



**Australian Government**  
**Attorney-General's Department**

November 2016

## **Consultation paper**

### **Real estate professionals: a model for regulation under Australia's anti-money laundering and counter-terrorism financing regime**

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# 1. Introduction

## 1.1 What is the purpose of consultation paper?

The purpose of this consultation paper is to obtain feedback about options for regulating real estate professionals under Australia's anti-money laundering and counter-terrorism financing (AML/CTF) regime.

Money laundering and terrorism financing are serious financial crimes that pose a threat to Australia's economic and financial stability and national security.

Money laundering is the processing of criminal profits to disguise their illegal origins. Successful money laundering arrangements allow criminals to enjoy the benefits of the profits of their crimes without drawing attention to themselves, and reinvest the profits in future criminal activity or in legitimate business.

Terrorist financing involves the raising of funds to supply terrorists with the resources they need to carry out their activities. Terrorists and terrorist organisations require only relatively small amounts of money to undertake terrorist attacks on Australian soil or to support terrorist activities overseas.

To combat these serious threats, Australia has implemented an AML/CTF regime. This regulatory regime requires businesses to comply with a number of obligations when they provide specific services that pose money laundering and terrorism financing (ML/TF) risks. These obligations are designed to mitigate these risks and include customer due diligence (CDD), reporting, record-keeping, and compliance programs.

Businesses currently regulated under the AML/CTF regime are supervised by AUSTRAC for compliance with these obligations, Australia's AML/CTF regulator and financial intelligence unit (FIU). The information these businesses collect and report to AUSTRAC about the movement of funds and assets as part of their AML/CTF obligations forms the basis of valuable financial intelligence that enhances the ability of law enforcement agencies to detect, deter and prevent crime.

In Australia, like elsewhere in the world, the buying and selling of real estate poses significant ML/TF risks.<sup>1</sup> The availability of high-value properties, Australia's stable economy and the absence of AML/CTF regulation of the real estate sector offer ideal opportunities to launder large volumes of illicit funds.<sup>2</sup> Increasingly countries are regulating real estate professionals for AML/CTF purposes to mitigate these risks and comply with the international standards for combating ML/TF and other serious crimes set by the Financial Action Task Force (FATF), an intergovernmental body.<sup>3</sup> These standards require real estate professionals to be subject to AML/CTF regulation when they are involved in certain transactions for a client that pose high ML/TF risks.<sup>4</sup>

This consultation paper initiates discussion about a model for regulating real estate professionals in Australia, implementing a key recommendation from the *Report of the Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 and the Associated Rules and Regulations*.<sup>5</sup> The statutory review provided an opportunity to explore options to shape a modern AML/CTF regime that positions Australia to address current and future challenges, as well as respond to the findings of the FATF's 2015 assessment of the effectiveness of Australia's AML/CTF regime. The FATF's report strongly criticises Australia's non-regulation of

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<sup>1</sup> AUSTRAC, *Money laundering in Australia 2011*, p. 25, [www.austrac.gov.au/money\\_laundering\\_in\\_australia\\_2011.html](http://www.austrac.gov.au/money_laundering_in_australia_2011.html).

<sup>2</sup> *Ibid.*

<sup>3</sup> The Financial Action Task Force is an inter-governmental policy-making body that promotes the effective implementation of measures for combating ML/TF and other related threats to the integrity of the international financial system.

<sup>4</sup> FATF Recommendation 22, criterion 22.1(b)

<sup>5</sup> Attorney-General's Department, *Report on the Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 and Associated Rules and Regulations* (April 2016), Canberra. Available online at:

[www.ag.gov.au/consultations/pages/StatReviewAntiMoneyLaunderingCounterTerrorismFinActCth2006.aspx](http://www.ag.gov.au/consultations/pages/StatReviewAntiMoneyLaunderingCounterTerrorismFinActCth2006.aspx)

real estate professionals (and a number of other sectors) under the AML/CTF regime and recommends their inclusion as a matter of priority.<sup>6</sup>

The report on the statutory review was tabled in Parliament in April 2016. The report identified a need to strengthen capabilities to mitigate ML/TF risks within the real estate sector but noted that regulating the sector under AML/CTF regime would have a significant regulatory impact. In view of this impact, the report recommends consultation with industry to design an efficient regulatory model for the sector and for the costs and benefits of this model to be examined.

**Recommendation 4.6:** *The Attorney-General's Department and AUSTRAC, in consultation with industry, should:*

- a) *develop options for regulating lawyers, conveyancers, accountants, high-value dealers, real estate agents and trust and company service providers under the AML/CTF Act, and*
- b) *conduct a cost-benefit analysis of the regulatory options for regulating lawyers, accountants, high-value dealers, **real estate agents** and trust and company service providers under the AML/CTF Act.*<sup>7</sup>

The release of this paper represents the first step towards implementing the aspects of this recommendation that relate to real estate professionals.

## 1.2 How can you have your say?

Public submissions are invited on the issues raised in this consultation paper. While questions are included at the end of each chapter to guide discussion, these are not intended to limit or constrain stakeholders in their responses.

Submissions can be sent to:

### **Financial Crime Section**

Transnational Crime Branch  
Criminal Justice Policy and Programmes Division  
Attorney-General's Department  
3-5 National Circuit  
BARTON ACT 2600

Submissions may also be submitted electronically to [antimoneylaundering@ag.gov.au](mailto:antimoneylaundering@ag.gov.au) or by facsimile to (02) 6141 2873. The closing date for submissions is **31 January 2017**.

All submissions and the names of persons or organisations that make a submission will be treated as public, and may be published on the Department's website, unless the author clearly indicates to the contrary. A request made under the *Freedom of Information Act 1982* for access to a submission marked confidential will be determined in accordance with that Act.

## 1.3 What are the next steps?

Roundtable discussions will be arranged with industry representatives and other interested stakeholders after the closing date for submissions to discuss and clarify the issues raised in the responses to the consultation paper.

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<sup>6</sup> Financial Action Task Force, *Anti-money laundering and counter-terrorist financing measures, Australia: Mutual Evaluation Report, April 2015*: <http://www.fatf-gafi.org/documents/documents/mer-australia-2015.html>.

<sup>7</sup> *Ibid.*

The feedback from the submissions and the roundtable discussions will be considered as part of designing a model for AML/CTF regulation of the sector. This model will be subject to a cost-benefit analysis to allow the Government to assess the benefits of regulating these sectors relative to regulatory costs and make an informed decision about any future regulation.

Industry will be consulted about the conduct of the cost-benefit analysis.

## 2. Why regulate real estate professionals?

### 2.1 What are the benefits of regulating real estate professionals?

The AML/CTF regime provides the foundation of Australia's commitment to meet the FATF's global standards for combating ML/TF and other serious crimes.<sup>8</sup> These global standards apply to financial institutions and a number of businesses and professions: lawyers; accountants; casinos; dealers in precious stones and precious metals; real estate professionals; and trust and company service providers.

