THE LAW SOCIETY
OF NEW SOUTH WALES

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Dear Dr Popple,

Reforming Australia's anti-money laundering and counter-terrorism financing regime – second phase consultation

Thank you for the opportunity to provide input to the Law Council of Australia for its submission in response to papers published in the second phase of consultation by the Attorney-General's Department (AGD), *Reforming Australia's anti-money laundering and counter-terrorism financing regime*. In the time available, we have prepared the below feedback on the matters raised in your Memorandum, together with some additional matters for consideration. Of course, we would be happy to discuss these issues in further detail as the consultation progresses.

1. Scope of tranche 2 regime – Exemptions recognised by the AGD

The Law Society supports the exemptions proposed by the AGD, as summarised on Page 2 of your Memorandum, as they appear sensible and proportionate to the potential risks relating to provision of those services. The Law Society considers the exclusion of certain legal services as noted in Paper 2, such as services provided for litigation work, trust accounting where there is no "transaction" being carried out for a client, and administering a testamentary trust, as reasonable and appropriate. The Law Society also agrees that the work of barristers, and government and corporate lawyers, should be excluded from regulation under the anti-money laundering and counter-terrorism financing regime (AML/CTF regime).

We consider the exemption of "pure advisory work …where there is no underlying transaction" requires some further guidance or clarification. The examples provided on Page 7 of Paper 2 of "work undertaken by barristers" and "general advice on matters such as directors' duties or employment law" are clear cut. However, it may be useful to provide guidance by way of more nuanced examples of advisory work where there is *an underlying transaction* to demonstrate, by contrast, how these would be caught within tranche 2.

While we note the activity of "*representing* a client in legal proceedings" (emphasis added) is not proposed to be a designated service, we suggest further clarification would be of benefit.

From our members' experience, whilst a client may seek legal advice in connection with a matter that could potentially involve legal proceedings, commencement of proceedings is often the last resort, and many disputes are resolved before court action is taken. We recommend that the exception for legal proceedings include any legal assistance or legal advice in respect of potential legal proceedings.

2. Scope of tranche 2 regime – Designated services

Risk – Inherent versus residual – Implications for the new obligations

We agree that it is important to highlight the effectiveness of existing controls relating to the proposed designated services. The regime should, in our view, ensure that solicitors are able to leverage these existing controls, if they wish, to assist in satisfying new obligations under the tranche 2 regime. The verification of identity requirement that applies to solicitors in jurisdictions conducting electronic conveyancing, as mentioned on Page 3 of your Memorandum, is a good example of an existing control that should be available for practitioners to use.

However, the regime must be sufficiently flexible to allow other means of verification of identity to satisfy AML/CTF requirements, if the solicitor so chooses. For example, a solicitor in NSW undertaking a conveyancing matter may choose to satisfy the verification obligations under Rule 6.5.2 of the NSW Participation Rules[1] by taking "reasonable steps" to identify the client, rather than applying the Verification of Identity Standard.[2] While providing solicitors with the option of using existing controls, caution must be taken to ensure that the existing controls are not rigidly mandated as part of the AML/CTF Rules. For example, we would not support the AML/CTF Rules mandating the use of the Verification of Identity Standard in all conveyancing matters. The Verification of Identity Standard has limitations, including that the verification must be conducted face to face and cannot be conducted over an audio-visual link. The Verification of Identity Standard for electronic conveyancing also requires the solicitor to retain copies of the client identification documents.[3] In our members' experience, clients are, understandably, increasingly reluctant to permit their solicitor to retain copies of their identity documentation, in light of recent data breaches. The AML/CTF customer due diligence requirements need to be cognisant of this and avoid an overly prescriptive approach.

References to using verification of identity under the electronic conveyancing framework must also recognise the difference between the flexible path of taking "reasonable steps", and the more prescriptive approach of using the Verification of Identity Standard. We would be pleased to be involved in any further discussions seeking to leverage the verification of identity regime under electronic conveyancing.

