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Crime and Corruption
Commission

QUEENSLAND

Our Reference: AD-16-0809 / 17/012785

31 January 2017

Financial Crime Section
Attorney-General's Department
3 - 5 National Circuit
BARTON ACT 2600

By email: antimoneylaundering@ag.gov.au

Dear Sir/Madam

RE: AML/CTF STATUTORY REVIEW IMPLEMENTATION

I refer to the Australian Government's consultation with industry on proposals to implement the first phase of legislative proposals arising from recommendations from the Report on the Statutory Review of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* and Associated Rules and Regulations (the Report).

As part of this consultation, the Attorney-General's Department (the Department) has developed sector-specific consultation papers regarding regulatory models for lawyers, conveyancers, accountants, high-value dealers, real estate agents and trust and company services providers under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.

The Crime and Corruption Commission's submission regarding regulatory models for lawyers, conveyancers, accountants, high-value dealers, real estate agents and trust and company services providers is enclosed.

Yours faithfully

A handwritten signature in black ink, appearing to read 'A. MacSporrán', written over a horizontal line.

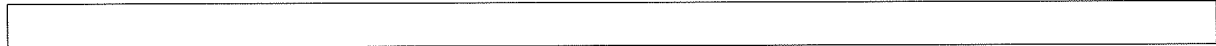
ALAN MacSPORRAN QC
Chairperson

Encl.

January 2017

**Consultation on regulatory models
for lawyers, conveyancers,
accountants, high-value dealers,
real estate agents, trust and
company service providers under
the *Anti-Money Laundering and
Counter-Terrorism Financing Act
2006***

Submission by the
Crime and Corruption Commission



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Introduction

The Australian Government Attorney-General's Department (the Department) has invited submissions on proposals to implement the first phase of legislative reforms arising from recommendations made by the *Report on the Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 and Associated Rules and Regulations* tabled in the Commonwealth Parliament in April 2016 (the statutory review of the AML/CTF Act).

The purpose of the consultation papers is to obtain feedback about options for regulating certain professional 'gatekeepers' to the financial system which transnational and Australian-based crime groups are increasingly making use of to establish networks of businesses, proprietary companies, partnerships and trusts to facilitate money laundering and support criminal activity.

The Crime and Corruption Commission (Qld) (CCC) welcomes this opportunity to participate in the Department's consultation with industry on regulatory models for lawyers, conveyancers, accountants, high-value dealers, real estate agents, and trust and company service providers under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act).

In regard to AML/CTF the CCC is a law enforcement agency with substantial investigative powers but without a specific regulatory role for lawyers, conveyancers, accountants, high-value dealers, real estate agents, and trust and company service providers. The CCC does not intend to comment on specific regulatory and operational practices applicable to the delivery of services by these industries. It is acknowledged that these industries engage daily in a vast number of diverse transactions (ranging from the routine to the complex and complicated) that are all of significant importance to their clients and the general public.

The Department has indicated a preference that submissions be treated as public and made available for publication on its website. The CCC considers this appropriate and has not made any comment or observation on matters that must in the public interest remain confidential.

Consultation papers

The Department has released sector-specific consultation papers developed for industry (the consultation papers)¹ to promote discussion on the topics raised without intending to limit or constrain submissions. The consultation papers are variously called:

- Accountants: a model for regulation under Australia's anti-money laundering and counter-terrorism financing regime – Consultation paper
- High-value dealers: a model for regulation under Australia's anti-money laundering and counter-terrorism financing regime – Consultation paper
- Legal practitioners and conveyancers: a model for regulation under Australia's anti-money laundering and counter-terrorism financing regime – Consultation paper
- Real estate professionals: a model for regulation under Australia's anti-money laundering and counter-terrorism financing regime – Consultation paper
- Trust and company service providers: a model for regulation under Australia's anti-money laundering and counter-terrorism financing regime – Consultation paper

¹ <https://www.ag.gov.au/Consultations/Pages/amlctf-statutory-review-implementation.aspx>

Observations

The consultation papers refer to the World Economic Forum having identified that the use of professional gatekeepers to the financial system is one of two key enablers of money laundering, alongside the related activity of concealing beneficial ownership through complex corporate and trust structures for the purpose of illicit financial transactions.²

The CCC agrees with both of these propositions.