The regulation of real estate professionals under the AML/CTF regime would deliver a number of benefits. These include spreading the regulatory burden associated with combating ML/TF, closing a regulatory and intelligence gap, enhancing national security, and enhancing the reputation of the Australian financial system.

Australia's AML/CTF regime currently only comprehensively regulates financial institutions, bullion-dealers and gaming providers. The robustness of AML/CTF measures for these sectors under the regime increases the risk of detection and disruption for those seeking to misuse the services they provide to launder illicit proceeds or finance terrorism. However, the gap generated by the non-AML/CTF regulation of other sectors increases the attractiveness of using these sectors to launder illicit funds.<sup>9</sup> This, in turn, increases the risks faced by financial institutions when they engage in transactions facilitated by these sectors, increasing their compliance burden as they implement measures to mitigate these risks.<sup>10</sup>

Australia is likely to be an attractive destination for the investment foreign proceeds of crime in real estate, particularly corruption-related proceeds from the Asia-Pacific region. Laundering illicit funds through the real estate sector not only allows criminals to conceal and enjoy the profits from their crimes, but also can lead to the artificial inflation of property prices, as the criminal may be willing to pay more than the fair market value to secure a safe investment which minimises the chance of detection.

The AML/CTF regulation of real estate professionals would enhance the sector's awareness of ML/TF risks and harden the sector against criminal exploitation. AML/CTF regulation would prompt real estate professionals to fully consider and better understand the identity of their client and the source of funds used by a client for a transaction. In particular, an obligation to conduct CDD would assist real estate professionals to identify 'red flags' that may be early indicators of criminality or potential misconduct.<sup>11</sup> While these indicators should not automatically be considered as a basis for a suspicion of ML/TF, where there are a number of indicators, it is more likely that an accountant should have a suspicion that ML or TF is occurring. Where real estate professionals are subject to AML/CTF obligations, they can report suspicions about specific customers or transactions earlier in the transaction chain than occurs currently, activate the protections of the AML/CTF Act and provide 'early warnings' that would enhance the ability of law enforcement and national security agencies to detect and disrupt criminal activities.

Robust CDD requirements for real estate professionals would also enhance Australia's visibility and transparency of beneficial ownership of trusts and company structures that purchase and sell property, assist in the identification of individuals seeking to circumvent Australia's foreign investment requirements and prevent the fraudulent sale of property by individuals with no title to the property.

More broadly, the AML/CTF regulation of real estate professionals would:

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<sup>9</sup> FATF, *Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals*, 2013, p. 7

<sup>10</sup> Australian Bankers' Association, *Submission, Statutory Review of the AML/CTF Regime*, 2014, p. 9

<sup>11</sup> Red flags illustrate the types of abnormal or unusual circumstances that may give rise to a reasonable suspicion that a transaction may involve ML/TF or other criminal activity.

- strengthen the reputation of the sector and build a collaborative partnership with AUSTRAC and law enforcement agencies to combat and disrupt ML/TF
- fill intelligence gaps and improve the ability for Australia’s intelligence community to discover, understand, and disrupt money laundering, terrorist financing, and the serious offences that predicate these activities
- reduce the harm and adverse impacts of ML and TF on the Australian economy and society
- enhance national security
- enhance Australia’s international reputation as a destination for foreign business and investment, and
- more closely align Australia’s AML/CTF regime with the FATF’s international standards for combating ML/TF.

## 2.2 What are the ML/TF vulnerabilities of the real estate sector?

Real estate can be an attractive channel for criminals wishing to launder illicit funds for a number of reasons. Criminals can purchase a property using large sums of cash, live in the property, renovate the property (using illicit cash) to improve its value and sell the property at a later date for a capital gain. The ultimate beneficial ownership of real estate can also be easily concealed.<sup>12</sup>

Some common methods of money laundering through the real estate sector include:

- the use of third parties to buy and sell properties
- the use of loans and mortgage (for example, criminals take out a mortgage to buy a property and pay back the mortgage using lump sum cash payments)
- manipulating property values (that is, criminals buy and sell real estate at a price above or below market value)
- structuring cash deposits to buy real estate (that is, criminals deposit cash below the reporting threshold of AUD10,000 at different banks and then use these deposits to obtain a bank cheque to buy a property)
- the use of complex company structures and multiple accounts to disguise the real purpose of a property transaction and disguise its true ownership
- buying and leasing properties, but providing the tenant with illicit funds to pay the rents
- buying a property using illicit funds with the intention of conducting further criminal activity at the property, and
- using illicit funds to renovate properties.<sup>13</sup>

A particular ML/TF vulnerability for property developers is the potential for a foreign purchaser to buy new properties in Australia using illicit funds. While there are rules surrounding foreign investment in residential real estate, the goal of these rules is to bolster housing supply by directing foreign investment into new housing rather than to verify the identity of the purchaser of the property and scrutinise the transaction from an AML/CTF perspective.

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<sup>12</sup> AUSTRAC, *Strategic analysis brief: Money laundering through real estate*, 2015, <http://www.austrac.gov.au/sites/default/files/sa-brief-real-estate.pdf>.

<sup>13</sup> AUSTRAC, *Strategic analysis brief: Money laundering through real estate*, 2015, <http://www.austrac.gov.au/sites/default/files/sa-brief-real-estate.pdf>, pp. 7-10.

The risks associated with conveyancing are considered in the discussion paper '*Legal practitioners and conveyancers: a model for regulation under Australia's anti-money laundering and counter-terrorism financing regime*'.<sup>14</sup>

## 2.3 What are the international standards for regulating real estate professionals?

The AML/CTF regime provides the foundation of Australia's commitment to meet international standards for combating ML/TF set by the FATF.<sup>15</sup>

The FATF standards require AML/CTF obligations to apply to real estate professionals when they are involved in transactions for a client concerning the buying and selling of real estate.<sup>16</sup>

The FATF's AML/CTF obligations for real estate professionals centre on:

- CDD (customer identification and verification, ongoing due diligence, transaction monitoring and enhanced due diligence)
- applying enhanced due diligence to 'politically exposed persons' (PEPs)<sup>17</sup>
- assessing and mitigating the ML/TF risks associated with new technologies
- specific measures for relying on customer due diligence performed by third parties
- suspicious matter reporting
- internal controls and special measures for mitigating risks for foreign branches and subsidiaries, and
- enhanced due diligence when dealing with higher risk countries.

### DISCUSSION QUESTIONS

1. What services provided by real estate professionals pose a ML/TF risk?
2. Are there circumstances where the buying and selling of real estate in the Australian context poses a low ML/TF risk?
3. 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?

