

***Anti-money laundering and counter-terrorism
financing reforms***

**The Real Estate Institute of New South Wales
Limited**

**Submission in response to the Consultation Papers on
Australia's Anti-Money Laundering and Counter-
Terrorism Financing Regime**

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TO: *Attorney General's Department*
By email: economiccrime@ag.gov.au

1. Introduction

This Submission has been prepared by The Real Estate Institute of New South Wales Limited (**REINSW**) and is in response to Consultation Papers 1 and 5 about proposed anti-money laundering and counter-terrorism reforms (**AML CTF Reforms**). REINSW is the largest professional association of real estate agents and other property professionals in New South Wales. REINSW seeks to promote the interests of its members and the property sector on property-related issues. In doing so, REINSW plays a substantial role in the formation of regulatory policy in New South Wales.

This Submission outlines REINSW's positions and recommendations predominantly in response to Consultation Papers 1 and 5, and specifically focuses on real estate agents who are proposed to be captured by Tranche 2 of the AML CTF Reforms. REINSW raises issues and recommendations throughout this Submission for Government to consider in relation to the proposed AML CTF Reforms. REINSW also supports the issues and recommendations raised in the Submission lodged by the Real Estate Institute of Australia, as a member of this national real estate peak industry body.

2. Risk-Based Approach

REINSW opposes the proposed risk-based approach which requires reporting entities to consider their business risks relating to anti-money laundering and counter terrorism financing (**AML CTF**) and implement risk mitigation measures commensurate to it. Although real estate professionals can carry out identification checks, **REINSW recommends** that legal professionals and conveyancers should rightfully carry out risk assessments associated with the AML CTF Reforms. As reporting entities, legal professionals and conveyancers are also required to carry out risk assessments as part of the AML CTF Reforms. Requiring real estate professionals to also do so simply duplicates work involved in real estate business activities and transactions. Legal professionals and conveyancers have an in-depth knowledge and expertise of the law and handle 90% of the funds transferred as part of a real property transaction, and so are best placed to identify AML CTF risks. Real estate professionals would require significant training to effectively implement the risk-based approach and assess the level of risk their business poses to AML CTF activities, whereas risk assessment would simply be an extension of a legal professional and conveyancer's normal due diligence obligations.

However, were Government to implement the currently proposed risk-based approach, **REINSW recommends**:

- An extended implementation period, during which Government takes an educational approach to compliance as opposed to issuing penalties, to give real estate professionals enough time to familiarise themselves with, and implement, these reforms on top of their already busy schedules and limited resources. **REINSW further recommends** that this transition period be 2 years, but no less than 12 months, for industry to be educated on the AML CTF Reforms and to adjust their business practices for compliance with the AML CTF Reforms. In any event, **REINSW recommends** that, at the very least, for the first 12 months, there should be no

penalties for non-compliance and instead AUSTRAC should take an educational approach to compliance.

- A comprehensive training package, beyond just a continuing professional development (**CPD**) module to ensure real estate professionals have a detailed understanding of their obligations and the steps they need to take to comply with the AML CTF program.
- AUSTRAC provide funds to REINSW to assist with the implementation process and roll out of the AML CTF Reforms within industry. Such funds are necessary to prepare training materials, templates and other educational resources necessary to raise awareness of, and ensure compliance with, the AML CTF Reforms.
- Clear guidance be given from Government (preferably in the legislation) about signs, behaviour or conduct which points specifically to AML or CTF. Real estate professionals are not experts in AML and CTF and might inadvertently miss tell tail signs of suspicious activity or inadvertently overlook or miscategorise the severity of certain risk factors without clear and specific guidance in the legislation on what they should be looking for.

3. Customer Due Diligence

The proposed AML CTF Reforms require real estate professionals, as “reporting entities”, to confirm a customer’s identity by carrying out verification procedures and then require the agent to assign the risk related to offering services to that client.