The consultation papers state that:

Financial institutions in Australia currently bear the compliance burden of maintaining robust AML/CTF programs for customers who access the Australian financial system. While these AML/CTF programs increase the risk of detection for criminals seeking to use and exploit the financial system to launder illicit proceeds, they also increase the attractiveness of using the services of professionals ... who operate outside of the AML/CTF framework, to facilitate and disguise financial operations. This, in turn, increases the ML/TF risks faced by financial institutions when they engage in transactions facilitated by these professionals, requiring them to implement enhanced measures to mitigate these risks.³

Indeed, while the CCC is unable to comment on particular matters, it holds the view that some of these professionals may themselves engage in cash handling practices for the purposes of:

- tax evasion
- bankruptcy offences, or
- undermining or subverting proceeds of crime action which is either on foot or in contemplation

Prior to the completion of the statutory review of the AML/CTF Act, the *Queensland Organised Crime Commission of Inquiry Report, October 2015* (QOCCI Report) expressed the hope that the Commonwealth Government amend the AML/CTF Act to cover these non-financial businesses and professions following the Department's review.⁴ The QOCCI Report documented a number of case examples demonstrating how these non-financial businesses and professions may be used to facilitate money laundering and terrorism financing (ML/TF).⁵ AUSTRAC maintains a publicly available library of case studies which also document correlations between services provided by non-financial businesses and professions which may be used to facilitate ML/TF.⁶

The statutory review and the consultation papers make a persuasive case for the Commonwealth Government to realise the hope expressed by the QOCCI Report for regulation of these professional services to promote resilience against, and reduce, ML/TF.⁷

In particular the CCC notes and supports the following propositions:

² World Economic Forum, Global Agenda Council on Organized Crime, *Organized Crime Enablers*, July 2012.

³ Section 2.1 of the consultation papers.

⁴ http://www.organisedcrimeinquiry.qld.gov.au/data/assets/pdf_file/0017/935/QOCCI15287-ORGANISED-CRIME-INQUIRY_Final_Report.pdf, p 529.

⁵ http://www.organisedcrimeinquiry.qld.gov.au/data/assets/pdf_file/0017/935/QOCCI15287-ORGANISED-CRIME-INQUIRY_Final_Report.pdf, pp 504-523

⁶ http://www.austrac.gov.au/casestudies?body_value=&field_industry_ref_tid=All&field_offence_ref_tid=All&field_jurisdiction_ref_tid=All&field_channel_ref_tid=All&page=3 and <http://www.austrac.gov.au/international-case-studies>

⁷ Sections 2.1, 2.2 and 2.3 of the consultation papers.

-
- the regulation of professionals under the AML/CTF regime would help reduce ML/TF risks faced by financial institutions which process transactions conducted by professionals on behalf of a third person⁸
 - High-value dealer (HVD) transactions involving large sums of cash are virtually invisible to law enforcement when no information is collected and verified about the identity of the customer and the source of the customer's funds, and no information is reported to AUSTRAC⁹
 - the regulation of legal practitioners and conveyancers under the AML/CTF would help close a significant regulatory gap of compliance with global standards developed by the Financial Action Task Force (FAFT),¹⁰ and
 - the laundering of illicit funds through the real estate sector not only allows criminals to conceal and enjoy the profits of their crimes, but also can lead to the artificial inflation of property prices¹¹

The CCC considers that ML/TF vulnerabilities and risks have been appropriately identified under section 2.2 of the consultation papers.

Further, the international standards developed by the FAFT for combating ML/TF (and the proliferation of weapons of mass destruction) set out in section 2.3 of the consultation papers are also considered appropriate.

The CCC endorses the recommendations referred to in section 2.3 of the consultation papers which would require AML/CTF obligations to apply to accountants, HVDs, legal practitioners and conveyancers, real estate professionals and TCSPs.

The effective implementation of FAFT recommendations concerning the range of AML/CTF obligations to be applied to lawyers, notaries, other independent legal practitioners and also accountants in the preparation and carrying out transactions for clients¹² are important components of the proposed reforms.

Of particular importance are the recommendations regarding provenance with respect to the creation, operation or management of legal entities and or arrangements and the buying and selling of business entities.