We suggest that it would be helpful to clarify whether a solicitor is able to utilise the services of a third-party to satisfy verification of identity requirements and other client due diligence obligations under the AML/CTF regime. For example, in electronic conveyancing, pursuant to Model Participation Rule 6.5.5, solicitors can use an Identity Agent (such as Australia Post) to undertake the verification of identity, provided the Identity Agent uses the Verification of Identity Standard. Clarification should be sought about the use of Identity Agents in the specific

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[1] NSW Participation Rules for Electronic Conveyancing, Version 7 https://www.registrargeneral.nsw.gov.au/__data/assets/pdf_file/0003/1286751/NSW-Participation-Rules-Version-7.pdf.

[2] The Verification of Identity Standard is set out in Schedule 8 of the NSW Participation Rules for Electronic Conveyancing, Version 7, which implements the Verification of Identity Standard set out in Schedule 8 of the Model Participation Rules issued by the Australian Registrars' National Electronic Conveyancing Council (ARNECC) https://www.arnecc.gov.au/wp-content/uploads/2024/01/Model-Participation-Rules-Version-7-Clean.pdf.

[3] Clause 3.(b), Schedule 8 of the Model Participation Rules.

context of applying the existing processes under electronic conveyancing, but also, importantly, in a broader sense, as to whether verification of identity or other aspects of client due diligence may be outsourced by the legal practice to a third-party provider.

We also note that the electronic conveyancing regime provides that where the client has very limited identification documentation, a statutory declaration may be given by an Identity Declarant, under paragraph 4 of the Verification of Identity Standard. If the AGD confirms that the Verification of Identity Standard may be used to discharge AML/CTF obligations in real estate transactions, it may be prudent to check that this includes the Identity Declarant process.

While we appreciate, in principle, the importance of client identity verification, we note that, occasionally, clients have difficulties in producing sufficient identity documentation or being able to present this documentation in person to a solicitor, particularly in rural or regional areas. This may pose a problem, particularly for small law practices in those areas.

There also needs to be a level of flexibility and clarification as to the period during which the verification of identity can be satisfied, particularly in urgent matters. While a rushed transaction can *sometimes* be a red flag, it is not uncommon for clients to seek pre-auction contract advice just prior to the auction. It may be preferable to allow the solicitor to provide some preliminary advice, provided the appropriate checks are conducted as soon as reasonably practicable. In our view, it is important that there is flexibility provided in relation to timing, to enable legitimate clients to access the legal services they need. Guidance and clarification that the AML/CTF obligations for client due diligence can be completed as soon as practicable would be helpful.

Proposed designated services – Direct link to a transaction should always be required

It is important that designated services capture only those services where there is a direct link to a transaction. It should operate as a guiding and limiting principle when solicitors are considering whether a particular legal service will be caught in tranche 2.

As a general comment on the proposed designated services, in fleshing out the scope of the designated services, Paper 2 appears to adopt a wide interpretation of the activities under the Financial Action Task Force's (FATF) Recommendations 22(d) and (e) listed activities. Arguably, the scope of activities has been broadened on a wide reading of the "preparing for" aspect of the activities, which may have the consequence of capturing a wider net of legal services than intended or necessary.

We set out our comments in relation to each of the proposed designated services below.

Proposed designated service 1 – Real estate

We support the proposed exemptions for deceased estates, leasing and property management. We suggest that this exemption should be expanded to apply to the licensing of real property.

In our view, there is tension between the definition of "real property", which includes "any interest in or right over land" and "a licence to occupy land and any other contractual right exercisable over land", and Proposed designated service 1, which is defined as acting on behalf of a person to "buy, sell or transfer real property". The delineation between the definition of real property to include "any interest or right and a licence to occupy", but then specifying that leasing of commercial real estate and residential tenancies fall outside the ambit is confusing. We suggest the exclusion of leasing should be framed in broader terms, so as to exclude not only residential and commercial leasing, but also industrial, retail, and rural

contexts. This could be achieved by excluding all leasing (and licensing) of real property. In our view, this would be a preferable approach, so as to avoid questions arising as to whether a particular lease is sufficiently commercial to attract the exclusion. An example might be the question of whether or not short-term leases that are not residential or commercial leases (such as hotels and holiday caravan parks) would be excluded.

Clarity about whether grants of easements, covenants, profit a prendre and exclusive use by-laws are excluded from Proposed designated service 1 would also be of assistance.

The broad definition of "real property" may also capture construction contracts and a contract granting a caveatable interest in land for any reason (that is, not just as security for finance, which is covered elsewhere). In our view, these transactions may fall outside the relevant inherent risk identified by the FATF's Recommendation 22 (d) and (e), which is "buying and selling real estate". The justification for Proposed designated service 1 encompassing a broader range of transactions is not clear.