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<sup>14</sup> Available at <https://www.ag.gov.au/Consultations/Pages/Consultation-on-AMLCTF-review-reform-project-plans.aspx>

<sup>15</sup> Financial Action Task Force, *International Standards on combating money laundering and the financing of terrorism and proliferation, The FATF Recommendations*, February 2012, available online at [www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html](http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html)

<sup>16</sup> *Ibid*, see FATF Recommendation 22.

<sup>17</sup> The FATF identifies three categories of PEPs: *Domestic PEPs* are individuals who hold a prominent public position or function in an Australian government body; *Foreign PEPs* are individuals who hold a prominent public position or function in a government body of a foreign country; and *International organisation PEPs* are individuals who hold a prominent public position or function in an international organisation.



### 3. What existing laws regulate real estate professionals?

Real estate professionals are generally subject to regulatory or professional licensing or registration requirements under state and territory legislation.<sup>18</sup> These typically involve passing a ‘fit and proper person’ test and a requirement to hold prescribed, minimum qualifications. Licensing and registration requirements can also impose rules of conduct or obligations.

For example, in NSW regulations prescribe rules of conduct to be observed in the course of the carrying on of business or the exercise of functions under a real estate agent licence or certificate of registration. The rules of conduct generally require agents to comply with the fiduciary obligations arising as an agent, act honestly, fairly and professionally with all parties in a transaction, exercise reasonable skill, care and diligence, act in the client’s best interest at all times unless it would be contrary to the *Property, Stock and Business Agents Act 2002* or regulations under that Act or otherwise unlawful to do so.<sup>19</sup> Penalties apply for breaches of these rules of conduct and disciplinary action can be taken by the Department of Fair Trading, which can lead to licence cancellation and disqualification.<sup>20</sup>

The NSW licensing scheme for real estate agents also requires agents to undertake continuing professional development each year to ensure they remain up to date and competent in the skills and knowledge needed to do their jobs.

In Victoria, real estate agents are licensed by Consumer Affairs Victoria.<sup>21</sup> Consumer Affairs can investigate real estate agents that may have breached their legal obligations under state legislation and has the power to cancel or suspend licenses and disqualify agents from practicing for a period of time.<sup>22</sup>

More generally, real estate businesses across Australia are required to keep certain business records for five years under taxation law and seven years under corporations’ law, where applicable.<sup>23</sup>

While the existing framework for licensing and/or registering real estate agents at the state and territory level provides some oversight of the sector, it is not tailored to mitigate the risks posed by ML/TF. There are no obligations for the real estate sector to understand their MT/TF risks and implement specific ML/TF risk mitigation policies that include CDD and reporting obligations. However, real estate transactions do intersect with the regulated AML/CTF sector as they most commonly go through a financial institution (for example, loans, mortgages, deposits or withdrawals). This intersection gives law enforcement some visibility over real estate transactions.

#### DISCUSSION QUESTIONS

4. To what extent are the AML/CTF customer due diligence obligations already reflected in existing regulation (including self-regulation) for Australian real estate professionals?
5. To what extent do existing mechanisms that allow for oversight of real estate transactions mitigate the ML/TF risks posed by services that provide for the buying and selling of real estate?

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<sup>18</sup> See *Property, Stock and Business Agents Act 2002* (NSW); *Estate Agents Act 1980* (Vic); *Property Agents and Motor Dealers Act 2000* (Qld); *Property Agents and Land Transactions Act 2005* (Tas); *Agents Act 2003* (ACT); *Real Estate and Business Agents 1978* (WA); *Agents Licensing Act* (NT); and *Land Agents Act 1994* (SA).

<sup>19</sup> Clause 7, *Property, Stock and Business Agent Regulation 2014*.

<sup>20</sup> Section 37 of the *Property, Stock and Business Agents Act 2002* (NSW).

<sup>21</sup> *Estate Agents Act 1980* (Vic).

<sup>22</sup> *Ibid.*

<sup>23</sup> Section 262A of the *Income Tax Assessment Act 1936*; Section 286 of the *Corporations Act 2001*.

## 4. What are the obligations under the AML/CTF Act?

### 4.1 Existing AML/CTF obligations

In Australia, the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) provides the legislative framework under which regulated businesses (known as ‘reporting entities’) are regulated for AML/CTF purposes. The detail of obligations is set out in the *Anti-Money Laundering and Counter-Terrorism Financing Rules* (AML/CTF Rules).<sup>24</sup>

Businesses are supervised for compliance with their AML/CTF obligations by AUSTRAC.

Businesses that provide a regulated service under the AML/CTF Act (a ‘designated service’) generally have obligations to:

- enrol with AUSTRAC
- register with AUSTRAC if the reporting entity provides a remittance service
- conduct CDD
- implement ongoing CDD procedures
- implement and maintain an AML/CTF compliance program
- lodge transaction and suspicious matter reports, and
- comply with various AML/CTF related record-keeping obligations.

An explanation of these obligations is provided at **Annexure A**.

CDD is a central obligation, requiring regulated businesses to identify and verify each of their clients so they can:

- determine the ML/TF risk posed by each client
- decide whether to proceed with a business relationship or transaction, and
- assess the level of future monitoring required.

CCD requirements under the AML/CTF regime include:

- considering the broader risks associated with clients
- collecting identification information in relation to clients
- collecting, where necessary, identification information about who owns and controls clients
- verifying information where necessary, and
- performing ongoing CDD and monitoring - including scrutiny of transactions.

The AML/CTF regime does not adopt a ‘one-size-fits-all’ approach to AML/CTF regulation and there are a number of mechanisms that allow obligations to be tailored to the level of ML/TF risk faced by a business.

Exemptions from complying with AML/CTF obligations can be provided under the AML/CTF Act and the AML/CTF Rules.<sup>25</sup> Applications for exemptions are assessed on a case-by-case basis and granted where there is evidence that a service, or the circumstances surrounding the provision of a service, poses a low ML/TF risk.

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<sup>24</sup> The AML/CTF Rules are contained in the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)*, available online at [www.legislation.gov.au/Series/F2007L01000](http://www.legislation.gov.au/Series/F2007L01000).

<sup>25</sup> For example, section 248 of the AML/CTF Act provide for exemptions and modifications of AML/CTF obligations by the AUSTRAC CEO. The AUSTRAC CEO may also grant exemptions from obligations under the FTR Act. Since 2006, the AUSTRAC CEO has granted approximately 120 exemptions to regulated businesses in accordance with AUSTRAC’s Exemption policy.

AML/CTF obligations can also be modified in the AML/CTF Rules. For example, regulated businesses can use simplified CDD procedures on customers in certain circumstances.<sup>26</sup> The simplified CDD diligence procedures can provide significant regulatory relief for some regulated businesses.