REINSW supports, in principle, procedures which require the verification of a client’s identity. Such procedures are already commonplace in the industry to protect against issues such as fraud. For example, the Supervision Guidelines under section 32 of the *Property and Stock Agents Act 2002* (NSW) (**PSA Act**) already requires agents to confirm the identity of their client prior to entering into an agency agreement.

However, in relation to the specific customer due diligence (**CDD**) obligations proposed as part of the AML CTF Reforms, **REINSW makes the following recommendations**:

- Customer due diligence obligations should be integrated into practice as seamlessly as possible in the normal flow of business to avoid industry disruption and resistance. **REINSW recommends** the trigger to undertake CDD on vendors during a sales transaction should take place at the listing, before an agency agreement is entered into.
- Except for buyers’ agents who should verify the identity of their clients prior to entering into Buyers’ Agency Agreements, **REINSW opposes** the requirement for real estate professionals to conduct CDD for buyers. Section 48 of the PSA Act prohibits agents from acting for both the buyer and seller at the same time and REINSW is concerned that requiring a real estate professional to conduct CDD on both the vendor and purchaser might put real estate professionals in a position where they have a conflict of interest. Additionally, an agent has a duty under section 6 of Schedule 1 to the *Property and Stock Agents Regulation 2022* (NSW) to act in their client’s best interest, and conducting CDD checks on the buyer could delay, or potentially jeopardise, a transaction putting the agent in conflict with their duty to the vendor. **REINSW also**

opposes the requirement to conduct CDD on prospective purchasers (or other interested parties). In addition to potential conflict of interest concerns raised above, an obligation to conduct CDD on every potential purchaser would be time consuming, costly, and would delay or disrupt the normal flow of business – especially in an auction environment where anyone can turn up at anytime prior to or during the auction to bid. **REINSW recommends** that were Government to require CDD on buyers, this due diligence should be carried out by banks or lawyers and should only be triggered on exchange in the case of a private treaty sale or a successful bid at an auction. Further, for buyers represented by buyers’ agents, **REINSW recommends** that buyers’ agents should carry out CDD checks on those buyers at the time of listing, before an agency agreement is entered into.

- **REINSW recommends** that auctioneers should be exempt from CDD obligations and should not be considered “reporting entities”. The focus of the AML CTF Reforms should be on entities directly involved in the real property transaction, whereas auctioneers simply facilitate auctions; do not handle financial transactions directly and do not have a contractual relationship (ie. agency agreement) with the vendor or purchaser. The sales agent, who is responsible for the overarching listing and sale of the property, would already have conducted CDD checks such that requiring auctioneers to do so as well simply duplicates these compliance obligations. In a similar way that Government does not intend to regulate residential tenancies, property management and leasing and commercial real estate services, **REINSW recommends** that auctioneers should also be exempt from the AML CTF Reforms.
- **REINSW recommends** that any CDD obligations should align with the current verification of identity practices required under State legislation (for example, in New South Wales, the Supervision Guidelines stipulates certain verification checks that must be taken before entering into an agency agreement). This would avoid inconsistencies and allow agencies to leverage existing systems, verification practices and procedures, and would not disrupt the ordinary course of workflow that industry currently knows.
- **REINSW supports**, in principle, the proposed flexible CDD framework which would allow one reporting entity to “rely on CDD undertaken by another reporting entity in appropriate circumstances” in a real estate transaction, subject to the comments made about CDD obligations more generally above.¹ In particular, **REINSW recommends** that agents should be able to rely on CDD undertaken by other agents during a transaction. For example, a buyer’s agent should be able to rely on CDD undertaken by the sales agent on the vendor (and vice versa) and a real estate franchise should be able to rely on CDD undertaken by other franchisees. REINSW’s view is because real estate professionals are subject to the same verification of identity and CDD obligations, reliance on each other’s CDD would not only be appropriate but would streamline and avoid duplication work in a transaction which would otherwise be inefficient, costly and have the potential to delay or lose a sale. **REINSW recommends** Government consider other ways it might be able to streamline AML CTF compliance obligations across the professional services sector to avoid unnecessary duplication of tasks. This might include real estate professionals having the ability to rely on the CDD carried out by banks when, for example, buyers had to apply for loans to purchase a property or when vendors had to mortgage the relevant property.