We note that "prepare or review contracts" is specified in the second dot point of the scope of Proposed designated service 1, on Page 8, of Paper 2. Although these services are generally connected to a transaction, and will therefore sometimes be caught, there will be many instances, such as where a property is sold at auction, where the underlying transaction does not actually proceed in relation to a particular client. It is important to highlight in any guidance material whether or not the AML/CTF regime applies in these circumstances, notwithstanding that the underlying transaction does not proceed. In our view, the regulation should only apply in circumstances where the transaction proceeds, as, without the underlying transaction, there is no AML/CTF risk. In practical terms, the primary change for many solicitors will be the stage at which identification documents are obtained from the client. Depending on firm policies, this might be done at the same time as client authority documents are signed (but not necessarily at the beginning of the engagement). As noted above, guidance and clarification that the AML/CTF obligations for client due diligence can be completed as soon as practicable would be helpful.

We agree that the inclusion of "land title or zoning permit searches" in the third dot point of Proposed designated service 1 on Page 8 of Paper 2 may be too wide a trigger. A direct link to an underlying transaction should be required, and this may not always be the case where land title or zoning permit searches are undertaken. For example, title searches are conducted for a range of reasons, including for advisory work, general property/commercial law work (eg. preparation of strata by-laws), in litigation (eg. security for costs), and insolvency (eg. identification of company property). A zoning certificate may be sought in connection with lodging an approval for the owner of the land to do works or change the use of the land. We suggest the reference to "land title or zoning permit searches" is too broad and should be removed. More broadly, the third dot point also refers to conducting "due diligence". We submit services should only be subject to the AML/CTF regime when a transaction is contemplated. Conducting due diligence occurs in a variety of situations, including security reviews and valuation of assets, which will not always lead to a transaction. We therefore submit that the whole of the third dot point, "conduct due diligence, land title or zoning permits" should not be included in Proposed designated service 1.

We suggest that the final dot point of the scope of Proposed designated service 1, "prepare documents to be provided to a registry authority for transfer of real property" may also extend the operation of Proposed designated service 1 beyond the intended scope, as it may inadvertently capture property transfers arising by way of the settlement of family law proceedings. We suggest consideration be given to removing this limb, as the buying and selling of real property, and any connected preparatory activities, are adequately captured by the remaining limbs of the scope.

In our view the sentence "The customer is the person", which appears as the final sentence in the definition of most of the proposed designated services, is unnecessary.

Our additional comments on Paper 1, Further information for real estate professionals, are included later in this response.

Proposed designated service 2 – Buying/selling legal entities

In our members' experience, in these types of transactions, it would be unusual for the due diligence work to be separate from the actual transaction. In our view, each of the activities provided on Page 9 of Paper 2 are appropriately within Proposed designated service 2.

Proposed designated service 3 – Receiving/holding/controlling/disbursing funds/property (includes trust accounts)

We note that the proposed exclusion of "pre-payments for goods and services" from Proposed designated service 3 activities implicitly assumes the client, or a person related to the client, is making the prepayment. However, it is common for law firms to receive money from third-parties, including insurers, in satisfaction of a liability to the client (eg a costs order in litigation), and to then use that money to pay the firm's existing or future professional fees and/or disbursements in accordance with the instructions of the client. It is unclear whether an AML/CTF obligation is triggered in those circumstances. If so, then the obligation will be triggered in relation to the client when the risk is actually related to the third-party source of funds.

We note the exclusion of the administration of deceased estates from proposed designated service 5,[4] and the exclusion of the receipt of property from a deceased estate from proposed designated service 1.[5] It would be helpful to confirm that the receipt of funds in a solicitor's trust account in connection with the administration of a deceased estate is also excluded from proposed designated service 3.

The scope of the definition for "prescribed disbursements" is unclear. Specifically, we are concerned that the category of exemption for payments to persons carrying on a business that relates solely to the services of a reporting entity may not capture all disbursements of a firm in the conduct of litigation – see dot point 5 on Page 11, Paper 2. For example, we note that while there is a professional cohort of expert witnesses who work solely in litigation, and may be caught under this exemption, most experts have a primary practice in their discipline and provide expert opinions in litigation on request. The majority of experts will therefore fail to meet the requirement that their services *solely* relate to the services provided by the reporting entity. Other examples of disbursements potentially falling outside this category of exemption inappropriately include costs from photocopying companies, couriers, third-party search providers, and private transport providers (taxis, airlines). The larger the disbursement, the more likely a firm will ask the client to pay money into trust specifically for that disbursement.

