Law Council
OF AUSTRALIA

Inquiry into foreign investment proposals

Responses to questions on notice

Senate Economics References Committee

25 August 2020

Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2020 Executive as at 1 January 2020 are:

- Ms Pauline Wright, President
- Dr Jacoba Brasch QC, President-elect
- Mr Tass Liveris, Treasurer
- Mr Ross Drinnan, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful to its Business Law Section's Foreign Investment Committee and the Law Council's Anti-Money Laundering and Counter-Terrorism Funding Working Group in the preparation of this submission.

Introduction

1. The Business Law Section (**BLS**) of the Law Council of Australia is grateful for the opportunity to have appeared before the Senate Economics References Committee (**Committee**) on 7 August 2020 in relation to its inquiry into foreign investment proposals (**Inquiry**). The BLS was represented at the hearing by the Chair and Deputy Chair of its Foreign Investment Committee. During the course of the hearing there were several matters that were taken on notice.

2. This supplementary submission responds to the outstanding questions asked of the representatives, specifically as they relate to:

   (a) recent engagement between the BLS and Government on foreign investment reforms; and

   (b) the Law Council's view on the extension of anti-money laundering (**AML**) regulations to the Australian legal profession.

Engagement with Government on foreign investment reform

3. During the hearing, the Acting Chair, Senator O'Neill, asked the BLS the following question relating to its engagement with Government on foreign investment reform:

   > *SENATOR O'NEILL: Given that this inquiry is underway, can I ask you to provide this committee with materials that are related to your conversations with the government [regarding foreign investment reform proposals] so we can keep an eye on what it is that you're suggesting and recommending?*[1]

4. In response, it is noted that the Foreign Investment Committee of the BLS has commenced a consultation engagement with the Foreign Investment Division of the Department of the Treasury regarding the exposure draft legislation implementing the Australian Government's reform package of the foreign investment regime.

5. Teleconferences have been held as part of the process to date as follows:

   - 4 August 2020: regarding compliance measures both current and under the reform package. Here, discussion included the frustration with the inability to access existing data within the Foreign Investment Review Board (**FIRB**) and government, and the impact on businesses to provide details that FIRB should have.
   - 7 August 2020: a combined session on national security business, compliance and tidy up elements including buybacks and the approach to when an agreement is entered.
   - 21 August 2020: a sub-group session focused on buybacks and when an agreement is entered. This session also sought to address the later announcement by the Critical Infrastructure Centre of its paper on critical infrastructure.

6. At consultations, members of the Foreign Investment Committee have voiced concerns that the proposed reforms must operate clearly and without adverse

[1] Committee Hansard, '*Inquiry into foreign investment proposals*' Senate Economics References Committee, 7 August 2020, 9 (Senator O'Neill).

impact on business or investment flows. In the consultation process, the Law Design Office was also present at the session dated 7 August 2020, and a request was made to ensure that the legislation is made less complex and in particular to ensure that where common use terms are given special meaning that this practice either be stopped or made abundantly clear.

Anti-Money Laundering

7. At the hearing, Senator Whish-Wilson asked several questions relating to AML regulation and the legal profession. These matters were taken on notice on the undertaking that the Law Council would consult with its Anti-Money Laundering and Counter-Terrorism Funding Working Group and respond accordingly. Responses to Senator Whish-Wilson's questions are now included below.

Question One

> *SENATOR WHISH-WILSON: Has your body actively lobbied against tranche 2 anti-money laundering and counterterrorism financing laws in Australia?*[2]

8. The Law Council deplores financial criminality and is committed to raising awareness within the Australian legal community of the risks of unwitting involvement in money laundering and other criminal conduct.

9. The Law Council has made formal submissions against the extension of Australia's existing *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AML/CTF Act**) to the legal profession when such a proposal has been mooted. On occasion, when contentions are raised in the public sphere which suggest the existence of a regulatory gap, the Law Council has provided information to demonstrate that reports may present an incomplete picture; that there is genuine debate as to the existence of any regulatory gap; that there is doubt as to the accuracy of anecdotes which underlie the contentions; that the current AML/CTF Act would be poorly suited to cover any asserted regulatory gap; and that the application of the AML/CTF Act would not be justified by any sound cost-benefit analysis.

10. Regulation must be appropriate and proportionate. The legal profession is already extensively regulated, in a way that is appropriate for the unique and important relationship between a client and their lawyer.