¹ Attorney-General’s Department, “Paper 1: Further information for real estate professionals” May 2024, 7.

4. Compliance Costs

REINSW's view is that implementing and complying with the proposed AML CTF Reforms will have significant costs. REINSW is concerned that the increased compliance costs will inevitably be passed onto consumers, making property transactions more expensive overall and the cost of sale will be higher.

Compliance costs will impact small and medium-sized enterprises (**SMEs**) who may not have the funds or resources to comply with the proposed AML CTF Reforms, especially if they have to implement new compliance software, train employees on their AML CTF obligations and hire a compliance officer to ensure compliance. This is also true for franchisors and franchisees. It will be costly for a head of a business group to develop, implement and maintain a group-wide AML CTF program and then to ensure that all reporting entities within that group comply with their obligations under the program. In relation to the "business group" concept, REINSW queries what will happen if a franchisee cannot afford these additional compliance costs or if their circumstances change such that it cannot maintain these costs? Further, what are the reporting obligations between the franchisors and franchisees in terms of a franchisee's compliance and what are the associated costs? Who remedies a breach of the group-wide AML CTF program if a reporting entity cannot afford to do so? There are so many questions relating to costs that remain unanswered by the Consultation Papers but that need to be addressed for a smoother implementation process. While the "business group" concept aims to simplify and reduce compliance costs for groups and franchises, REINSW's view is that the AML CTF Reforms do not actually do this. Therefore, if the reforms were to be implemented, **REINSW recommends** Government considers how it can support agencies of all types (not just SMEs, franchisors and franchisees) to reduce costs associated with complying with the proposed AML CTF Reforms.

REINSW reiterates recommendations made in paragraph 2 above that funding for REINSW from AUSTRAC or other Government body, to prepare training courses and materials and other educational resources for industry to help with the implementation of the AML CTF Reforms, could support agencies of any size to understand and comply with those reforms. Funding is essential as most agencies, especially small ones, lack the resources, centralised internal systems, knowledge, experience, expertise, software and support which must be available to them to ensure their compliance with the AML CTF Reforms. Government wants to ensure compliance with the AML CTF Reforms and, as the peak industry body for real estate agents and property professionals in New South Wales, REINSW is uniquely placed to work with industry and AUSTRAC to design effective policies and procedures to ensure real estate professionals get their compliance obligations right. REINSW already helps agents meet their day-to-day compliance and supervisory obligations by providing resources, such as template forms and agreements and its Supervision Guidelines Template (which helps agents create their own operational procedures, as required by the Supervision Guidelines), and could work with AUSTRAC to help develop and design similar industry resources and solutions tailored to the AML CTF Reforms, to ensure agents are compliant.

5. Reporting obligations

The proposed AML CTF Reforms require real estate professionals to report to AUSTRAC about certain transactions and activity including a Suspicious Matter Report where a real estate professional has reasonable grounds to suspect that “a client is not who they claim to be, or there may be criminal activity”.²

REINSW makes the following recommendations in relation to these reporting obligations:

- Government should provide clear, specific guidance about the signs, behaviours and conduct which would trigger a real estate professional’s reporting obligations or the lodgement of a Suspicious Matter Report. Without clear, exact guidance, real estate professionals, who are not experts in anti-money laundering and counter terrorism financing, may inadvertently miss or overlook suspicious activity, potentially miscategorise certain conduct as low risk when AUSTRAC considers it a high risk factor, or report information which may not be relevant. A comprehensive training package, **as recommended** in paragraph 2 above, as well as other educational resources would help agents identify “suspicious activity” and help them understand when they need to lodge a report.
- Government should consider agents’ statutory duties at a State level to avoid conflicting obligations. Inconsistencies could arise between real estate professionals’ reporting obligations under the proposed AML CTF Reforms and their existing obligations under State legislation, such as the PSA Act and PSA Regulation. A few examples of potential conflicts between the AML CTF Reforms and current State requirements for real estate professionals include:
 - Section 3 of Schedule 1 to the PSA Regulation requires agents to “act honestly, fairly and professionally with all parties in the transaction” and so have a duty, for instance, to answer a client honestly if asked whether they had reported them to AUSTRAC.
 - Real estate professionals’ reporting obligations may be inconsistent with their duty to act in their client’s best interest: Section 6 of Schedule 1 to the PSA Regulation.
 - Currently, both NSW Fair Trading’s Supervision Guidelines and the *Personal information and tenancy applications: Fair Trading Commissioner’s guidance* requires agents to only sight and make a note of identity documents, rather than keeping them on file. REINSW is concerned that some of the CDD and record keeping obligations proposed by the AML CTF Reforms could potentially be inconsistent with this practice, although it notes that Consultation Paper 5 states, in relation to record keeping, that Government is “committed to working with stakeholders to explore options to reduce the requirements for sensitive data retention”.³
- Government should consider the impact that real estate professionals’ reporting obligations will have on a real estate agent or real estate agency’s reputation, especially in relation to consumer complaints. A complaint, or enquiry, is recorded at entry point regardless of its substance if it meets NSW Fair Trading’s definition of a

² Ibid, 12.

³ Attorney-General’s Department, “Paper 5: Broader reforms to simplify, clarify and modernize the regime” May 2024, 23.

“complaint”. For example, agents have had complaints made against them simply because they were doing their job by calling tenants who are in rental arrears and the tenants have subsequently complained. NSW Fair Trading publishes the names of companies who have had 10 or more complaints made against them in a calendar month on a public register. REINSW is concerned that compliance with real estate professionals’ reporting obligations under the AML CTF Reforms might increase the instances of consumer complaints made against an agency or agent (for example, if an agent erroneously or even legitimately reports suspicious activity), and this might cause reputational harm.

- Government should consider the risks real estate professionals (and other reporting entities) face when meeting their AML CTF reporting obligations under the proposed reforms and how such risks can be mitigated. For example, these reporting obligations might damage client relationships and cause reputational damage to real estate agents/agencies if a real estate professional, in good faith, reports activity to AUSTRAC which turns out not to be relevant and a client becomes aware of it. Similarly, there could be circumstances where a real estate professional categorises certain conduct or activity as low risk but AUSTRAC takes a different view and determines that it is high risk. Clarity around the consequences for agents is required in this regard. While the current AML CTF framework provides some protections to parties who report suspicious individuals, **REINSW recommends** that Government considers and tries to mitigate risks that reporting entities might face when meeting their AML CTF reporting obligations so that real estate professionals (and other reporting entities) are not adversely affected by trying to do the right thing.

6. Summary

In summary:

- REINSW opposes the risk-based approach. Instead, REINSW recommends that legal professionals and conveyancers are better equipped to, and should, carry out risk assessments associated with the AML CTF Reforms. However, were Government to implement the currently proposed risk-based approach, REINSW recommends an extended implementation period of 2 years (with a minimum of 12 months), a comprehensive training package beyond just CPD, funding to REINSW so that it can support the implementation and roll out of the reforms by preparing training courses, materials and other educational resources (amongst other things), and clear, specific guidance from Government (preferably in the legislation) on the signs, behaviour and conduct which might pose an AML CTF risk.
- In relation to CDD, REINSW:
 - recommends that the trigger to undertake CDD on vendors during a sales transaction should take place at listing, before an agency agreement is signed;
 - opposes the requirement for real estate professionals to conduct CDD on buyers for conflict of interest reasons;
 - opposes the requirement to conduct CDD on prospective purchasers, or other interested parties, because, in addition to conflict of interest reasons, this practice would be costly, time consuming and would delay or disrupt the normal flow of business;