In response to your request for examples of recipients of payments to whom funds would typically be transferred upon payment of settlement monies, or from trust funds held for the purposes of litigation, we provide the following non-exhaustive list:

- mediation costs (including to a third-party mediator);
- arbitration costs;
- costs for consultants to set up and run paperless hearings;
- class action fees, such as fees to issue notices to class members; and

[4] Paper 2, Page 12.
[5] Ibid, Page 8.

- expert fees.

On page 10 of Paper 2, feedback is sought on whether escrow services should be excluded from this proposed designated service. We suggest this exclusion would be appropriate, and should similarly apply to money held in a solicitor's trust account (or controlled money account):

- as a deposit under a contract for the sale of land or option agreement;
- in connection with a dispute, pending settlement of the dispute;
- in connection with a final payment in a sale of business, for example a final stock valuation; and
- amounts retained in relation to a contractual warranty.

In each of the above situations, the solicitor should not be subject to client due diligence AML/CTF obligations in respect of the other party to the contract that is not the solicitor's client, particularly where that other party is represented or is the ultimate payee. Ordinarily, the solicitor acting for that other party would have already carried out client due diligence in relation to their own client. In this context, it is generally not appropriate for one solicitor to be directly communicating with another solicitor's client.[6]

Proposed designated service 4 – Raising contributions for companies, trusts and similar

We note that the Law Council has stated that the findings in the Vulnerabilities Analysis Report suggest that activities under this category are generally not undertaken by legal practitioners in Australia. However, the Report appears to have considered a different formulation of this designated service. While the actual raising of contributions is not undertaken by solicitors, the services described at the top of Page 12, of Paper 2, "Preparing for, carrying out, or organising transactions for contributions" would capture work regularly undertaken by solicitors, particularly the reference to "documenting these transactions". For example, the scope of this designated service, as currently proposed, could encompass assisting clients to negotiate and implement trade finance facilities, or joint ventures, and to draft, and enter into, a contract where the venturers have capital-raising obligations in relation to the joint venture vehicle. It would also be enlivened for much smaller matters. We understand there have been some discussions about introducing a monetary threshold of $5,000. We support this approach on the basis that, not only is the money laundering risk low, but any legal fees received by the solicitor would also be minimal. The cost of doing the AML/CTF due diligence on the transaction may be greater than the fees earned, which could lead to a situation where lawyers are less inclined to do this work, creating an access to justice issue.

Proposed designated service 5 – Creating companies, partnerships, trusts

Although the services of company formation specialists are often used, particularly for straight forward structures, solicitors may still be involved in the creation and documentation of legal entities. The four dot points on Page 12 of Paper 2 are broad, but appear to be consistent with proposed designated service 5 as currently defined. We are pleased to see the exclusion of testamentary trusts created by a will.

Proposed designated service 6 – Acting as director/partner/trustee etc

We suggest that solicitors would not commonly act as a director, secretary, or an attorney under a power of attorney, and note the important exclusion of executors or administrators of

[6] See also Rule 33, *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*, https://legislation.nsw.gov.au/view/html/inforce/current/sl-2015-0244#sec.33

a deceased estate. However, by way of example, solicitors may act as the settlor of a trust for the purpose of establishing a unit trust in a commercial transaction.

In our view, the greater concern is that the phrase "*arranging* for a third person to act" (emphasis added) might capture the drafting or reviewing of documentation in connection with this designated service, such as the drafting of a power of attorney, or a document appointing someone as director or secretary. In our view, the breadth of this proposed designated service requires further clarification, otherwise numerous documents that solicitors draft and review daily may be inadvertently caught.

Proposed designated service 7 – Acting as nominee shareholder (or arranging for another to act)

We agree that that this is not a service that legal practitioners in Australia generally provide.

Proposed designated service 8 – Providing registered office or principal place address

Although increasingly less common, some legal practices do provide their premises as the registered address for a client's company. We expect that legal practices may discontinue this offering.

