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To Whom It May Concern

First round consultation on exposure draft AML/CTF Rules

The Property Council of Australia (the Property Council) welcomes the opportunity to respond to the Australian Transaction Reports and Analysis Centre's (AUSTRAC) first round of consultation on the exposure draft AML/CTF Rules (the exposure draft Rules).

The Property Council is the peak body for owners and investors in Australia's $670 billion property industry. We represent owners, fund managers, superannuation trusts, developers, and investors across all four quadrants of property investments: debt, equity, public and private.

Members of the Property Council have diverse exposure to Australia's existing anti-money laundering and counter-terrorism financing (AML/CTF) regime. Some provide financial services, including offering finance, or operate Managed Investment Schemes (MISs) which already must comply with existing AML/CTF obligations. Some members will be regulated for the very first time, as the number of reporting entities grows from approximately 17,000 to 90,000.

In representing newly regulated real estate professionals, including property developers, the Property Council has been closely engaged with the Attorney-General's Department (the Department) and AUSTRAC during the development of the reforms, the passage of the bill in 2024, and in providing advice on the draft Rules including through AUSTRAC's industry forum and the Rules & Guidance Working Group for the Real Estate Sector.

This submission responds to the December 2024 consultation paper, and the exposure draft Rules, including but not limited to the subjects of reporting groups, AML/CTF programs, customer due diligence, AML/CTF compliance officers, and compliance reporting.

Previous submissions
The Property Council's most recent submissions cover several outstanding matters that will be referred to in this submission. These submissions should be considered in addition to any further commentary made:

- Submission on May 2024 proposals to reform Australia's anti-money laundering and counter-terrorism financing regime
- Submission on the Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024

New AML/CTF Rules framework

The Property Council welcomes the changes to the AML/CTF Rules in order to simplify the regime and replace lengthy prescriptions which exist in the current Rules. The substantial reduction of the Rules will be accompanied by specific legacy exemptions in a separate document, which will assist in readability.

The consultation paper refers to the principle of scalability, which is central to appropriately regulating real estate professionals from diverse businesses as Real Estate Investment Trusts (REITs) and property developers, to self-employed real estate agents.

The exposure draft Rules should further acknowledge the complexity, in particular, of the largest businesses and establish a principle of self-nomination, allowing businesses the flexibility to appropriately discharge their obligations, such as through a reporting group, in the most efficient manner consistent with their individual corporate structures.

Exposure Draft AML/CTF Rules

Reporting groups

The exposure draft Rules replace the existing concept of business groups with a new 'reporting group', intended to require the management of money laundering/terrorism financing (ML/TF) risk at the group level, and to better facilitate the efficient implementation and exercise of these functions.

The Property Council supports this new concept, subject to the appropriate delegation of functions to the most appropriate entities in the reporting group. AUSTRAC has indicated that further consultation will take place on determining the 'lead entity', however there are some common corporate structures in the property sector which allow for the simple determination of control, in a practical sense and not simply in a structural sense.

As the forming of a reporting group and a lead entity will be critical in determining an organisation's AML/CTF obligations, AUSTRAC should be prepared to assist new reporting entities with complex corporate or control structures, where the Rules or guidance is insufficient.

Flexibility must be considered for reporting groups where reporting entities have engaged individual contractors to perform the entity's AML/CTF functions, and ensure that the independent contractors do not automatically become reporting entities in their own right. For example, when a developer engages an individual sales agent as an independent contractor.

Recommendation 1: Allow flexibility for reporting groups to either include or exclude independent contractors as part of reporting entities (and therefore reporting groups), rather than reporting entities in their own right

Customer due diligence

Division 2 of the exposure draft Rules outlines the exemptions from initial customer due diligence (CDD), including for opening an account and deposit, certain financial markets transactions and services provided in a foreign country.

The exposure draft Rules do not outline the circumstances where verification of initial CDD can be delayed as part of a real estate transaction, such as during settlement, which could interrupt the ordinary course of business for these transactions, including but not limited to the payment of the balance or the lodgement of a transfer of legal title.