Regulated businesses also have the ability to use a risk-based approach to implementing compliance measures. The risk-based approach is a key pillar of Australia's AML/CTF regime and central to the effective implementation of the FATF standards. It allows regulated businesses to implement compliance measures that are proportionate to their assessed level of ML/TF risk. This approach recognises that the regulated business is in the best position to assess the ML/TF risks posed by its customers, delivery channels, products and services and allows these businesses to allocate resources for AML/CTF measures in an efficient and proportionate way.

## 4.2 What is AUSTRAC's role?

As Australia's FIU and AML/CTF regulator, AUSTRAC's objective is to detect, deter and disrupt the ML/TF risks and threats that affect Australia's financial system, and to contribute to the growth of Australia's economy.

AUSTRAC collects and analyses financial transaction reports submitted under the AML/CTF Act to develop and disseminate actionable financial intelligence to national and international law enforcement, national security, revenue and regulatory agencies, as well as international counterparts, for investigation.

AUSTRAC's financial intelligence is an integral element in the detection and investigation of serious and organised crime, ML/TF and tax evasion.

As part of its regulatory role, AUSTRAC works collaboratively with its regulated population to promote compliance with the obligations of the AML/CTF Act by providing, among other things, guidance and assistance to reporting entities. AUSTRAC also assesses reporting entities' compliance with AML/CTF obligations and takes enforcement action in cases of serious non-compliance.

In performing its regulatory functions, AUSTRAC must ensure, among other things, that the AML/CTF regime supports economic efficiency and competitive neutrality.

## 4.3 What approaches are adopted in other countries?

In recent years, there has been an increase in the number of countries extending AML/CTF regulation to real estate professionals in line with the FATF standards, particularly within the member states of the European Union (EU) and across Asia.

The United Kingdom (UK) has regulated real estate professionals for AML/CTF purposes since 2007. Anyone who engages in estate agency work in the UK must comply with the *Money Laundering Regulation 2007* and put in place procedures to anticipate and prevent ML/TF, and conduct appropriate CDD prior to entering into a business relationship with a client.

For the purposes of the *Money Laundering Regulation 2007*, estate agency work is defined under the *Estate Agents Act 1979*, and encompasses "things done by any person in the course of a business (including a business in which he is employed) pursuant to instructions received from another person (in this section referred to as "the client") who wishes to dispose of or acquire an interest in land—

- (a) for the purpose of, or with a view to, effecting the introduction to the client of a third person who wishes to acquire or, as the case may be, dispose of such an interest; and

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<sup>26</sup> Paragraphs 4.2.10 to 4.2.13 of the AML/CTF Rules and Parts 4.3 and 4.4 of the AML/CTF Rules.

(b) after such an introduction has been effected in the course of that business, for the purpose of securing the disposal or, as the case may be, the acquisition of that interest..”<sup>27</sup>

There are some exclusions, including ‘things’ done by a solicitor, or done in the course of credit brokerage or carrying out any survey or valuation.<sup>28</sup>

Responsibility for supervising a person who engages in real estate agency work in the UK rests with HM Revenue and Customs.

Canada imposes some AML/CTF obligations on real estate brokers or sales representatives, as well as real estate developers (i.e. property developers) when they sell real estate to the public in certain circumstances. A ‘real estate developer’ under the Canadian regulations is defined as:

- on any given day in a calendar year, a person or entity who, in that calendar year and before that day or in any previous calendar year after 2007, has sold to the public, other than in the capacity of a real estate broker or sales representative:
  - five or more new houses or condominium units
  - one or more new commercial or industrial buildings, or
  - one or more new multi-unit residential buildings each of which contains five or more residential units, or two or more new multi-unit residential buildings that together contain five or more residential units.<sup>29</sup>

AML/CTF obligations that apply relate to record-keeping, suspicious transaction reporting, prescribed financial transaction reporting.<sup>30</sup>

New Zealand is consulting with industry about reforms to capture real-estate related services under AML/CTF regulation. The proposed reforms would impose AML/CTF regulation on real estate professionals when they represent either the purchaser or the vendor in the purchase and sale of:

- real estate, both commercial and residential, or
- properties for development purposes.<sup>31</sup>

#### DISCUSSION QUESTION

6. What lessons can be learned from the experience of regulating real estate professionals under AML/CTF regimes in other jurisdictions?

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<sup>27</sup> Section 1, *Estate Agents Act 1979* (UK).

<sup>28</sup> The exclusions are set out in subsections 2-4 of the *Estate Agents Act 1979* (UK).

<sup>29</sup> *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations (Canada)*, Clause 1(2).

<sup>30</sup> Cash transactions of \$10,000 or more must be recorded and reported unless the cash is received from a financial entity or a public body.

<sup>31</sup> New Zealand Government, *Improving New Zealand’s ability to tackle money laundering and terrorist financing*, Ministry of Justice consultation paper on *Phase Two of the AML/CTF Act*, (2006), available online at: <https://www.justice.govt.nz/assets/Documents/Publications/Tackling-money-laundering-and-terrorist-financing.pdf>

## 5. What should the scope of regulation look like?

There are four threshold questions that need to be explored prior to considering a model for regulating real estate professionals under the AML/CTF regime. These are:

- How should real estate be defined?
- What real estate transactions should be regulated?
- Who is the client for CDD purposes?, and
- When should the obligation to conduct CDD commence?

### 5.1 How should real estate be defined?

There is no uniform approach to defining ‘real estate’ under Australian legislation but the term is commonly used in relation to the powers of executors, administrators and probate matters.<sup>32</sup>

In Victoria, ‘real estate’ is defined under the *Estate Agents Act 1980* to include:

- any estate or interest in land or buildings
- any share or shares in any company limited by shares entitling the holder thereof to the exclusive right to occupy a specified building or part of a building, and
- any goods chattels or other property or assets included in any transaction relating to real estate.<sup>33</sup>

The term ‘land’ is most commonly used in conveyancing legislation rather than real estate.<sup>34</sup> The *Corporations Act 2001 (Cth)* uses both the terms ‘land’ and ‘real property’ with no clear distinction and does not define either term.

In view of the multitude of definitions of ‘real estate’ and ‘land’ across the statute books, the preferred approach is to use the term ‘real estate’ and rely on its ordinary meaning (i.e. not to define the term in legislation). This approach allows for the broadest possible interpretation of what constitutes real estate, but exemptions should be provided for transactions involving the buying and selling of interests in real estates that pose a low ML/TF risk.

### 5.2 What real estate services should be regulated?

The AML/CTF Act adopts an activity-based approach to regulation. Under this approach, a business becomes a regulated entity and subject to AML/CTF obligations if it provides an activity (designated service) that is listed under section 6 of the AML/CTF Act. The strength of this approach is that it does not allow businesses to attempt to evade AML/CTF regulation by changing the way they characterise or label the nature of their business. In line with this approach, any proposed model for regulating real estate professionals under the AML/CTF regime will need to identify specific real estate services to be regulated.

