 *Corporations Act 2001* (Cth) s 911A.
138 Alison Deitz and John Buttle, *The Anti-Money Laundering Handbook: A Business Guide to Complying with the AML/CTF Legislation* (Lawbook, 2007).
139 Rees, above n 73, 26.
140 *MER 2005*, above n 19, 109.
141 *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No 1)* (Cth).
142 Rees, above n 73, 64.

remittance network provider, or an independent remittance dealer.[143] Sanctions that can be imposed are two-year imprisonment, or fine, or both.[144] AUSTRAC is required to maintain the Remittance Sector Register,[145] and it is up to AUSTRAC to decide to register a person, in accordance with the *AML/CTF Act*, after considering whether that person would pose a significant ML/TF or people smuggling risk should registration be granted.[146] According to the *MER 2015*, the implementation of this standard in Australia was Largely Compliant.[147]

G Wire Transfers

Australia has a mandatory system for submitting reports on all international funds transfer instructions to AUSTRAC. Under the *FTR Act*, the reporting obligations for International Funds Transfer Instructions (IFTI) which defined as 'an instruction for a transfer of funds that is transmitted into or out of Australia electronically or by telegraph, but does not include an instruction of a prescribed kind',[148] require cash dealers to include mandatory information in the reporting of cross border transfers.[149] FTR Regulations outline the details which are required for an IFTI,[150] and, where an IFTI is sent and reported to AUSTRAC, reporting entities are required to report the name and address or location of the originating customer. There are no minimum thresholds for wire transfers under the Australian system. All international funds transfer instructions, whether incoming or outbound, must be reported to AUSTRAC. However, there are no requirements for any information to be recorded for domestic transfers, and there is no obligation to verify that the sender's information is accurate and meaningful, or to require that the account number be included.

Failure to comply with the reporting requirements of the *FTR Act* is a criminal offence, punishable by imprisonment for up to two years, or a fine.[151] Australia was rated in the *MER 2005*, as being Non-Compliant with this wire transfers standard, due to lacking a system with which to implement the requirements; only a reporting obligation for international wire transfers.

Since 2009, Australia has implemented measures intended to solve these shortcomings. Australia now meets the requirements regarding originator information (name, account number or unique transaction reference, address or identity/customer number, or date and place of birth), as well as the requirements for originator information to be retained with a transfer. However, legislation does not yet reflect these elements of this standard: verification of the accuracy of the information, beneficiary information, intermediary financial institutions, and record keeping. Given that the

143 *AML/CTF Act* s 74.
144 Ibid s 74(2).
145 Ibid s 75.
146 Ibid s 75C.
147 *MER 2015*, above n 20, 152.
148 *FTR Act* s 3.
149 Ibid s 17B.
150 *Financial Transaction Reports Regulations 1990* (Cth) regs 2, 11AA.
151 *FTR Act* s 28. Pursuant to s 31 of the *FTR Act*, a person commits an offence if he is a party to cash transactions involving less than $10,000 and it would be reasonable to conclude that the person conducted the transactions in a particular manner as to avoid the transactions being reported. See, eg, *Ansari v R* (2007) 70 NSWLR 89 and *Ansari v R* (2010) 241 CLR 299.

intermediary, beneficiary, verification, money service business, and targeted financial sanctions elements have not yet been updated in accordance with the updated standard, Australia was rated in the *MER 2015* as being Partially Compliant.

H Non-Profit Organisations

Non-profit organisations in Australia are not required to register or incorporate, however, if an organisation does not incorporate, it will not have a legal identity separate to that of its members and will not be eligible for recognition for tax purposes. Australia was rated in the *MER 2005* as being Partially Compliant with this standard. The main shortcomings noted at the time pertained to a lack of follow-up of Non-Profit Organisations (NPO) sector reviews, and a lack of effective implementation of a system to address TF-related NPO risks.[152] The regulator of the Australian NPO sector, the *Australian Charities and Not-for-profits Commission Act 2012*,[153] has some information on those NPOs that voluntarily register for tax purposes, however, none of this information pertains to TF.

While the primary objectives of the *ACNC Act* are to promote good governance, accountability, and transparency, in order for NPO entities to maintain, protect, and enhance public trust and confidence in the NPO sector,[154] these standards only apply to those NPOs that voluntarily register for tax purposes. The ACNC allows certain NPOs to register voluntarily for tax reasons, and in such cases, the NPOs are expected to register certain information and keep certain records.[155] The voluntary registration information includes the charity's responsible persons, including directors, trustees, administrators and receivers, but excludes information about the purpose and objectives of the stated activities. Medium and large charities that voluntarily register must file annual financial reports and annual information statements, while small charities must simply provide annual information statements,[156] and basic religious charities are excluded from the requirement to provide nonfinancial information, even if registered.[157] Record keeping requirements pertaining to financial records which explain transactions, financial positions and performance apply only to those that voluntarily register.[158] The *MER 2015* found Australia to be Non-Compliant with this standard,[159] a poorer rating than that obtained in the Mutual Evaluation Report of 2005.

