



**SUBMISSION ON THE PROPOSED REGULATION OF REAL ESTATE
PROFESSIONALS UNDER THE *ANTI-MONEY LAUNDERING AND COUNTER-
TERRORISM FINANCING ACT 2006 (CTH)* (“AML/CTF ACT”)**

Introduction

1. We thank the Attorney-General’s Department for the opportunity to provide a submission on the proposed regulation of real estate professionals under the AML/CTF Act.

2. Our submission is primarily directed to question 3 in the Consultation Paper, which asks:

What are the benefits of requiring real estate professionals to comply with AML/CTF obligations when performing services that may pose an ML/TF risk?

3. In short, the proposed regulation would bring obvious crime prevention benefits. While real estate presents a relatively straightforward and secure means of concealing proceeds of crime, the existing State and Territory regulation of the profession is neither designed nor adequate to manage such risks. A stand-alone regime that sees real estate professionals serving as the first line of defence against money-laundering and terrorism-financing (“**ML/TF**”) is now required.

4. However, rather than focussing on these crime prevention benefits, our submission highlights the way in which the proposed regulation would complement other recent legislative reforms that have been implemented to support the industry and the public generally. Specifically, the underquoting reforms undertaken at a State level and the Commonwealth foreign investment reforms have respectively sought to restore public confidence in the real estate sector by targeting issues that concern the price of real estate.

5. Our submission also comments on what, in our view:
 - (a) the regulation should look like, bearing in mind the preference expressed in the Consultation Paper towards a risk-based approach; and
 - (b) the consequences of non-compliance should be, including whether there should be any effect on a real estate agent's licence.

Why regulate?

Underquoting reforms

6. In the past year, the Victorian and NSW State Governments have both strengthened their laws on the problem of “underquoting” in the real estate sector.
7. The Victorian Parliament passed the *Estate Agents Amendment (Underquoting) Bill 2016* (Vic) in October 2016, which will come into effect on a day to be proclaimed.
8. The *Estate Agents Act 1980* (Vic) previously required agents to give an estimate of the selling price of real estate based on the amount that they believed “a willing but not anxious buyer” would pay, or the range within which that amount was likely to fall. In addition, the Director of Consumer Affairs Victoria could compel agents to provide evidence of the reasonableness of their estimates.
9. The new laws will now impose a positive obligation on agents to ensure that their estimates are reasonable from the outset, having regard to three recent comparable sales. They will also ban certain forms of advertising (e.g. ranges of more than 10% and the use of phrases such as “offers above” or “from”) and require estimates to be updated if the seller rejects a higher offer.
10. Similarly, amendments introduced in January 2016 to the *Property, Stock and Business Agents Act 2002* (NSW) require agents to ensure that their estimates are, and remain, “a reasonable estimate of the likely selling price”.
11. These reforms aim to:
 - (a) give the public confidence that agents’ estimates are likely to reflect the actual selling price; and
 - (b) in turn, ensure that prospective home-buyers do not waste time and money inspecting properties that are out of their budget.
12. However, the potential for ML/TF through the real estate sector poses a threat to undermine the effectiveness of the underquoting reforms. As identified in the Consultation Paper, those engaged in such activities “may be willing to pay more than the fair market value to secure a safe investment which minimises the chance of detection”. This means that, despite agents’ best efforts to provide a reasonable estimate, the actual selling price of a property may prove to be far outside the advertised range.

13. In this context, regulating real estate professionals under the AML/CTF Act would serve two purposes:
 - (a) it would lessen the ML/TF risk, which would in turn increase the accuracy of agents' estimates and help consolidate the work undertaken on underquoting by the State legislatures and the real estate profession; and
 - (b) it would show that the industry is taking responsibility for the deleterious impact that ML/TF activities have on the price of real estate and the reputation of their profession. This serves to enhance the overall public perception of the real estate profession just as the underquoting reforms were also designed to achieve.

14. Evidently, these purposes not only serve consumers and the community at large, but also the real estate profession. We consider that effectively communicating these benefits to the profession should be a key part of the Commonwealth Government's strategy in rolling out whatever regulation results from the Statutory Review.

Foreign investment reforms

15. In December 2015, the Commonwealth Government amended the *Foreign Acquisitions and Takeovers Act 1975* (Cth) to prohibit foreign residents from purchasing existing dwellings in Australia, except in limited circumstances.
16. The Commonwealth Government has explained that these laws “*seek to channel investment into new housing to increase housing supply and support economic activity.*”¹ The aim of increasing supply is, of course, to increase housing affordability.
17. However, just as ML/TF threatens the effectiveness of the underquoting reforms, it is also contrary to the objectives behind the foreign investment reforms. While the precise effect of ML/TF on the Australian property market is unknown, it is plausible that its contribution to the current high price of real estate is just as significant as foreign investment – if not more so. Furthermore, unlike foreign investors, the demand created by those engaged in ML/TF is entirely illegitimate. They are not genuine participants in the property market, but merely seek to invest in it as a way of concealing illegally obtained funds.
18. In this sense, regulation designed to prevent ML/TF would stand alongside the foreign investment reforms as measures which the Commonwealth Government has taken to increase housing affordability.