3. Requirements under the regime

We welcome the intention to avoid duplication by applying existing mitigating measures when demonstrating compliance with AML/CTF obligations. We also note that Australia, being one of a handful of countries yet to regulate "gatekeeper" professions, has the benefit of learning from the experiences of those regulated jurisdictions. Our observations in relation to some relevant obligations are set out below.

i. Enrol with AUSTRAC

As solicitors will become providers of designated services under the reforms, they must navigate and understand the requirements for AUSTRAC enrolment. The introduction of another regulator into an already complex regulatory framework will disproportionately impact smaller firms, which are less likely than larger firms to have existing systems or protocols in place to serve as mitigating measures.

Many small to medium firms will have to make nuanced decisions as to what constitutes their "senior management", and the qualities and resources an AML/CTF Compliance Officer will need to effectively carry out their role. Law firms are also likely to need support developing appropriate risk assessment protocols and triggers for re-assessment of risk. Education of legal professionals will need to emphasise that risk assessment is not a "once off" activity conducted when a client is onboarded.

It seems likely that most AML/CTF compliance will be conducted at the time a new matter is opened by the firm. However, sometimes practitioners commence work or give advice prior to the matter being formally opened. There should be guidance provided to the profession on how to manage compliance while still conducting an effective and competitive legal business.

ii. Develop and maintain an AML/CTF Program

Paper 2, Page 17 states:

> If your business is a member of a 'business group' (see Paper 5: Broader reforms to simplify, clarify and modernise the regime), the head of your business group would be

> required to develop, implement and maintain a group-wide AML/CTF program and ensure that all reporting entity members comply with their obligations. Individual members of the business group would remain responsible for fulfilling their own obligations within the group-wide AML/CTF program.

We suggest that the legislation should ensure that firms operating AML/CTF-compliant operations in other jurisdictions should be able to use those same processes to be compliant under the Australian regime. Having a different approach for the same legal firm in every jurisdiction would create an additional and unnecessary administrative burden.

iii. Conduct client due diligence

Paper 2, Page 18, refers to assigning a risk rating for each customer. Lawyers will be relatively new to this concept, especially those without previous AML/CTF experience. It is recommended that guidance is provided on what factors are relevant to such a risk. Furthermore, risk can only be indicative, and shouldn't require extensive review. For example, a client incorporated in a jurisdiction where significant sanctions are imposed would be a high risk. It would be helpful to clarify the degree to which AUSTRAC will issue guidance around risk parameters or how legal practices should assess such risks.

Paper 2, Page 18, refers to determining whether a client is a "politically exposed person" or whether they appear on any Australian sanction lists on the Department of Foreign Affairs and Trade website. Sanctions screening should be risk-based, such as when dealing with a foreign company or individual (i.e. not domestic) or where a foreign beneficial owner is identified.

We note that the definition of a politically exposed person in the AML/CTF Rules will include judges of the High Court of Australia, Federal Court of Australia and Supreme Courts of Australian states and territories, and their immediate family members and close associates. This will require solicitors to treat conveyancing transactions involving such persons as high-risk transactions, for which particular precautions will need to be taken, including as to the source of funding for such transactions. On a practical level, it may be problematic to require law firms to treat the acceptance of instructions from relevant judges, and their families, as a red flag. We suggest this could be explored in discussions with the AGD.

v. Lodge suspicious matter reports

As discussed further below, the expansion of AML/CTF legislation to the legal sector has implications for the inadvertent waiver of legal professional privilege (LPP) and thereby a loss of protection of client confidentiality. The reforms must be carefully calibrated to ensure that suspicious matter reporting obligations are applied in a way that is sensitive to, and will not interfere with, the operation of LPP. At the same time, guidance for practitioners on developing clear policies and procedures on the action to be taken when a conflict arises as between AML/CTF obligations and LPP may mitigate the potential for waiver. Suspicious Matter Reporting can cause significant conflicts of interest, confidentiality and LPP issues as currently proposed, putting the solicitor in a difficult position, including the potential conflict of a solicitor breaching LPP and confidentiality, to avoid personal penalties for non-compliance.

vi. Make and keep records

Solicitors already make and keep records. Clarification as to which records generally need to be made available to AUSTRAC would be of assistance. There are significant risks associated with being required to hold extensive client data, including data security concerns.