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152 *MER 2005*, above n 19, 125.

153 *Australian Charities and Not-for-profits Commission Act 2012* (Cth) ('*ACNC Act*'). This Act sets out the objects and functions of the ACNC, as well as the framework for the registration and regulation of charities. Also see *Charities Act 2013* (Cth) which introduces a statutory definition of charity that sets out more clearly the common law meaning of charity and clarifies some areas of uncertainty, and Explanatory Memorandum, Charities (Consequential Amendments and Transitional Provisions) Bill 2013 (Cth).

154 *ACNC Act* s 15.5.

155 Ibid s 25.5.

156 Ibid div 60.

157 For a discussion on the 'chilling effect' upon the willingness of Australian Muslims to carry out their religious obligations and make charitable donations, see Andrew Lynch and Nicola McGarrity, 'How Neutral Laws Create Fear and Anxiety in Australia's Muslim Communities' (2008) 33(4) *Alternative Law Journal* 225, 226.

158 *ACNC Act* ss 55.5(1), 55.1(4).

159 *MER 2015*, above n 20, 148.

I Cash Couriers

According to the *FTR Act*, an incoming or outgoing currency movements report must be completed where currency in an amount exceeding the prescribed threshold of AUD $10,000 in value, or its foreign currency equivalent, is transferred into or out of Australia.[160] Currency is defined as 'the coin and paper money of Australia or of a foreign country that (a) is designated as legal tender; and (b) circulates as, and is customarily used and accepted as, a medium of exchange in the country of issue.'[161] This definition does not include the reporting of Bearer Negotiable Instruments (BNI). Passengers departing from, and arriving in, Australia, must complete either an out-going or in-coming passenger card, which includes a question pertaining to the transfer of currency.[162]

The *Criminal Code* provides a range of penalties that may be applied to persons who deal with (including possession of) proceeds of crime, including money or other property derived from the commission of any indictable offence.[163] The *Code*'s provisions also criminalise the possession of money or property where there is a risk that it could become the instrument of a crime. *The Proceeds of Crime Act* additionally provides powers of confiscation and forfeiture in relation to indictable offences, including offences under the *FTR Act* for breaching cross-border cash reporting requirements. Where the source of the currency is suspected of being related to terrorist financing, confiscation can be sought.[164]

Australia has a comprehensive system for reporting cross-border movements of currency above AUD $10,000 to AUSTRAC. Nevertheless, reporting requirements do not extend to BNI. Therefore, the FATF recommended in the *MER 2005* that Australian legislation be amended to include incoming and outgoing cross-border transportations of BNI, and assigned Australia the rank of Partially Compliant.[165]

In response, Australia implemented a combination of declaration (for cash) and disclosure (for BNI) systems for incoming and outgoing cross-border transportation of currency and BNIs. For cash, whether Australian or foreign, the *AML/CTF Act* requires a declaration for all physical cross-border movements above the threshold of AUD $10,000, whether by travellers or mail and cargo.[166] For BNIs, the traveller must, if required to do so by a police or customs officer,[167] disclose whether or not they have any BNIs with them, and the amount payable of each, and produce every BNI they have to

160 *FTR Act* s 15.
161 Ibid s 3(1).
162 Ibid sch 3.
163 *Criminal Code* div 400.
164 *Proceeds of Crime Act 2002* (Cth) s 19.
165 *MER 2005*, above n 19, 64.
166 *AML/CTF Act* ss 53, 55.
167 This 'disclosure when asked' system enable more targeted use of customs and police resources. For example, officers may request disclosure by particular persons about whom they might already have some relevant intelligence information. See Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2005 (Cth) 7.

the officer.[168] In the event of a false declaration or failure to disclose, regular law enforcement powers can be implemented.[169]

It is apparent that the amendment to include BNI is an implementation of the standard, as the definition of BNI in the *AML/CTF Act*,[170] is almost a mirror of the FATF's definition.[171] These changes were made in order to better implement FATF Recommendations, contained in the *MER 2005*, as explicitly stated in the Explanatory Memorandum to the Anti-Terrorism Bill,[172] and this implementation led to Australia's rating in 2015 of Largely Compliant.[173]

IV CONCLUSION

The FATF has great practical influence over the CTF regime in Australia, as the Australian Parliament, whether sooner or later, is unable to resist the pressure to legislate in accordance with FATF Recommendations. It is true that Australia, like any other country in the world, has not been fully compliant with all FATF Recommendations, and some might argue that this proves the Australian Parliament is able to resist their influence. As seen in this article however, any resistance to comply is temporary. Australia improved the implementation of the Recommendations during the period between the two MER's on Australian CTF as asked, and continues to do so.[174]

Joining the FATF was a decision of the executive arm of government, and as Australia is a member of the FATF, the executive arm is part of the decision-making process, a part of legislating. The mere act of joining the FATF deemed its terms enforceable in Australia, which in turn lends to the argument that the executive arm, rather than parliament, was responsible for introducing enforceable norms.

