

26 June 2023

Attorney General's Department
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BARTON ACT 2600
Via email: economiccrime@ag.gov.au

To Whom It May Concern

Submission to the proposed reforms to the anti-money laundering and counter-terrorism financing regime

Thank you for the opportunity to comment on the Government's Anti-Money Laundering and Counter Terrorism Financing (AML/CTF) reforms which propose to extend AML/CTF regulations to the real estate industry.

The Property Council is the peak body for owners, and investors in Australia's \$670 billion property investment industry. We represent owners, fund managers, developers and investors across property investment: debt, equity, public and private, and all major asset classes including commercial offices, residential, industrial, hotels, living communities and alternative classes.

The property industry now employs more people than any other sector. Creating more than 1.4 million jobs, property is the biggest direct contributor to employment in Australia by industry.

The Property Council of Australia acknowledges the Government's commitment to the integrity of the Australian financial system and consultation with industry in the consideration of any proposed reforms to the AML/CTF regime that will occur throughout 2023.

No legitimate business wants to wittingly, or unwittingly, assist the laundering of money.

However, the Property Council is concerned that the extension of AML regulations to include real estate sector may duplicate current processes which are already undertaken by regulated entities for transactions and may impose undue regulatory burden on the industry.

In this submission we have highlighted our concerns and made recommendations on adopting a risk-based approach, out of scope services and customer due diligence.

We have also addressed the questions raised in Part Two of the consultation paper and provided guidance on key definitions, scope of regulation, current practices and international examples that may be relevant to the Australian regulatory landscape, in good faith recognition of the Government's commitment to consult with industry.

We recognise the challenges in getting the balance right.

The real estate industry may not be vulnerable to "misuse and exploitation" as transactions and services are captured by existing AML regulation.

The industry is diverse in the transactions and services provided; from listed to unlisted REITS, to retail leases, to suburban real estate agents. In recognition of this diversity the Government's stated intention of taking a risk-based approach to AML regulation should take into account differing levels of risk depending on the type of transaction or service provided.

To capture the totality of the real estate industry under Tranche Two would result a significant volume of low-risk transactions and services being reported; overwhelming law enforcement and security agencies and failing to provide actionable financial intelligence.

We would welcome the opportunity to discuss this submission further, please contact Policy Manager, Capital Markets Joan Dharamdas on 0400 457 341, jdharamdas@propertycouncil.com.au or myself 0424 547 664.

Yours Sincerely

A handwritten signature in dark ink, appearing to read 'Antony Knep', with a small dot at the end.

Antony Knep
Executive Director- Capital Markets

Submission

The Property Council strongly recommends that the proposed regulations adhere to a risk-based approach by focusing on those areas of heightened risk and where the industry can have the most impact in detecting, deterring and disrupting money laundering whilst ensuring that there is minimal duplication of efforts by various reporting entities in performing AML screening.

Our high-level position is as follows:

- Commercial and retail capital transactions – in scope of regulation when the customer is the vendor, and the conveyancer is responsible for due diligence on the purchaser. Due diligence is applied depending on the customers risk profile and other regulatory approvals.
- Leasing – customer checks on tenants exempt from regulation or if regulated, financial or other metrics applied, including for companies with major property holdings. Due diligence is applied depending on the customers risk profile.
- Property management services – property and facility management exempt from regulation based on their low risk profile.
- Residential real estate – regulation to extend to the real estate agent only who sells or manages the property and reliance on the conveyancer to conduct due diligence on the purchaser.

High Level Recommendations

Recommendation – The Government considers the diverse and complex nature of the real estate industry and the impact of proposed legislation on sub sectors.

In extending the AML/CTF regulations we request the Government considers the complexity and diversity of the real estate industry and its operations which range from large, global commercial real estate groups that provide a variety of services to investors and occupiers through to companies developing and selling residential real estate; to real estate investment trusts and emerging asset classes such as purpose-built student accommodation and build to rent property. This diversity highlights the need to consider how trusts, commercial developers, corporate property managers and others are captured by the proposed regulations and the consequences that arise for each real estate sub sector. The risk profile for each sub-sector varies as does the interplay of other regulations or regulated entities. We welcome the opportunity to provide further advice on the nature of the industry in future discussions with the government.

Recommendation – That the government implements a risk-based approach to its proposed regulation of the real estate sector.

The risk-based approach allows AML/CTF compliance arrangements to be aligned to where money laundering and terrorism risk is more likely allowing for flexibility and proportionality of AML/CTF systems and controls.

We believe the key risk indicators for money laundering are dependent upon size of business and transaction, customer type, types of products and services sold to the customers and the location of customers. For instance, cross-border purchases of property where the buyer is based in a high-risk jurisdiction.

We recommend an approach be developed to identify recommended levels of customer due diligence based on risk, that is either Simple, Standard or Enhanced based on the risk profile of the customer.

Recommendation – Avoidance of duplication. The regulations should address multiple dealings with the same client/customer over a fixed period of time, so that due diligence need only be undertaken once in that period.