11. The Law Council's position on this issue has been comprehensively stated in its response to the Attorney-General's Consultation Paper: *Legal Practitioners and Conveyancers, a model for regulation under Australia's anti-money laundering and counter-terrorism financing regime.*[3] However, for ease of reference, some key issues are:

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[2] Committee Hansard, '*Inquiry into foreign investment proposals*' Senate Economics References Committee, 7 August 2020, 7 (Senator Whish-Wilson).

[3] The timeframe of for responding to the Senator's questions was too narrow to conduct a full, further consultation with our members. Nonetheless, the same issues are in focus and, accordingly, the Law Council relies on the response paper:
Law Council of Australia, *Response to Consultation paper: Legal Practitioners and Conveyancers, a model for regulation under Australia's anti-money laundering and counter-terrorism financing regime* (7 February 2017), available online: <www.lawcouncil.asn.au/resources/submissions/a-model-for-regulation-under-australia-s-anti-money-laundering-and-counter-terrorism-financing-regime>.

- there is little objective evidence that the current AML/CTF laws are efficient or effective in reducing the incidence of money laundering, terrorism financing or predicate offending, as is evidenced by the recent prosecutions of major financial institutions which have been regulated for more than a decade for historical non-compliance rather than criminal facilitation;
- despite fourteen years of application, the Law Council is not aware of any convictions of lawyers under the existing AML/CTF criminal provisions in Division 400 of the *Criminal Code Act 1995* (Cth) to demonstrate widespread or systemic complicity;
- AML regulation of lawyers would raise a range of concerns including:
  - threatening the operation of the doctrine of client legal privilege;
  - eroding client confidentiality and the concept of independent legal advice because of the operation of suspicious matter reporting and information gathering under the notice requirements of the AML/CTF regime;
  - creating irreconcilable conflicts of interest where a suspicious matter report is required to be lodged, which will require a legal practitioner to terminate the client retainer agreement for reasons that cannot be disclosed to the client under pain of the legal practitioner committing an offence;
  - creating a chilling effect on the client's willingness to provide otherwise priviliged information openly and frankly resulting in damage to the lawyer client relationship which will impede the legitimate and efficient delivery of legal services;
  - changing the role of legal practitioners in the Australian system of justice from trusted advisor to that of informant to law enforcement;
  - imposing dual regulation on legal practitioners (as a matter of principle as well as practice);
  - increasing compliance burdens and costs associated with operating a legal practice and providing legal services; and
- there are significant implementation and compliance costs for the legal profession, many of which are small businesses in suburban and regional locations, which will have a chilling effect on access to justice in those communities and may contribute little to reducing the incidence of money laundering, terrorism financing or predicate offending.

12. The fundamental issue requiring further consideration, however, is that the extension of the existing regime to the legal profession is both inappropriate and disproportionate, as discussed further below.

Tranche 2 is inappropriate for the legal profession

13. The unique relationship between a lawyer and their client is intrinsically linked with the administration of justice. This element is what sets the legal profession apart from the other entities presently regulated in Australia's AML regime.

14. The functioning of our legal system is predicated on clients having confidence in the confidential nature of their relationship with their lawyer. This facilitates a client's full

and candid disclosures, which in turn allows that client to receive full, proper, and correct legal advice based on a complete knowledge of the facts and circumstances.[4]

15. This confidence furthers access to justice through the provision of correct and appropriate advice, and also serves an important function in guiding and deterring aberrant behaviour. That is, clients can be deterred from engaging in illegal behaviour by being counselled against such conduct by their lawyers - an important social function that cannot occur when a client is afraid of disclosing such information to their lawyer.

16. Key elements of the AML regime, such as suspicious matter reporting would serve to undermine an important deterrent to such activity. As is outlined in more detail in **Attachment A**, the Australian legal profession is extensively regulated, including existing prohibitions on accepting unlawful client instructions,[5] an obligation to avoid compromises to their integrity,[6] to comply with the law,[7] and in respect of owing a paramount duty to the administration of justice.[8] These standards prohibit lawyers from overstepping the boundary between warning clients before the engaging in illegal activities, as opposed to engaging in and/or facilitating such activities.

17. These fundamental ethical and regulatory obligations of course give rise to certain exemptions to the aforementioned confidentiality, but this issue is regulated in a manner that is appropriate for the legal profession given the above-noted considerations and context.[9]

18. Given the unique relationship between the lawyer and client, and the context of that relationship within the Australian legal system, it follows that lawyers need to be regulated differently to other professions. A simple 'tranche 2' extension of the AML regime to lawyers would regulate lawyers in the same manner as (for example) banks. It is a blunt solution that has the potential to inflict far more damage than benefit to Australia as a whole, although the Australian legal system would be the primary locus of effect.

