

Adviser Update

MAY 2019

Anti-Money Laundering & Counter Financing of Terrorism

Civil enforcement and pecuniary penalties for accountants

AT A GLANCE:

- The AML/CFT regime became effective for practising accountants from 1 October 2018 and penalties for non-compliance are significant.
- The Courts are dealing sternly with contraventions, to deter and denounce non-compliance.
- Accountants need to have robust systems in place, an objective standard for reporting suspicious transactions and clear documentation for all transactions.
- Accountants cannot rely on consultants to achieve compliance.

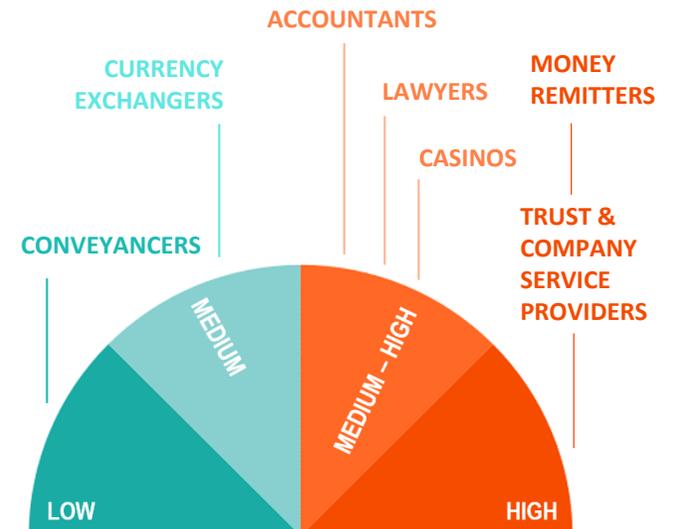
OVERVIEW

Accountants have been assessed as carrying a medium-high risk for money laundering and financing terrorism – the same designation as given to casinos.

The *Anti-Money Laundering and Countering Financing of Terrorism Act 2009* (the Act) imposes onerous obligations on the so-called gate-keeper professionals – including accountants.

Any New Zealand accountant who fails to undertake client due diligence, monitor accounts and transactions, report suspicious transactions or establish, implement and maintain an AML/CFT program will have committed a ‘civil liability act’.

While the costs of compliance are high, and the benefits of the regime are largely unknown, non-compliance has significant risks.



Inherent risk of money laundering and financing terrorism

Department of Internal Affairs –
Phase 2 AML/CFT Sector Risk Assessment ([Read More](#))

The enforcement regime

Where a civil liability act is alleged to have occurred, the Department of Internal Affairs (DIA) may issue a formal warning (which it may publish on its website), accept an enforceable undertaking or apply to the High Court for an injunction or civil pecuniary penalty.

Civil Enforcement – Pecuniary Penalties

Civil pecuniary penalties are monetary penalties designed to punish and deter commercial wrongdoing. Civil pecuniary penalties feature in 18 pieces of legislation but have one consistent feature – they are large.

Under the Act, the maximum pecuniary penalty per civil liability act is \$200,000 for an individual or \$2 million for a body corporate. The civil standard of proof of balance of probabilities applies.

Factors that the Court must consider when determining the amount of the pecuniary penalty include:

- the nature and extent of the civil liability act;
- the likelihood, nature, and extent of any damage to the integrity or reputation of New Zealand’s financial system because of the civil liability act;
- the circumstances in which the civil liability act occurred; and
- whether the person has previously been found by the Court in proceedings under the Act to have engaged in any similar conduct.

LESSONS FROM CASES TO DATE

To date the Courts have considered two cases under the Act: *DIA v Ping An Finance (Group) New Zealand Co Ltd* [2018] 2 NZLR 552 and *DIA v Qian Duoduo Limited* [2018] NZHC 1887. While these cases both involved money remitters, they highlight general principles that will apply to accountants.

In both *Ping An* and *Qian Duoduo* there was a significant degree of non-compliance, including failure to complete customer due diligence and account monitoring or record keeping, and in *Ping An*’s case, to report suspicious transactions.

Reliance on Consultants

Qian Duoduo engaged and placed significant reliance on an expert consultant to achieve compliance. During a three year period the consultant drafted three risk assessments and advised *Qian Duoduo* how to comply with the regime. *Qian Duoduo* implemented the consultant’s recommendations. The consultant confirmed compliance with the Act.

The consultant’s risk assessments were in fact deficient, in part because the consultant lacked a real, detailed understanding of *Qian Duoduo*’s business. The Court did not treat *Qian Duoduo*’s use of a consultant as a defence, but considered it to be a factor substantially reducing *Qian Duoduo*’s culpability. *Qian Duoduo* was ordered to pay \$356,000 in penalties.

Reasonable Grounds for Suspicion

The Act does not state the requisite mental element for failure to report suspicious activities. In *Ping An*, the High Court held that the obligation to report arises when a reporting entity either becomes aware of facts constituting reasonable grounds for suspicion, or through reasonable diligence should have become aware of them. The test is what would an objective observer conclude, rather than whether the reporting entity subjectively considered the activity suspicious.

Ping An tried to argue that it had so little documentation that it could not reasonably have concluded that any transactions were suspicious. The Court inferred that in the absence of documentation explaining the legitimacy of the transactions, *Ping An* was aware (or would have been aware with reasonable diligence) of external indicators of suspicion for at least 173 transactions. This amounted to reasonable grounds for suspicion.

High Pecuniary Penalties

Ping An was ordered to pay \$5.29 million in penalties and banned (together with its director) from carrying out any financial activity requiring AML compliance.

Conclusion

Accountants need to have documentation that explains the legitimate purpose of an activity. Without it, Courts are likely to infer that accountants were aware that the activity in question was suspicious.

Risk assessments are foundation documents for AML processes and must be tailored for the specific practice. AML consultants can be invaluable but accountants must ensure that the consultant meaningfully understands the business.

While the administrative burden of implementing a robust system to achieve compliance is high, this needs to be viewed in light of the Courts' approach of dealing sternly with contraventions.

Reputationally, and financially, being found to be non-compliant could be disastrous for any accounting practice.



Accountants need to have documentation that explains the legitimate purpose of an activity.

Need to know more?

For more information please contact us.



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