The proposed services to be regulated under the AML/CTF Act are:

- the buying and selling of real estate on behalf of a person, where the service is provided in the course of carrying on a business

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<sup>32</sup> See, for example, the *Administration and Probate Act 1919 (SA)*.

<sup>33</sup> Section 4, *Estate Agents Act 1980* (Victoria).

<sup>34</sup> See, for example, the *Conveyancing Act (NSW) 1919* and the *Law of Property Act (SA)*.

- acting as a broker between the vendor of real estate and a potential purchaser and the service is provided in the course of carrying on a business
- providing property management services where large cash payments are accepted for the payment of rent, and
- providing a conveyancing service to a person in relation to the purchase or sale of land, where the service is provided in the course of carrying on a business.

The AML/CTF regulation of the provision of a real estate service that provides for conveyancing is discussed in a separate consultation paper, *Legal professionals and conveyancers: models for regulation under Australia's anti-money laundering and counter-terrorism financing regime*.<sup>35</sup>

*Who can provide these services?*

A number of industry groups can be involved in transactions concerning the buying and selling of real estate that pose ML/TF risks, including auctioneers, commercial agents, property developers, builders and real estate brokers. These industry groups can all potentially be engaged in a 'business' that involves providing a service that involves the buying and selling of real estate on behalf of a person.

A real estate agent would be involved in the buying and selling of real estate on behalf of a person where they enter into an agreement with a vendor/purchaser broker to introduce, or arrange for the introduction of a prospective purchaser of real estate of the vendor or a prospective vendor of real estate to the purchaser.

Builders may also be providing a 'real estate service' if they act as a broker and help potential buyer's sell their current property by:

- introducing the potential buyer to a real estate professional, or
- introducing the potential buyer to a company that may wish to purchase the potential buyer's current property.

Property developers that are not real estate agents, but who sell new homes or buildings directly to the public, may also be vulnerable to exploitation for ML/TF purposes. AML/CTF regulation of real estate agents and property developers would maintain competitive neutrality within the real estate industry and address shared ML/TF risks. If real estate agents are subject to regulatory requirements while property developers are not, property developers may have a competitive advantage in not having to cover the costs of complying with such requirements. This may also result in the purchase of real estate from property developers being more attractive as a money laundering strategy.

Property management and leasing services do not generally pose high ML/TF risks. However, a common method of money laundering through real estate involves buying properties and subsequently leasing the property to a tenant who is provided with illicit funds to pay the rent in cash. One way to address this risk would be to regulate a real estate professional for AML/CTF purposes where the real estate professional provides property management and leasing services and accepts large sums of cash as payment for rent.

### **5.3 Who is the client for CDD purposes?**

The FATF standards require real estate professionals to comply with customer due diligence (CDD) requirements for both parties to a transaction for the buying and selling of real estate (i.e. the vendor and the purchaser).<sup>36</sup>

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<sup>35</sup> This paper is available on the Attorney-General's Department website.

<sup>36</sup> FATF, *Methodology for assessing technical compliance with the FATF Recommendations and the effectiveness of AML/CTF systems*, 2013, Paris.

Different countries have adopted different approaches to determining which party or parties to a transaction a real estate professional should be required to conduct CDD on. In the UK, the client is the party who forms a contractual relationship with the property professional.<sup>37</sup> This means that the CDD requirements require the property professional to check the identity of the seller, but not that of the buyer of real estate. While this is inconsistent with the global standards, property transactions in the UK usually involve other parts of the regulated sector, such as solicitor or licensed conveyancer, who will also have obligations to conduct CDD for the buyer.<sup>38</sup>

In Canada, the approach is to require real estate agents to undertake CDD in relation to a person in a transaction that is not their client only when that person is not represented by another real estate agent or broker.<sup>39</sup> In these circumstances, the real estate agent is only required to take reasonable measures to ascertain the identity or confirm the existence of the parties that are unrepresented. If the identity or existence of an unrepresented party cannot be confirmed, the real estate agent must keep records about the CDD steps they took and the reasons why the identity or the existence of that party could not be confirmed.

A requirement to conduct CDD with respect to both the vendor and the purchaser would be onerous for real estate agents and other entities involving in buying or selling real estate on behalf of a person, as they may have minimal or no contact with other party to the transaction. In view of this, an alternative model that requires the real estate professional to apply reasonable risk-based CDD measures to the party that is not their client may be preferred.<sup>40</sup>

## 5.4 When should the obligation to perform CDD begin?

Vendors of real estate often list their property with multiple real estate agencies and do not pay fees for the real estate service until the contract is completed (i.e. upon settlement). However, formal 'business relations' between the real estate agent and the customer are generally established once there is an exchange of contracts between the real estate agent's client and the party to the transaction. At that time a deposit is paid by the purchaser to the vendor and both parties acquire actionable rights against the other party to complete the contract. There is also a ML/TF risk at the point of exchange of contract, as a vendor can pass illicit funds to another party, who poses as a purchaser of the real estate and uses those funds to pay the deposit and then deliberately fails to complete the contract and forfeits the deposit. The vendor subsequently receives the funds as forfeiture of deposit which appears to be from a legitimate source.

In view of these risks, the regulatory model proposes that the obligation to conduct CDD should arise at the time that there is an exchange of contract between the vendor and purchaser. Where property management or leasing services are regulated, the obligation to conduct CDD arises the first time the business is prepared to accept a large cash payment under the property management or leasing arrangements.

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<sup>37</sup> The Money Laundering Regulations 2007 (UK).

<sup>38</sup> <http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20UK%20FULL.pdf>

<sup>39</sup> *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*,

<sup>40</sup> This is consistent with the FATF's *Risk-based approach guidance for real estate agents*, available on line at: <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatfguidanceontherisk-basedapproachforrealestateagents.html>

## DISCUSSION QUESTIONS:

7. Should the term 'real estate' be defined under the AML/CTF regime? If yes, how?
8. What real estate services should be regulated or excluded under the AML/CTF regime?
9. When should the obligations for real estate professionals to conduct CDD arise?
10. What factors should be taken into account in determining whether a person is in the business of buying and selling real estate?
11. Should real estate professionals have obligations to identify both parties to a real estate transaction?
12. Should real estate professionals be required to comply with AML/CTF obligations if they provide property management and leasing services and accept large sums of cash as payment from tenants/leasees?



## 6. Model for regulation

Any AML/CTF obligations proposed for real estate professionals should be efficient, proportionate to ML/TF risks, and tailored to the nature of the services provided by these professions

The existing regulatory model under the AML/CTF regime is the starting point for consultation on a proposed regulatory model for real estate professionals. The consultation process will explore whether and how the obligations under this regime could be applied to real estate professionals, having regard to the FATF standards.