Current practices undertaken by the real estate industry to comply with other legislation and regulation should be leveraged as much as possible to avoid duplication of checks which would unduly burden customers and businesses. Checks and customer due diligence conducted by other parties involved in the transactions such as financial institutions should also be taken into account.

For acquisitions of indirect property interests in wholesale property funds, AML customer due diligence requirements already apply. Many Australian real estate investment trusts hold an Australian Financial Services Licence under which “designated services” for the purposes of AML/CTF legislation are provided. Accordingly, customer due diligence is already undertaken on all new investors into these funds and the industry actively participates in the existing regime in this regard.

For real estate and leasing transactions, many which would involve a real estate agent, lawyer, and bank where the bank provides finance, or provides the means of payment, for a real estate transaction, a real estate agent should be able to rely on the customer due diligence processes in place by other parties involved in the transaction.

These existing practices within the financial institution sector already encompass AML/CTF requirements and have been developed and refined to mitigate the risks associated with money laundering and terrorist financing. Implementing the proposed reforms in certain situations would duplicate these arrangements, leading to unnecessary repetition of efforts and increased administrative burden.

Recommendation – The regulations should apply to where there is an actual contractual arrangement with the client/customer rather than potential contractual arrangements.

We believe the client/customer relationship to be limited to that where there is a contractual arrangement and not be extended to include “prospective clients/customers” .

Given the volume of transactions which may be potentially captured, for example with multiple parties being interested in a potential acquisition of a property or entering into a lease, it would be unduly burdensome to expect that customer due diligence be conducted prior to entering into a contract for the sale or lease of a property.

Recommendations for out-of-scope services – The regulations should recognise that a number of services or transactions which relate to "real estate" and "property management" do not pose a real risk of money laundering or financing of terrorism. These are set out below:

Leasing

We recommend that leasing transactions (where the customer is the tenant) are excluded from the AML/ CTF regime as these would have the consequence of capturing high volume, low value

transactions that generally pose a low risk. Regulating this activity would create a regulatory burden not aligned with the risk profile of this activity.

Commercial property leasing activities are subject to, as a general industry standard and where relevant, state-based regulation which requires formal processes to identify lessees and KYC checks to determine source of funds.

It is common industry practice to undertake existing 100 points of identification checks prior to entering into a commercial lease arrangement so that a commercial property landlord receives comfort regarding their counterparty risk. Additional Know Your Client/Customer Checks also entail, where relevant, a review of prospective tenant financial data and other assets to understand as a critical credit assessment the potential lessee's source of wealth and funds prior to entering into the lease. Further evidence of financial worthiness is supported through the tenant providing an open-ended bank guarantee provided by an Approved Deposit-taking Institution.

Commercial property leases are also predominately associated with large and sophisticated companies that range from ASX listed tenants, large professional services firms through to large private corporations. This affords an additional degree of comfort in "knowing your client/customer" under existing business relationships.

However, if the Government's intent is to capture leasing arrangements in the AML/CTF regime, we believe the regulation should focus on where risk exists and the scope is limited either by establishing monetary thresholds, through defining who is the client/customer for letting transactions and allowing simplified due diligence based on the customers risk profile including permitting reliance of the customer due diligence carried out by other parties to the transaction including banks who are already regulated under AML /CTF legislation.

We suggest the Government consider a carve out range, to be agreed with industry. This will exclude low value and/or temporary short-term leases. We believe leases of this nature are unlikely to be material for money laundering and are of negligible risk.

Property and Facilities Management Services

We believe that it is necessary to clearly define property management services, with a focus on services where there is a risk arising from funds flow, to avoid inadvertently capturing services which focus on the physical aspects of property or facilities management such as security and cleaning.

Property management whereby the suppliers e.g. cleaning, security, maintenance services vendors etc. are contracted directly by the property owner, as principal should not be regulated. Facilities management includes services such as concierge, mailroom, catering as well as health and safety support. In general, these services are delivered through employees and contractors.

The risk for money laundering is considered low as these transactions that are linked directly to products and services being provided onsite, through vendor contracts with entities where the funds paid under the service agreement are directly related to or referable to the provision of physical services.

Project management relates to the fit out of office buildings. The money laundering risk associated with these services, being based in Australia and being primarily operational and advisory in nature, is low risk.

Capital transactions

For commercial capital transactions the customer should be the vendor and we propose that due diligence on the purchaser is the responsibility of the conveyancer. Commercial capital transactions, although high value, are not unusual transactions and the risk of illegitimate source of funds can be adequately dealt with by conducting customer due diligence on the purchaser. Commercial property transactions pose less risk than residential property due to low customer turnover and more challenges in selling properties.

We also propose that simplified customer due diligence be available to conduct on the vendor and purchaser of commercial property according to the risk posed by the client/customer e.g. taking into account whether they are listed as part of a substantial corporate group or have already obtained regulatory approval for the purchase through FIRB and/or the ACCC.

Answers to consultation questions

Question 29: How should the Act regulate real estate agents so that they can manage their AML/CTF risks? Are there international examples that have worked well for this sector?