This component is important because it partly compensates for the lack of a uniform national system for the registration of wills, trusts and powers of attorney. The absence of such registers has an undoubted tendency to frustrate both the AML/CTF prevention and risk mitigation strategy. It also impedes regulators and law enforcement agencies within Australia in the efficient and timely undertaking of inquiries regarding the identity of the person or persons who ultimately control, or benefit from, particular transactions which may involve ML/TF risks or related offences.

⁸ See the respective sections 2.1: Accountants – Consultation Paper; Legal Practitioners and conveyancers – Consultation Paper; Real Estate Professionals – Consultation Paper; TCSPs – Consultation Paper.

⁹ Section 2.2, High Value Dealers – Consultation Paper.

¹⁰ Sections 2.1 and 4.3, Legal practitioners and conveyancers – Consultation Paper.

¹¹ Section 2.1, Real Estate Professionals – Consultation Paper.

¹² Section 2.3, Accountants – Consultation Paper; section 2.3, Legal Practitioners and conveyancers – Consultation Paper.

Models for regulation

Each of the consultation papers proposes a model for regulation of the respective industry. The model details are usually contained in the relevant consultation papers under either section 6 or 7 and Annexure A.¹³

In short, these models comprise the following elements:

- Enrolment with the Australian Transaction Reports and Analysis Centre (AUSTRAC)
- Customer due diligence (CDD)
- Ongoing customer due diligence
- Reporting obligations
- Internal controls – AML/CTF programs
- Record-keeping
- Monitoring and supervision

The CCC supports these proposals.

The model assumes that all industry participants are interested in promoting AML/CTF strategies and mitigating ML/TF risk.

While it is not an issue that has been directly raised by the consultation papers the extension of the AML/CTF to the proposed professional service providers will also likely need to be accompanied by an increased sanction regime. This will be necessary in order to promote compliance by businesses and individuals as a matter of their personal self-interest, if not the public interest. Increased penalties may be required in order to effectively remove from the relevant industries those businesses and individuals demonstrated to be either unwilling or unable to effectively comply with their AML/CTF obligations.

The CCC strongly supports the development of robust internal controls – AML/CTF programs which provide protection and guidance for those upon whom the day to day compliance burden may fall within businesses.

In the CCC's experience the lack of a developed internal policy and procedure for cash handling and reporting requirements compounds a lack of understanding by administrative and professional staff of risks associated with receiving large cash sums and awareness that this could in certain circumstances amount to money-laundering.

It is important that the existing reporting obligations and the policy reasons for these obligations are matters which are well understood by junior and mid-level professional staff. This needs to form part of both continuing professional and in-house education programs which should also be supported by avenues to seek advice if staff are requested to undertake practices which are not consistent with legal obligations.

It is noted that if implemented:

- the key pillar underlying compliance is Australia's AML/CTF risk-based approach which allows businesses to implement their obligations in a way which is proportionate to their level of ML/TF risk.
- the affected individual businesses, industries and industry group representatives may incur substantial expenditure and require lead in times to comply with the proposed reform models.

¹³ In in the case of the Real-Estate Agents and Trust and Company Service Provider consultation papers, see section 6 and Annexure A; in the case of the Accountants, High-value dealers and Legal practitioners and conveyancers consultation papers, see section 7 and Annexure A.

The FATF has assessed that in some industries there is a widespread lack of awareness of ML/TF risk and vulnerability to being exploited by clients seeking to misuse legitimate professional services.¹⁴ While lawyers and accountants ordinarily would incorporate due diligence obligations into their daily practice, some industries or some individual businesses within all industries may not have developed appropriate practices for customer due diligence around proof of client and other party identity. Accordingly, each of the affected industries (or particular parts of an industry) may require a transition period to develop capacity to systematically implement an effective and appropriately informed risk-based approach. For example, in Queensland there may be a need for widespread industry consultation about the terms and conditions for standard contracts for the sale of land regarding whether or not the contract should provide for termination on grounds that a party was unable to satisfy AML/CTF CDD requirements.