Australian legislation for counter terrorist financing has undergone several legislative amendments since 9/11. It is evident that Australia has introduced new laws and updated previous ones also in accordance with the UNSC resolutions and the

168 *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) s 53.
169 Ibid ss 199–200.
170 *AML/CTF Act*s 17.
171 *FATF Recommendations*, above n 5, 110.
172 First the FTR was updated and later the *AML/CTF Act*.
173 *MER 2015*, above n 20, 139.
174 As seen with regard to the implementation of different CTF Recommendations. Moreover, in 2006 the Australian government passed the 1st tranche of legislation establishing a new regime to combat money laundering/terrorist financing and to meet Australia's international obligations as a member of FATF. The full implementation of the AML/CTF regime, which will impact accountants as well as lawyers, jewellers and real estate agents, has been delayed for different reasons. In April 2016, the Attorney-General's Department report on the statutory review of the AML/CTF regime identified the 'tranche two' laws as a priority area for action, and it is very likely that the government will take action to address the shortcomings identified by the FATF's MER in the near future. See Thomson Reuters, 'State of Regulatory Reform 2016: A Special Report' (August 2016) 32; Michael Keenan, 'Address at the 2016 Counter-Terrorism Financing Summit' (Speech delivered at the 2016 Counter-Terrorism Financing Summit, Bali, 10 August 2016 <https://www.ministerjustice.gov.au/Speeches/Pages/2016/ThirdQuarter/Address-at-the-2016-Counter-Terrorism-Financing-Summit.aspx/>.

terrorist financing convention which are binding norms, but has legislated and continued to revise its regime in CTF, in accordance with the FATF Recommendations.

Australia's CTF regime is based on international standards developed by the FATF, in response to FATF requirements, and amendments made to various pieces of legislation were made in order to achieve better implementation of the FATF's Special Recommendation. This implementation was criticised by the FATF's *2005 MER*, and new legislation, via the *AML/CTF Act*, was introduced. Once again, the FATF, in 2015, recognised some gaps in the implementation; however, Australia's responses to FATF Recommendations in the past suggest that it is likely to respond to these gaps in the near future.[175]

The causal relationship between both FATF MERs and Australian legislation in the field of CTF supports the argument that two legislative forums exist. The Australian Parliament constitutes the formal legislative forum; while in meting out Recommendations, the FATF—an organisation which Australia joined following a decision of the executive branch which was neither made nor accepted *a fortiori* by the Parliament—constitutes the legislative forum in a practical sense.

175 The rating of compliance with FATF Recommendations of both *MER 2005* and *MER 2015*, attached in appendices A and B respectively. Support for this suggestion can be found in the Attorney-General's Department, *Statutory Review of the Anti-Money Laundering and Counter Terrorism Financing Act 2006 and Associated Rules and Regulations* (2016). This report was made under s 251 of the AML/CTF Act, which required a review of the operation of the AML/CTF Act, and also took into account the relevant findings in the MER 2015 on Australia, and states that '[t]he MER identified a number of deficiencies in the scope of Australia's AML/CTF regime and the preventive measures that apply to regulated entities. These deficiencies have been considered and options explored to improve compliance': at 2.

APPENDIX 1

Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism (2005)

Ratings of Compliance with FATF Recommendations

Recommendations	**Rating**
SR.I: Implement UN instruments	Largely Compliant
SR.II: Criminalise terrorist financing	Largely Compliant
SR.III: Freeze and confiscate terrorist assets	Largely Compliant
SR.IV: Suspicious transaction reporting	Largely Compliant
SR.V: International cooperation	Largely Compliant
SR.VI: AML requirements for money/value transfer services	Partially Compliant
SR.VII: Wire transfer rules	Non-Compliant
SR.VIII: Non-profit organisations	Partially Compliant
SR.IX: Cash couriers	Partially Compliant

APPENDIX 2

Fourth Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism (2015)

Ratings of Compliance with FATF Recommendations

OLD NUMBER* RECOMMENDATIONS	**NEW NUMBER**	**OLD RATING**	**RATING**
SR.I: Implement UN instruments	36	Largely Compliant	Largely Compliant
SR.II: Criminalise terrorist financing	5	Largely Compliant	Largely Compliant
SR.III: Freeze and confiscate terrorist assets	6	Largely Compliant	Compliant
SR.IV: Suspicious transaction reporting	20	Largely Compliant	Compliant
SR.V: International cooperation	37	Largely Compliant	Compliant
SR.VI: requirements for money/value transfer services	14	Partially Compliant	Largely Compliant
SR.VII: Wire transfer rules	16	Non-Compliant	Partially Compliant
SR.VIII: Non-profit Organisations	8	Partially Compliant	Non-Compliant
SR. IX: Cash couriers	32	Partially Compliant	Largely Compliant

* The 'old number' column refers to the corresponding 2003 FATF Recommendation.