The key obligations under the existing regulatory model are set out below and discussion questions posed as to how these obligations might be applied to services provided by real estate professionals.

### 6.1 Enrolment and scope of services

OBLIGATION	DISCUSSION QUESTIONS
<p>Under the current regime, it is mandatory for all businesses with obligations under the AML/CTF Act to be enrolled on AUSTRAC's Reporting Entities Roll. This obligation applies to all businesses that provide a 'designated service' under section 6 of the AML/CTF Act.</p> <p><b>COMMENT:</b></p> <p>The enrolment process, which is administrative in nature and does not attract any fees, provides AUSTRAC with information on every entity it regulates. This includes details about:</p> <ul style="list-style-type: none"> <li>- business structure</li> <li>- number of employees</li> <li>- annual earnings, and</li> <li>- the designated services they provide.</li> </ul> <p>This information is also used by AUSTRAC to understand and monitor the regulated population, and identify the entities subject to the annual AUSTRAC Industry Contribution<sup>41</sup> (based on earnings and transaction reporting criteria) and the amount that applies to each billable entity.</p> <p>The AML/CTF Act adopts an activity-based approach to regulation. Where an entity provides a service listed under section 6 of the AML/CTF Act, the entity becomes a regulated business ('reporting entity') for the purposes of the AML/CTF Act and is subject to applicable AML/CTF obligations.</p>	<ul style="list-style-type: none"> <li>• Should real estate professionals be required to enrol with AUSTRAC? <ul style="list-style-type: none"> <li>- Or are existing obligations that require real estate professionals to be enrolled/licensed under other regulatory regimes sufficient?</li> <li>- If these existing obligations are sufficient, how would any AML/CTF regulator for these sectors identify the regulated population?</li> </ul> </li> <li>• What services provided by real estate professionals should be regulated under the AML/CTF Act?</li> <li>• What factors should be taken into account in determining whether a real estate professional is providing a designated service?</li> <li>• Are there circumstances in which transactions involving the buying and selling of real estate pose a low ML/TF risk?</li> <li>• Should real estate professionals be required to comply with AML/CTF obligations if they provide property management and leasing services and accept large sums of cash as payment from tenants/leases?</li> </ul>

<sup>41</sup> Information on Industry Contribution is available at: [www.austrac.gov.au/austrac-industry-contribution-information](http://www.austrac.gov.au/austrac-industry-contribution-information)

## 6.2 Customer due diligence (CDD)

EXISTING OBLIGATIONS	DISCUSSION QUESTIONS
<p>A business that provides designated services regulated under the AML/CTF Act must conduct CDD measures that allow the business to be reasonably satisfied that:</p> <ul style="list-style-type: none"> <li>• an individual client is who they claim to be, and</li> <li>• for a non-individual client (e.g. a business), the client exists and their beneficial ownership and/or control details are known.</li> </ul> <p>The CDD measures include:</p> <ul style="list-style-type: none"> <li>• collecting and verifying customer identification information - for example, identity documents, data or other information which can be verified using a reliable and independent source</li> <li>• identifying and verifying the beneficial owner(s) of a client</li> <li>• identifying whether a client is a politically exposed person (PEP) (or an associate of a PEP) and taking steps to establish the source of funds used during the business relationship or transaction<sup>42</sup></li> <li>• ongoing CDD and transaction monitoring, and</li> <li>• obtaining information on the purpose and intended nature of the business relationship.</li> </ul> <p>Once a regulated business has established who is a beneficial owner or owners of a client, the business must collect at least the following information in relation to each individual beneficial owner:</p> <ul style="list-style-type: none"> <li>• full name, and</li> <li>• date of birth or full residential address.</li> </ul> <p>The business must take <u>reasonable measures</u> to verify the information it collects about the beneficial owner. Reasonable measures means it must take certain steps to verify the information, and the steps taken must be appropriate given the level of ML/TF risk.</p> <p>Where a business is unable to verify the identity of the client (including beneficial owners) and the purpose and intended nature of the business relationship, the business should generally not agree to act and terminate the business relationship.</p> <p>The AML/CTF regime permits businesses to apply simplified CDD verification procedures. These are:</p> <ul style="list-style-type: none"> <li>• streamlined 'safe harbour' procedures for verifying medium or low ML/TF risk clients who are individuals, and</li> <li>• simplified verification procedures for certain low ML/TF risk companies and trusts.</li> </ul> <p><b>COMMENT:</b> The AML/CTF regime focuses on requiring businesses to implement systems and controls for</p>	<ul style="list-style-type: none"> <li>• What CCD obligations should real estate professionals have?</li> <li>• What CDD obligations do real estate professionals currently have that duplicate CDD obligations under the AML/CTF regime?</li> <li>• Should simplified CDD measures be available for some services provided by real estate professionals? <ul style="list-style-type: none"> <li>– If yes, in what circumstances?</li> </ul> </li> <li>• When should the obligation for real estate professionals to conduct CDD on clients commence? <ul style="list-style-type: none"> <li>– Should it be before or after the real estate professional has been appointed to act for the client in the sale of property?</li> <li>– Or should it not commence until there is an exchange of contract between the vendor and purchaser?</li> </ul> </li> <li>• Should real estate professionals have obligations to identify both parties to a real estate transaction? <ul style="list-style-type: none"> <li>– What opportunities are there for real estate professionals to rely on CDD performed by other businesses involved in same transaction?</li> </ul> </li> </ul>

EXISTING OBLIGATIONS	DISCUSSION QUESTIONS
<p>the purpose of detecting suspicious activity and to take steps to prevent their services from being misused and exploited by criminals to launder illicit funds. The collection of information about client identity is a central component of these systems and controls, allowing a business to determine whether the interaction with that client is commensurate with the transactional activity on which they are seeking advice and to understand and assess the ML/TF risks posed by accepting the client's business.</p> <p>The AML/CTF regime currently allows regulated businesses to rely on CDD procedures carried out by a third party in limited circumstances.<sup>43</sup> Reforms are being developed to expand these opportunities, potentially allowing regulated businesses to rely on CDD undertaken by other businesses in a wider range of circumstances. These reforms will be useful where regulated businesses have a shared customer, or where a customer uses services provided by different entities within a corporate group.</p>	