- best practice may require that those businesses and financial institutions providing a regulated service under the AML/CTF Act (a 'designated service') do not cede, transfer, or contract out their AML/CTF compliance responsibilities to other entities involved in the same or related transactions. The overall strength of the AML/CTF risk mitigation regime may be enhanced in many circumstances when records¹⁵ held by independent entities which provide relevant designated services in related transactions are able to be compared with those held by the other entities providing designated services related to the transactions and also those held by various regulators and law enforcement agencies.
- the structuring offence provisions under the AML/CTF Act will apply to the proposed entities providing designated services unless they are of a kind exempted under the AML/CTF rules.
- legal professional privilege will prevail over certain AML/CTF obligations unless Parliament expressly provides otherwise. The CCC takes the view that in regard to the CDD, ongoing CDD, threshold transaction reporting (TTR) and suspected matter reporting (SMR), internal controls and record-keeping obligations proposed, legal professional privilege should be expressly excluded, subject to some exceptions.

The CCC recommends that legal professional privilege only override TTR and SMR reporting obligations in those circumstances, if any, where the lawyer obtained knowledge by means of communications for the dominant purpose related to the proper seeking/providing legal advice or for use in existing or anticipated legal proceedings. For example, the privilege would apply when taking instructions from a client under investigation or charge for a suspected criminal offence. However, the privilege would not be available when a lawyer prepares for or carries out transactions for their client as detailed in section 2.3 of the relevant consultation paper.¹⁶ Of course legal professional privilege does not in any circumstances have application to communications associated with perpetrating a crime or fraud or to further an illegal purpose.¹⁷

¹⁴ Section 2.2 Legal Practitioners and conveyancers – Consultation Paper; section 2.2, Real Estate Professionals – Consultation Paper; and sections 2.2 and 2.3 High Value Dealers – Consultation Paper.

¹⁵ These records relate to the identity of the parties to the relevant transactions and the provenance of funds involved in these transactions.

¹⁶ Legal Practitioners and conveyancers – Consultation Paper.

¹⁷ *Cross on Evidence*, [25210], [25225], [25285] and [25290].

<http://www.lexisnexis.com/au/legal/results/tocBrowseNodeClick.do?rand=0.7370724761164733&tocCSI=267939&clickedNode=TAAOAABAAEAADAACAAC&refPt=TAAC>

Criminal Proceeds Confiscation Act 2002 (Qld)

The proposals to extend AML/CTF CDD, ongoing CDD and internal control obligations are not inconsistent with existing due diligence requirements necessarily implied from sections 25, 26(a) and 27 of the *Criminal Proceeds Confiscation Act 2002* (the CPC Act). Sections 25, 26(a) and 27 of the CPC Act are reproduced below.

25 Property retains its character despite disposal

Illegally acquired property or serious crime derived property retains its character—even if it is disposed of, including by using it to acquire other property—until it stops being property of that character under section 26.

26 When property stops being illegally acquired property or serious crime derived property

Property stops being illegally acquired property or serious crime derived property—

(a) when it is acquired by a person for sufficient consideration, without knowing, and in circumstances not likely to arouse a reasonable suspicion, that the property was illegally acquired property or serious crime derived property; ...

27 Property may again become illegally acquired property or serious crime derived property

If property that was, but is no longer, illegally acquired property or serious crime derived property is again acquired by the person who owned it when it had that character, the property again becomes property of that character unless it is acquired by the person under an order under this Act.

As long as persons involved in property transactions take reasonable measures to establish that there are no circumstances likely to arouse a reasonable suspicion that the property involved in the transaction was illegally acquired property or serious crime derived property, the CPC Act has the effect of protecting the integrity of:

- (i) property transactions in and outside Queensland¹⁸
- (ii) fees for professional services directly or indirectly derived from property transactions in and outside Queensland¹⁹

While the CPC Act does not provide any specific or general guidance about the nature, substance and scope of the relevant measures to be taken to comply with the CPC Act, it is considered that CDD and ongoing CDD and internal control obligations inherent in the proposed reforms to the AML/CTF Act would likely promote the development of documented best practice measures for relevant industries.

Conclusion

The CCC supports the proposals put forward by respective consultation papers on regulatory models for lawyers, conveyancers, accountants, high-value dealers, real estate agents, trust and company service providers under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.

¹⁸ Pursuant to s 5A of the *Criminal Proceeds Confiscation Act 2002*, that Act applies outside Queensland to the full extent of the extraterritorial legislative power of the Queensland Parliament.

¹⁹ Pursuant to s 5A of the *Criminal Proceeds Confiscation Act 2002*, that Act applies outside Queensland to the full extent of the extraterritorial legislative power of the Queensland Parliament.



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