We strongly agree that proposed record keeping requirements in relation to AML/CTF matters, particularly identity records, pose a further data breach risk for law firms that must be managed. As mentioned above, some clients are very concerned about identity theft. They are reluctant to give a solicitor their identification documents. Sometimes, a law practice will agree to only hold paper copies in a physical file (rather than store any of it electronically).

Guidance regarding the required retention period will also be important. It would be useful if the requirement to keep these records could correspond with rule 14.2 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*, being seven years. This is also consistent with obligations to retain records under the electronic conveyancing framework.[7]

4. Legal professional privilege and confidentiality

The operation of legal professional privilege (LPP), and the proposed obligations under the AML/CTF regime may place practitioners in a position where they cannot avoid waiving their client's privilege, which the Law Society believes is an untenable position.

This issue has similarly arisen in relation to the ATO's approach to abrogating LPP. We are concerned that the disclosures required by AUSTRAC for the particulars of a claim of LPP may, by their nature, jeopardise LPP and result in a waiver of LPP. If there is a dispute as to the claim for LPP, Paper 2, Page 23 notes that AUSTRAC will liaise with the reporting entity to resolve the dispute and, where not resolved, AUSTRAC may apply to the Federal Court for determination of the claim of LPP. In our view, a preferable solution would be for an independent determination of LPP at an early stage, for example, lodging sealed contents of the relevant information and a claim of LPP with the Federal Court, for determination, rather than lodging a claim of LPP with AUSTRAC.

Further consultation is critical when the proposed definition of LPP is made available. Paper 2, Page 21 notes that regard will be had to the *Evidence Act 1995 (Cth)* which we support, however in our view, the specific proposed definition of LPP must be the subject of further consultation. Similarly, it is critical that the legal profession is provided with greater detail of the information, and the form, required by AUSTRAC if a claim for LPP is made (assuming that mechanism remains).

5. Implementation and timelines

We are pleased to see indications that practitioners will be afforded a period of assisted compliance. This should be further clarified to ensure adequate time is provided for education prior to commencement of the regime. We similarly support a staged implementation.

It is also important that an adequate period is provided for proper review of the draft legislation.

From an implementation and compliance perspective, we are pleased to see that the AGD is proposing to transition pre-commencement customers for new and existing regulated entities into the AML/CTF regime over a specified period of time. It is difficult to provide feedback, as requested in Paper 2, as to the appropriate period of time, other than to say the period needs to reflect the compliance burden of the transition, particularly on sole practitioners, which will make up a large percentage of legal practices. However, we suggest that a period of between one to two years is appropriate, given the likelihood of needing to introduce system changes and education programs. We also note that, under the verification of identity framework for electronic conveyancing, verification of identity is valid for two years.[8] For legal practices that conduct a significant volume of conveyancing transactions, it would be very helpful if the transition period for pre-commencement customers was two years.

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[7] Page 2, ARNECC Model Participation Rules Guidance Note, Retention of Evidence, https://www.arnecc.gov.au/wp-content/uploads/2021/08/mpr-guidance-note-5-retention-of-evidence.pdf

[8] Rule 6.5.4(b), Model Participation Rules issued by ARNECC https://www.arnecc.gov.au/wp-content/uploads/2024/01/Model-Participation-Rules-Version-7-Clean.pdf.

Page 26, Paper 2 (first paragraph of Page 26), refers to the AGD proposing to:

> …extend the requirement for a customer risk rating to all pre-commencement customers to inform a risk-based transition into the regime. The Act would then require a reporting entity to collect and verify identity information about any pre-commencement customer who is rated as medium or high risk. Identity information that has previously been collected and verified by a reporting entity could be used for this purpose, where appropriate.

Essentially this will mean that any pre-commencement customers that are medium or high risk will require customer due diligence to be completed within the specified transition period. In our view, this should only apply to *high-risk* customers.

Paper 5: Broader reforms to simplify, clarify and modernise the regime

We note, on Page 24 of Paper 5, that the AGD is considering defining a "business relationship" and "occasional transaction". We support the need to define these terms, due to their implications for the *level* of ongoing customer due diligence, and *when* obligations for ongoing customer due diligence cease. We note that the AGD proposes to define a business relationship as:

> A relationship between a reporting entity and a customer involving the provision of a designated service that has, or is expected to have, an element of duration.