There are a number of circumstances where the name of a purchaser on a contract may be changed, such as:

- A change in personal circumstances, not limited to a marriage, divorce or inheritance
- For financing or structuring reasons, including for tax or liability reasons
- The on-selling of a property prior to settlement
- Nominating an alternative purchaser, or
- To make use of a stamp duty exemption or concession.

Whilst the timing of these activities prior to settlement varies, they could take place days prior, and would then incur additional initial CDD on the new purchaser.

In these circumstances, there will be a contractual obligation on both parties that the transaction will settle on a particular date, and without an exemption in this circumstance would cause a party to be in breach of its obligation.

The Rules should provide an exemption for, at the very least, low-risk transactions such as for first home buyers or for those with a mortgage (and thus have already been graduated through another entity's AML/CTF program), and delayed verification should be allowed to occur through and shortly after the settlement date.

For example, in NSW, neither the *Conveyancing Act 1919 (NSW)* nor the *Real Property Act 1900 (NSW)* stipulate a specific cut-off date prior to settlement that a purchaser's details can be changed on a contract.

Without an exemption, and in order to meet their (new) AML/CTF obligations, the established practice of real estate professionals will need to change considerably to prevent any interaction between the substitution of a purchaser and the settlement date.

The proposed exemptions do provide for an exemption from initial CDD for politically exposed persons (PEPs) and sanctions screening. These screenings would make up a significant portion of the obligations under initial CDD which would be causing time delays, or cause a verification to be delayed past a settlement date. The Rules should clarify that these provisions would apply in this circumstance.

In addition, there may be delays in identifying beneficiaries or classes of beneficiaries. This should not prevent a transaction from finalising, particularly if the transaction is viewed as low risk.

Recommendation 2: Provide an exemption for delayed verification for initial CDD where there is a contractual obligation to settle on a real estate transaction, it is considered low-risk, and reasonable steps have been taken to finalise verification prior to settlement

In addition, neither the exposure draft Rules nor the future law compilation of the Act provide sufficient guidance on simplified CDD. AUSTRAC should clarify whether this will be contained within the formal AML/CTF customer due diligence guidance or in a later version of the Rules open for consultation.

Customer due diligence on employees and contractors

Reporting entities will be required to conduct due diligence on personnel who are employed or otherwise engaged by the reporting entity, and who will be performing the relevant AML/CTF functions for the entity.

Section 13 of the exposure draft Rules refer to the requirements for employment or engagement of a person for the purposes of performing AML/CTF functions, including assessing the person's skills, knowledge and expertise, as well as the person's integrity.

Many developers rely on channel agents, which are specialised real estate professionals who facilitate engagement or access to certain markets, such as for international investors. Channel agents may undertake AML/CTF functions to support the reporting entity.

However, as part of the obligations under Section 13 of the exposure draft Rules, it would be exceptionally burdensome to expect reporting entities to conduct due diligence on the personnel of a channel agent, including assessing their integrity or skillsets.

Recommendation 3: As part of provisions allowing a reporting entity to rely on the due diligence of other parties, if a reporting entity engages with an external contractor or service provider (such as channel agents), which are required to conduct their own personnel due diligence and training requirements, then a reporting entity should be able to rely on those assessments

CDD reliance arrangements

The exposure draft rules outline the obligations on reporting entities in order to rely on another entities' CDD in sections 44 and 45. Section 45 outlines the ad-hoc reliance arrangements in circumstances where there is no established agreement allowing so.

The Rules should allow for a reporting entity to rely, on an ad-hoc basis, certain approvals from government agencies to satisfy initial CDD, in order to simplify the regime.

For example, foreign purchasers of residential properties including land in Australia require approval from the Foreign Investment Review Board (FIRB) before a transaction can be finalised. As part of the approval process from FIRB, entities undergo background checks from the Australian Tax Office (ATO) or FIRB to establish and verify their identity, provide details on financing arrangements and source of funds, as well as detailed information regarding its ownership structure (including the beneficial owners).