- recommends that were Government to require CDD on buyers, this due diligence should be carried out by banks or lawyers and should only trigger on exchange in the case of a private treaty sale or a successful bid at an auction;
 - recommends, for buyers represented by buyers' agents, that buyers' agents carry out CDD checks on those buyers at the time of listing, before an agency agreement is entered into;
 - recommends that auctioneers should be exempt from CDD obligations and should not be considered "reporting entities";
 - recommends that any CDD obligations should align with the current verification of identity practices required under State legislation; and
 - supports, in principle, the proposed flexible CDD framework which would allow one reporting entity to "rely on CDD undertaken by another reporting entity in appropriate circumstances" in a real estate transaction (subject to other comments made about CDD obligations more generally above), recommends that real estate professionals should be able to rely on CDD undertaken by other real estate professionals during a transaction and recommends that Government considers other ways in which it might be able to streamline AML CTF compliance obligations across the professional services sector to avoid unnecessary duplication of tasks.
- REINSW recommends that Government considers how it can support real estate agencies of all types (SMEs, franchisors, franchisees, business groups, etc) to reduce costs associated with complying with the proposed AML CTF Reforms.
 - REINSW reiterates recommendations that AUSTRAC or other Government body should provide funding to REINSW, to assist REINSW to prepare training courses, materials and other educational resources for industry to help with the implementation and roll out of the AML CTF Reforms. Such funding to REINSW would support agencies of any size to understand and comply with the AML CTF Reforms. Funding is essential as most agencies, especially small ones, lack the resources, centralised internal systems, knowledge, experience, expertise, software and support which might be available to them to ensure compliance with the AML CTF Reforms. Since REINSW is the peak real estate body in NSW with very high industry coverage, REINSW is uniquely placed to work with industry and AUSTRAC to design effective policies and procedures to ensure real estate professionals get their compliance obligations right. REINSW already helps agents meet their day-to-day compliance and supervisory obligations by providing resources, such as template forms and agreements and its Supervision Guidelines Template (which helps agents create their own operational procedures, as required by the Supervision Guidelines), and could work with AUSTRAC to help develop and design similar industry resources and solutions tailored to the AML CTF Reforms, to ensure agents are compliant.
 - In relation to reporting obligations, REINSW recommends:
 - Government should provide clear, specific guidance (preferably in legislation) about signs, behaviours and conduct which would trigger real estate professionals' reporting obligations or the lodgement of a Suspicious Matter Report. As recommended in paragraph 2 above, a comprehensive training

package, as well as other educational resources, would help agents identify “suspicious activity” and help them understand when they need to lodge a report.

- Government should consider agents’ statutory duties at a State level to avoid conflicting obligations (including, for instance, agents must not retain identity documents at a State level but must retain AML documents at a Federal level).
- Government should consider the impact that real estate professionals’ reporting obligations will have on a real estate agent or real estate agency’s reputation, especially in relation to consumer complaints.
- Government considers and tries to mitigate risks that reporting entities might face when meeting their AML CTF reporting obligations so that they are not adversely affected by trying to do the right thing.

7. Conclusion

REINSW has considered the proposed AML CTF Reforms and has provided its comments above, aiming to provide input on as many pertinent aspects of the proposed AML CTF Reforms as possible. However, REINSW’s resources are very limited and, accordingly, it does not have the capacity to undertake a thorough review and is unable to exhaustively investigate all potential issues in this submission. Nonetheless, REINSW has identified a number of matters that it believes will cause significant consumer detriment, some of which appear above.

REINSW appreciates the opportunity to provide this Submission and would be pleased to discuss it further, if required.

Yours faithfully



Tim McKibbin
Chief Executive Officer