We suggest the definition requires further clarity, as any provision of legal services will have an "element of duration". Presumably, the definition is seeking to emphasise that services provided in a "business relationship" will be provided on an ongoing basis, for a longer period, rather than in connection with a one-off transaction or piece of work. This aspect of the definition should be strengthened, in our view.

Paper 5, Page 11 refers to a requirement for independent audit, with a frequency determined by the entity's risk profile (with a potential minimum frequency of every four years) and detail around the minimum standards for auditors. We suggest that it should be sufficient for that review to include a review done as part of a trust account audit or any other state/territory based regulatory review.

Paper 5, Page 25, refers to changing the process for issuing Chapter 75 exemptions by specifying in the Act that eligible law enforcement agencies can issue a "keep open notice" directly to a reporting entity. An eligible law enforcement agency could issue a "keep open notice" without requiring approval from AUSTRAC, in circumstances where a senior delegate within the agency reasonably believes that maintaining the provision of a designated service to the customer would assist the investigation of a serious offence. In our view, "keep open notices" should not apply to lawyers, due to concerns relating to the maintenance of LPP and confidentiality.

In our view, the Tipping off offence (Paper 5, Pages 28 and 29) should be amended to include an exemption for communicating to a relevant law society or any other designated local regulatory authority for the purpose of seeking guidance with respect to a Suspicious Matter Report, AML/CTF compliance and questions around issues such as LPP and confidentiality. By its nature, the Tipping off offence proposal may cause a conflict with a solicitor's duty to the client, and solicitors will likely seek assistance in navigating these issues.

Paper 1: Further information for real estate professionals

We note the interplay between proposed designated services 1 and 2 effectively means that a real estate agent may have AML/CTF obligations in respect of both parties to the transaction, "their own client before commencing to provide services, and to the other party to the sale when it becomes clear that the sale is likely to proceed." The legislative drafting of this limitation will be important in qualifying the obligations of the vendor's real estate agent, otherwise AML/CTF obligations would arise in relation to every potential purchaser the vendor's real estate agent deals with. It will be particularly important in an auction context, as it would be impractical for the vendor's real estate agent to comply with AML/CTF obligations in respect of every bidder at an auction. However, we note that, in NSW, the vendor's agent must verify the identities of registered bidders at an auction.[9]

We suggest that greater clarity is required in relation to ongoing customer due diligence, such as whether it applies for a particular customer who uses the services of the agent from time to time, but not on an ongoing basis, and the point in time at which the obligation to conduct ongoing customer due diligence ceases. The example of an obligation to conduct ongoing customer due diligence provided on Page 12, in the context of an ongoing sale of an off-the-plan development, is a good and clear example, however, we suggest more nuanced examples should be provided in guidance material for real estate agents.

It would also be helpful to clarify whether strata management services would be regarded as property management services and, therefore, exempt. Often the term "property management services" refers only to services provided in respect of tenanted properties, both residential and commercial. Strata management services could be regarded as similar to property management services, but instead of receiving rent from tenants, the strata manager receives strata levies from lot owners. In our view, strata management services should be similarly exempt.

Conclusion

When tranche 2 is rolled-out, it will likely present issues for smaller firms conducting a significant volume of property transactions, with the costs and administrative burden for conducting client due diligence, and compliance with AUSTRAC reporting requirements, likely to be significant, and, in some cases, prohibitive.

Lawyers already have obligations to report significant cash transactions, and most lawyers' trust accounts are issued by an authorised deposit-taking institution, subject to the existing AML/CTF regime. We restate our view that it is of paramount importance for the new regime to strike a careful balance between mitigating AML/CTF risks, and ensuring law practices and those with limited risk profiles, particularly smaller practices, are not unduly burdened with compliance obligations.

[9] Section 69 *Property and Stock Agents Act 2002*(NSW) https://legislation.nsw.gov.au/view/whole/html/inforce/current/act-2002-066#sec.69.

We look forward to further involvement in this ongoing consultation. Any questions in relation to this letter should be directed to Bobbie Wan, Team Leader Professional Support and Regulatory Policy at bobbie.wan@lawsociety.com.au or (02) 9926 0158.

Yours sincerely,

Brett McGrath
President