### 6.3 Ongoing customer due diligence

EXISTING OBLIGATIONS	DISCUSSION QUESTIONS
<p>Regulated businesses have obligations to conduct ongoing customer due diligence (OCDD), including:</p> <ol style="list-style-type: none"> <li>1. <b>An enhanced due diligence program.</b> This includes systems and controls in place to determine whether the business should collect and/or verify additional information relating to a customer on an ongoing basis. These systems help a business to ensure that it holds up-to-date information about its customers.</li> <li>2. <b>A transaction monitoring program.</b> This program assists a business to identify suspicious transactions, complex or unusually large transactions, and unusual patterns of transactions that may be suspicious.</li> </ol> <p><b>COMMENT:</b> Conducting ongoing due diligence and scrutiny of transaction activity throughout the business relationship is important to ensure that the activity is consistent with the business' knowledge of the client and their business and risk profile, including where necessary the source of the client's funds. Ongoing due diligence means that clients engaging in ML/TF may be detected after the business relationship with the client has commenced.</p> <p>Where a business is unable to verify client identity (including beneficial owners) and the purpose and intended nature of the business relationship, the business should generally not agree to act and terminate the business relationship.</p>	<ul style="list-style-type: none"> <li>• What ongoing due diligence obligations should apply to real estate professionals?</li> <li>• Are there existing ongoing due diligence obligations or industry standard practices for real estate professionals that duplicate CDD obligations under the AML/CTF regime?</li> </ul>

<sup>43</sup> Section 38 of the AML/CTF Act and Chapter 7 of the AML/CTF Rules.

## 6.4 Reporting obligations

OBLIGATIONS	DISCUSSION QUESTIONS
<p>There are three primary reporting obligations for businesses regulated under the AML/CTF regime:</p> <ul style="list-style-type: none"> <li>• suspicious matter reporting</li> <li>• international funds transfer instruction reporting, and</li> <li>• threshold transaction reporting.</li> </ul> <p><b>COMMENT:</b></p> <p>Once a client is accepted, the ongoing monitoring of their activities and reporting by the regulated business is intended to detect whether the client is engaging in unusual or suspicious transactional activity.</p> <p><i>Threshold (cash) transaction reporting</i></p> <p>Australia imposes threshold transaction reporting (TTR) obligations on cash transactions because of the high ML/TF risks posed by transactions involving large amounts of cash. TTRs must be reported to AUSTRAC where a regulated business that provides a designated service to a client that involves the payment or transfer of physical currency or e-currency of AUD10,000 or more (or foreign currency equivalent).</p> <p><i>Suspicious matter reporting</i></p> <p>If at any time while dealing with a client a regulated business forms a suspicion that matter may relate to any serious offence under any law of the Commonwealth, including, tax evasion or proceeds of crime, the business must provide a suspicious matter report (SMR) to AUSTRAC. Relevant offences include money laundering, terrorism financing, or operating under a false identity.</p> <p>Regulated businesses are required to submit a SMR to AUSTRAC within three business days of forming the suspicion. If the suspicion relates to the financing of terrorism, the SMR must be submitted within 24 hours of forming the suspicion.</p> <p><i>Reporting international funds transfers</i></p> <p>Any person who sends or receives a funds transfer instruction to or from a foreign country must complete an international funds transfer instruction (IFTI) report. The IFTI report must be submitted to AUSTRAC within 10 business days of sending or receiving the international funds transfer instruction.</p>	<ul style="list-style-type: none"> <li>• Should all reporting obligations apply to real estate professionals?</li> <li>• To what extent do accountants conduct international funds transfers?             <ul style="list-style-type: none"> <li>– How do real estate professionals carry out international funds transfers? For example through Australian banks? Western Union?</li> </ul> </li> <li>• Should real estate agents be able to voluntarily report to AUSTRAC suspicious matters that relate to services they provide that are not subject to AML/CTF regulation?</li> </ul>

## 6.5 Internal controls– AML/CTF programs

OBLIGATIONS	DISCUSSION QUESTIONS
<p>Regulated businesses generally have an obligation to develop, implement and maintain an AML/CTF program to identify, mitigate and manage the ML/TF risk arising from the provision of a regulated service.</p> <p>An AML/CTF program should provide for:</p> <ul style="list-style-type: none"> <li>• an ML/TF risk assessment</li> <li>• approval and ongoing oversight by boards (where appropriate) and senior management</li> <li>• appointment of an AML/CTF compliance officer</li> <li>• regular independent review</li> <li>• an employee due diligence program</li> <li>• an AML/CTF risk awareness training program for employees</li> <li>• policies and procedures for the reporting entity to respond to and apply feedback from the AML/CTF regulator</li> <li>• systems and controls to ensure the entity complies with its AML/CTF reporting obligations</li> <li>• CDD procedures (see above), and</li> <li>• OCDD procedures (see above).</li> </ul> <p><b>COMMENT:</b> The purpose of an AML/CTF program is to implement systems and controls that assist a business to detect suspicious activity allow the business to take steps to prevent their services from being misused by criminals to launder illicit funds.</p> <p>Regulated businesses can develop AML/CTF programs that reflect their commercial environment, knowledge of their clients and knowledge of the ML/TF risks they face. Some of the measures included in an AML/CTF program may already constitute standard industry practice.</p> <p>Industry associations, professional bodies and the AML/CTF regulation would need to provide leadership and guidance on developing AML/CTF programs to comply with AML/CTF obligations.</p>	<ul style="list-style-type: none"> <li>• Should real estate professionals have an obligation to establish, implement and maintain an AML/CTF program to identify, mitigate and manage ML/TF risks?</li> <li>• If yes, what should the components of the AML/CTF program be?</li> <li>• Do real estate businesses that operate internationally already have AML/CTF programs in place that comply with the FATF standards?</li> <li>• How could professional bodies and/or the AML/CTF regulation assist real estate professionals in developing AML/CTF systems and procedures suited to their professional practices?</li> <li>• What are the implications of a risk-based approach for real estate professionals?</li> </ul>

## 6.6 Record-keeping

OBLIGATIONS	DISCUSSION QUESTIONS
<p>Regulated businesses must make and retain the following records for seven years:</p> <ul style="list-style-type: none"> <li>• records relating to the provision of a regulated service to a client</li> <li>• records of the CDD procedure the regulated business undertakes for clients to whom they provided, or proposed to provide, a regulated service</li> <li>• records of electronic funds transfer instructions, and</li> <li>• AML/CTF programs.</li> </ul> <p><b>COMMENT:</b> In tracking down money trails, it is essential that law enforcement agencies be able to recreate patterns of suspicious activity and reconstruct individual transactions. This ability is very much dependent upon the record management practices of regulated businesses.</p>	<ul style="list-style-type: none"> <li>• What records should real estate professionals be required to keep?</li> <li>• To what extent do AML/CTF record-keeping obligations mirror existing record-keeping obligations for real estate professionals?</li> </ul>