The Act should distinguish between those real agents that are standalone entities and real estate agents in complex structure of large scale property owners, particularly where the "real estate agent" forms part of a large, listed group; where transactions may be intra group (for example transactions with related bodies corporate or in similar trust structures); or where the size or nature of the transaction is inherently lower risk because of the other forms of regulatory approval required, for example, FIRB or ACCC approval. The lower risk profile of commercial property agency work is reflected in real estate regulations which provide an exemption for companies with major property holdings.

Appropriate exemptions should be available where a real estate agent or property manager is providing services within a corporate group, or to other entities where the nature of the entity is inherently low risk for example, to listed entities and their subsidiaries, or to Australian government or state-owned entities.

Question 30. Do you have any suggestions on how real estate should be defined for AML/CTF purposes?

The regulation should provide a clear definition of the types of real estate activities considered as designated services subject to AML/CTF regulations. This definition should differentiate between low-risk assets, such as retail shopping centres and commercial property transactions, and higher-risk assets such as residential properties with higher customer turnover and that may involve external real estate agents in the buying, selling and leasing of real estate.

Consideration should be given to aligning this definition with other definitions of real estate services or functions currently found in state legislation. By clearly defining these categories, AML/CTF regulations can effectively target the specific risks associated with each type of real estate. This clarity enables a better understanding of the obligations and implement appropriate AML/CTF measures tailored to the characteristics and risk profiles of each real estate category.

Below are suggested definitions.

Residential Real Estate: Residential properties are defined as properties primarily used for housing purposes, including houses, apartments, condominiums, townhouses, and similar dwellings. This category encompasses properties involved in buying, selling, or renting for residential purposes. Any AML/CTF obligation should not extend further than the real estate agent who manages the property.

Commercial Real Estate: Commercial properties are defined as properties used for business activities. This includes office buildings, industrial facilities, warehouses, hotels, and other properties primarily intended for commercial purposes that are valued in excess of several million dollars. Retail property, as a subset of Commercial Real Estate, is defined separately as per below "Retail Centre Real Estate".

Retail Real Estate: Generally, a retail shopping centre asset is of substantial value, valued at millions of dollars per asset. This considerable valuation makes it challenging to transfer funds autonomously and there is a higher level of scrutiny and compliance in financial transactions should the property be purchased, sold or leased as a whole. In addition, these transactions are generally publicly disclosed, reported in the media or notified to the market via the ASX, and low risk as a result.

Alternative asset classes: This includes aged care and childcare centres and emerging classes of data centres and purpose-built student accommodation. These asset classes are being institutionalised within the real estate sector and represent considerable transaction value and are subject to the similar or same regulatory controls traditional real estate classes.

Question 31. In your view, are there any existing obligations for real estate agents that could interfere with their ability to comply with the six key AML/CTF obligations?

Cross-border restrictions on capturing and storing customer information from a privacy perspective may impact on customer due diligence. Many countries have laws and regulations in place that govern the transfer and storage of personal data across international borders.

This may involve implementing data protection measures, obtaining consent when required, and considering data localisation requirements or cross-border data transfer mechanisms such as standard contractual clauses or binding corporate rules.

One example is the General Data Protection Regulation (GDPR), which is a comprehensive data protection law applicable in the European Union (EU) and the European Economic Area (EEA). The GDPR imposes restrictions on the transfer of personal data to countries outside the EU/EEA unless certain conditions are met. These conditions may include obtaining explicit consent from individuals, implementing appropriate safeguards for the data transfer, or ensuring that the recipient country has an adequate level of data protection.

Other countries, such as Canada, Australia, and Brazil, also have data protection laws that regulate cross-border data transfers and require certain safeguards to be in place. In addition, the nature of business activity within residential property may be difficult to obtain from tenants due to security or privacy leasing structures.

Question 32. Are there any existing practices that would duplicate AML/CTF requirements? If so, do you have any suggestions on how these practices could be leveraged for the purpose of AML/CTF compliance?

The activity undertaken in the real estate industry is often only part of the transaction that involves a number of reporting entities including financial institutions. Existing practices within the financial institution sector already encompass a high level of AML/CTF due diligence. These practices have been developed and refined to mitigate the risks associated with money laundering and terrorist financing.

Currently the real estate sector utilises checks conducted by financial institutions and third party assurances such as ASX listing and credit ratings. We request that consideration be given to the real estate sector relying on "AML representation letters" from banks outlining their AML/CTF controls and confirming they have satisfactorily conducted Customer Due Diligence on individuals and/or business enterprises, e.g., domestic and foreign corporations, unregulated trusts, partnerships, associations.

Duplication of collecting the same information on clients/customers will have a detrimental impact on client/customer relationships and experience with the real estate sector and may unduly add time delays and cost to the real estate transaction.

For example, Unlisted REIT transactions are considered financial transactions so are already covered by AML regulations. Similarly, Listed REIT transactions are clients/customers of brokers and are therefore covered by the brokers' AML requirements. The majority of other transactions are done via the banking system and therefore are covered under the banks' own obligations.