FIRB approval exists to ensure that foreign investment into Australia is not contrary to the national interest and forms a detailed assessment of not just the project but the proponent.

As such, if FIRB has deemed an entity as fit and proper to invest in real estate in Australia, having received approval and provided it to the real estate professional, and the real estate professional has that confirmed as legitimate, then it should be able to satisfy the obligations under initial CDD.

As part of the development of the Rules, AUSTRAC should further consult with industry and its government partners on what other government approvals could be used to satisfy initial CDD, to reduce the regulatory burden and streamline processing.

Recommendation 4: Allow entities to rely on certain government approvals, such as FIRB approvals, on an ad-hoc basis in order to satisfy initial CDD

Documenting updates to assessments or policies

The consultation paper seeks feedback on the reasonable period of time for reporting entities to document updates made to their ML/TF assessment or AML/CTF policies.

Whether assessment or policies have been updated during a routine assessment or when material changes have occurred, a period of 90 days would be satisfactory and reasonable to document the changes.

Recommendation 5: Allow reporting entities a period of 90 days to update their ML/TF risk assessments or AML/CTF policies

Compliance reports

The consultation paper seeks feedback on a preferable reporting or lodgement period. For the property industry, this will be varied and depend on a company's individual circumstances, including whether they use the default financial year in Australia (from 1 July to 30 June), or an approved substituted accounting period such as the calendar year.

For multinational companies headquartered overseas, particularly in the United States of America or in parts of the European Union, many prefer to report in Australia on a substituted accounting period of a calendar year in order to align themselves with their parent companies.

By allowing entities to determine their reporting period as either 1 July to 30 June, or a calendar year, there will be greater flexibility for entities in order to streamline their reporting with either their financial reporting or their AML/CTF obligations in other jurisdictions.

In addition, this could assist AUSTRAC in managing reporting throughout the year, rather than all reporting entities submitting at the same time.

Recommendation 6: Allow lead entities flexibility to choose their own reporting period, either the financial year (1 July to 30 June) or a calendar year (1 January to 31 December), to allow alignment with other reporting obligations, such as financial or climate, or AML/CTF reporting obligations in other jurisdictions

Classes of eligible beneficiaries—collecting sufficient information

Section 28 outlines the requirements for reporting entities to establish the identity of any person on whose behalf the customer is receiving a designated service.

Clarity is sought on the interaction between section 28, paragraph 1, and section 28, paragraph 2. Paragraph 1 notes that it is not always possible to identify each beneficiary of a trust, due to the nature of the trust (such as the number of beneficiaries, or where the beneficiaries are not yet certain).

Paragraph 2 notes however that reporting entities must be able to collect sufficient information to be satisfied it can establish the identity of beneficiaries when there is a distribution from the trust or when a beneficiary intends to exercise vested rights.

It is not uncommon to see a number of eligible beneficiaries listed in a trust deed as an eligible trustee. The primary beneficiary (named in the trust deed) can be accompanied by general beneficiaries, not limited to parents, children, grandchildren, siblings, spouses of any other general beneficiary, or a number of other examples.

Where a trust deed lists the eligible beneficiaries in addition to the primary (named) beneficiary, the Rules should clarify that each of the listed general beneficiaries do not require CDD, other than when a distribution is made or vested rights exercised.

In New Zealand, in identifying the beneficiaries of trusts: for discretionary trusts, the reporting entity needs to obtain a description of or the type of beneficiary (usually listed on the Trust Deed); and for non-discretionary trusts, to obtain the name and date of birth for each beneficiary. AUSTRAC should consider whether this simplified expression is more practical than that currently drafted in the exposure draft Rules.

Recommendation 7: Clarify that general beneficiaries listed in a trust deed do not require CDD unless a distribution from the trust is made to the general beneficiary or a beneficiary exercises its vested rights

The Property Council would welcome the opportunity to discuss this submission in more detail. Please contact Dan Rubenach, Policy Manager at drubenach@propertycouncil.com.au to arrange a meeting.

Yours sincerely

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