## 6.7 Monitoring and supervision

REGULATORY APPROACH	DISCUSSION QUESTIONS
<p>While AUSTRAC currently monitors and supervises enrolled businesses for compliance with their AML/CTF obligations, a number of regulatory approaches could be taken to monitor and supervise real estate professionals regulated under the AML/CTF regime. This includes a risk-based industry collaborative approach.</p> <p>Under this co-regulation approach, professional bodies would have primary responsibility for developing guidance to assist their membership to implement appropriate detection systems and for monitoring effectiveness. Rather than legislating customer due diligence models for each sector, professional bodies would design appropriate procedures for their industry. The AML/CTF regulator would be responsible for setting principles and guidelines.</p> <p>Risk-based procedures are essential to this approach. The risk-based approach allows professionals to tailor their policies and procedures to the potential risk of ML/TF in particular client transactions. The risk-based approach minimises the regulatory burden on both businesses and clients while maintaining effective controls. It is an approach adopted by Australia and supported by the FATF.</p> <p>Alternatively, professional bodies or AUSTRAC could have sole responsibility for monitoring and supervising these sectors for AML/CTF purposes.</p>	<ul style="list-style-type: none"> <li>• Should AUSTRAC monitor and supervise real estate professionals for compliance with AML/CTF obligations? If not, how would the sector be regulated?</li> <li>• Are there professional bodies that could regulate or co-regulate accountants?</li> <li>• What regulatory approach should be adopted for accountants</li> <li>• What advice and assistance should the AML/CTF regulator provide to support real estate professionals to implement AML/CTF obligations?</li> </ul>

# ANNEXURE A: EXPLANATION OF OBLIGATIONS UNDER THE ANTI-MONEY LAUNDERING AND COUNTER-TERRORISM FINANCING REGIME

## 1. Enrol/register with AUSTRAC

Any business that provides a service regulated under the AML/CTF Act must be enrolled on AUSTRAC's Reporting Entities Roll.

Businesses which intend to provide remittance services (remitters) must also apply to be registered with AUSTRAC.

More than 14,000 regulated businesses across the financial, remittance, gambling and bullion sectors are currently enrolled with, and regulated by, AUSTRAC for their compliance with their AML/CTF Act obligations.

## 2. Conduct customer due diligence

A regulated business must conduct CDD measures that allow the business to be reasonably satisfied that:

- an individual customer is who they claim to be, and
- for a non-individual customer (e.g. a company), the customer exists and their beneficial ownership details are known.<sup>44</sup>

By knowing its customers a regulated business should be better able to identify and mitigate ML/TF risks in the conduct of their financial transactions, particularly where the activity or transactions are unusual or uncharacteristic.

The CDD measures include:

- collecting and verifying customer identification information - for example, identity documents, data or other information which can be verified using a reliable and independent source
- identifying and verifying the beneficial owner(s) of a customer
- identifying whether a customer is a politically exposed person (PEP) (or an associate of a PEP) and taking steps to establish the source of funds used during the business relationship or transaction<sup>45</sup>
- ongoing customer due diligence and transaction monitoring, and
- obtaining information on the purpose and intended nature of the business relationship.

The CDD procedures developed by a regulated business must be included in a business's AML/CTF program (see below).

## 3. Implement ongoing customer due diligence procedures

Regulated businesses must have in place appropriate systems and controls to determine whether additional customer information (including beneficial owner information) should be collected and/or verified on an ongoing basis to ensure that it holds up-to-date information about its customers. This process is known as 'ongoing customer due diligence' (OCDD). The decision to apply the OCDD process to a particular customer depends on the customer's level of assessed ML/TF risk.

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<sup>44</sup> A beneficial owner of a customer is defined as an individual (a natural person or persons) who ultimately owns or controls (directly or indirectly) the customer.

Ongoing customer due diligence also includes:

- implementing a transaction monitoring program, and
- developing an 'enhanced customer due diligence' program (ECDD).

A transaction monitoring program is a program for monitoring transactions using a risk-based approach and allows a regulated business to:

- identify transactions that are considered to be suspicious, and
- identify complex, unusually large transactions and unusual patterns of transactions which have no apparent economic or visible lawful purpose

ECDD is the process of undertaking additional CDD in certain circumstances deemed to be high risk. For example, where the customer is located in a country where there are weak AML/CTF controls. The ECDD program details the procedures the reporting entity must undertake in these high risk circumstances.

The OCDD procedures developed by a regulated business must be included in the business's AML/CTF program (see below).

#### **4. Implement and maintain an AML/CTF program**

Regulated businesses must develop and maintain a written AML/CTF program that sets out the operational framework for meeting compliance obligations under the AML/CTF Act.

The AML/CTF program must have two parts and should specify how the business identifies, mitigates and manages the risk of its products or services being misused to facilitate ML/TF.

Part A covers identifying, managing and reducing the ML/TF risk faced by a regulated business and includes:

- an ML/TF risk assessment of the business conducted by the entity
- approval and ongoing oversight by boards (where appropriate) and senior management
- appointment of an AML/CTF compliance officer
- regular independent review of Part A
- an employee due diligence program
- an AML/CTF risk awareness training program for employees
- policies and procedures for the reporting entity to respond to and apply AUSTRAC feedback
- systems and controls to ensure the entity complies with its AML/CTF reporting obligations, and
- ongoing customer due diligence (OCDD) procedures (see above).

Part B covers a regulated business' CDD procedures and includes:

- establishing a framework for identifying customers and beneficial owners of customers so the reporting entity can be reasonably satisfied a customer is who they claim to be, and
- collecting and verifying customer and beneficial owner information.

#### **5. Lodging transaction reports**

Regulated businesses have a number of ongoing reporting obligations. These obligations relate to:

- threshold transaction reports (TTRs)



- international funds transfer instructions (IFTIs) reports, and
- suspicious matter reports (SMRs) with AUSTRAC.

A business that provides or commences to provide a regulated service to a customer that involves the payment or transfer of physical currency or e-currency of AUD10,000 or more (or foreign currency equivalent), the business must submit a TTR to AUSTRAC. The TTR must be submitted to AUSTRAC within 10 business days of the transaction taking place.

If a business sends or receives a funds transfer instruction to or from a foreign country, the business must complete an IFTI report. The IFTI report must be submitted to AUSTRAC within 10 business days of sending or receiving the international funds transfer instruction.

If at any time while dealing with a customer the regulated business forms a suspicion on a matter that the regulated business suspects may relate to any serious offence, tax evasion or proceeds of crime, the business must provide a report to AUSTRAC. Offences include money laundering, terrorism financing, operating under a false identity or any other offence under Commonwealth, State or Territory law.

Regulated businesses must submit an SMR to AUSTRAC within three business days of forming the suspicion. If the suspicion relates to the financing of terrorism, the SMR must be submitted within 24 hours of forming the suspicion.

## **6. Record-keeping**

Regulated businesses have a range of record-keeping obligations under the AML/CTF Act. These obligations depend on the type of regulated service it provides but generally include records about:

- transactions
- electronic funds transfers
- customer identification procedures
- AML/CTF programs, and
- due diligence assessments of correspondent banking relationships.