¹ Australian Government, *Foreign Investment Reforms Factsheet: Residential Real Estate*, available at https://firb.gov.au/files/2015/09/FIRB_fact_sheet_residential.pdf.

What should the regulation look like?

19. In line with the recommendations of the Financial Action Task Force, we support the adoption of a risk-based approach to the regulation of real estate professionals under the AML/CTF Act. This means that the laws should be flexible enough to ensure that the obligations on real estate professionals are commensurate with the risks in different circumstances, allowing resources to be allocated in the most efficient ways.²
20. However, the laws should not be left so vague and open-ended that real estate professionals do not know what their AML/CTF obligations entail. Any doubt as to what is required could cause regulated individuals to pursue overly cautious measures, particularly if the penalties for non-compliance are serious. This would be contrary to the resource-saving justification for the risk-based approach.
21. An example can be made of the proposed obligation to conduct ongoing customer due diligence. Section 36 of the AML/CTF Act currently provides that a reporting entity must monitor its customers with a view to identifying, mitigating and managing the risk that the reporting entity may reasonably face that the provision of its services might involve or facilitate money laundering or terrorism financing.
22. This provision is clearly consistent with a risk-based approach. However, more detailed legislative guidance should be offered as to the kinds of factors that ought to trigger the application of enhanced due diligence measures for real estate professionals. This is to some extent achieved by Chapter 15 of the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No 1) (Cth)* (“**AML/CTF Rules**”),³ although those rules are not specific to any particular profession. Some ‘triggers’ for the application of enhanced due diligence measures by real estate professionals could include:
 - (a) transactions involving overseas purchasers;
 - (b) transactions involving entities with suspiciously complex corporate structures;
 - (c) transactions involving unusual forms of financing;
 - (d) transactions where speed is a significant and unexplained priority of either or both of the parties; and

² Financial Action Task Force, *RBA Guidance for Real Estate Agents*, 17 June 2008.

³ See, in particular, rule 15.9.

- (e) proposed or actual transactions at significant under- or over-value.
23. Another means of giving certainty to risk-based legislation would be to clearly enunciate the minimum requirements that real estate professionals must abide by at all times. While the AML/CTF Rules do express what must, at a minimum, be included in a reporting entity's AML/CTF program, a simple, concise and comprehensive document on the full suite of AML/CTF obligations could be developed and tailored to the real estate profession. The document could be modelled similarly to the Victorian Government's recently introduced Child Safe Standards. The Standards set out the baseline requirements that organisations providing services to children must follow, while allowing those organisations to retain some flexibility as to precisely how they achieve compliance.
24. Finally, the regulation should be framed in a way that is mindful of the need to take *proactive* (rather than merely *reactive*) steps to combat ML/TF. In other words, there should be an emphasis on preventing ML/TF *before* it occurs, rather than simply identifying it *when* it is occurring. One way in which this could be achieved is by requiring real estate professionals to provide new clients with a prescribed form 'Information Statement' on their ML/TF obligations. The Information Statement could, for example, require the client to acknowledge that suspicious activity will be communicated to AUSTRAC. Such a document would serve two purposes:
- (a) It would explain to innocent clients why the collection of due diligence information is necessary; and
 - (b) It would show to non-innocent clients that ML/TF is at the forefront of the industry and the regulator's mind, which may have a deterrent effect.

What should be the consequences of non-compliance?

25. Many of the obligations on reporting entities under the AML/CTF Act are civil penalty provisions, giving the Federal Court the ability to impose significant pecuniary penalties in the event of breach.
26. As noted in the Consultation Paper, real estate professionals are generally subject to licensing requirements under State and Territory legislation. An important question therefore arises as to:
 - (a) whether a breach of AML/CTF obligations by a real estate professional should have pecuniary consequences only; or
 - (b) whether it should be considered a matter that affects the professional's continued fit and proper status to hold a licence.
27. While there is a need to ensure that the penalties for non-compliance are not disproportionate to the breach (for the reasons discussed above at paragraph 20), it seems fair that those who repeatedly flaunt their AML/CTF obligations should have some restrictions imposed on their ability to continue practising the profession.
28. Obviously, it is not possible for the Commonwealth Government to legislate what effect a breach of AML/CTF obligations will have under State and Territory licensing legislation. However, the Commonwealth Government may wish to consider implementing a notification procedure to ensure that breaches are communicated to the relevant State and Territory regulators.
29. The desirability of ensuring consistent treatment of breaches by those regulators may also be a matter for discussion at a Council of Australian Governments' meeting.

Conclusion

30. In sum, we consider that there are benefits for both consumers and the profession in regulating real estate professionals under the AML/CTF Act.
31. As to the form of such regulation, we note that while a risk-based approach allows for the most efficient allocation of resources, the rules must contain sufficient guidance to ensure that real estate professionals understand what their obligations entail.
32. Finally, the Commonwealth Government must consider whether, and in what circumstances, a breach of AML/CTF obligations should have implications for a real estate agent's licence – and if so, how (e.g. via a notification procedure to State and Territory regulators).
33. If you would like to discuss any aspect of our submission further, please contact Damien Schulze, Associate, on (03) 9843 0404 or via email at DSchulze@moores.com.au.