Tranche 2 is not proportionate

19. If the attraction of the AML regime is the improved detection and investigation of money laundering, terrorism financing and related crimes, then any extension of Australia's AML regime would be expected:

    - to uncover additional forensic information not already available; and

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[4] See, for example, Justice Kirby's comments on how this candour facilitates the administration of justice in context of legal professional privilege in *Esso Australia Resources Limited v The Commissioner of Taxation [1999]* HCA 67 at [111] per Kirby J, quoting *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 490 per Deane J :

> *It arises out of "a substantive general principle of the common law and not a mere rule of evidence". Its objective is "of great importance to the protection and preservation of the rights, dignity and freedom of the ordinary citizen under the law and to the administration of justice and law". It defends the right to consult a lawyer and to have a completely candid exchange with him or her. It is in this sense alone that the facility is described as "a bulwark against tyranny and oppression" which is "not to be sacrificed even to promote the search for justice or truth in the individual case"*.

[5] Rule 8.1, *Australian Solicitors Conduct Rules* (ASCR).

[6] Rule 4.1.4 ASCR, Rule 4 Barristers' Rule.

[7] Rule 4.1.5 ASCR, Rule 4 Barristers' Rules. One law that must be complied with, for example, is Division 400 of the *Criminal Code 1995* (Cth), which prohibits the dealing with monies, whether knowingly or negligently, that are, or at risk of being, the proceeds of crime.

[8] Rule 3 ASCR, Rule 3 Barristers' Rule.

[9] For example, see Rule 9 ASCR.

- uncovered information would likely be of sufficient forensic value to outweigh the detriments of implementing the regime.

20. The Australian AML regime already regulates and requires banks and related organisations (utilised by legal practices) to monitor suspicious transactions and other AML red flags. The extension of the existing AML regime to lawyers creates an overlapping of regulation, at the considerable cost of undermining the confidentiality essential to the proper functioning of the legal system and Rule of Law.[10] Further, to the extent that additional information can be gleaned from customer due diligence, the legal profession already has corresponding regulation (see **Attachment A** for more information).[11]

21. Looking to a jurisdiction with a comparable legal system, the United Kingdom (**UK**), we can see that the full implementation of the Financial Action Task Force's (**FATF**) recommendations to the legal profession have yielded dubious benefits:

> *When looking at SARs from solicitors, neither the Law Society nor FATF have been able to obtain any example of where even one report from a lawyer and a lawyer alone has actually made a difference to serious and organised money laundering.*
>
> *…the majority of these reports relate to minor tax evasion, small scale opportunistic mortgage fraud by individuals (rather than criminal syndicates) or minor regulatory or environmental breaches uncovered during mergers and acquisitions.*[12]

22. More recent data for the UK Solicitors' Regulation Authority does not appear to track the making of reports through to convictions or disciplinary proceedings, and reveals that a majority of reports are made in respect of non-compliance with the onerous AML reporting regime.[13] It appears that a similar pattern is emerging in the Australian context, at least to the extent that the Australian Transaction Reports and Analysis Centre (**AUSTRAC**) have reported on its activities[14] or pursued court proceedings.[15]

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[10] Also see: Law Council of Australia, *Policy Statement: Rule of Law Principles* (March 2011), 3 at paragraph 4(b), available online: <https://www.lawcouncil.asn.au/docs/f13561ed-cb39-e711-93fb-005056be13b5/1103-Policy-Statement-Rule-of-Law-Principles.pdf>.

[11] Including 'know your client' requirements for property transactions- see from page 6 of Attachment A.

[12] The Law Society of England and Wales, *The Costs and Benefits of Anti- Money Laundering Compliance for Solicitors* December 2009, as referred to in paragraph 71 of the Law Council's Response to Consultation paper: Legal Practitioners and Conveyancers, a model for regulation under Australia's anti-money laundering and counter-terrorism financing regime (above n 3).

[13] Solicitors Regulatory Authority, *Anti Money Laundering Report* (May 2016), available online <https://www.sra.org.uk/globalassets/documents/sra/research/anti-money-laundering-report.pdf?version=4a1ab0 >, 5.

[14] As the Financial Action Task Force observed in its 2015 Mutual Evaluation Report of Australia's AML/CTF Regime:

> *However, a concern is that some statistics crucial to tracking the overall effectiveness and efficiency of the system related to ML investigations, prosecutions, convictions, and property confiscated are not maintained nationally…*
>
> *…there are very limited mechanisms or metrics actively in place to measure how efficient or effective the AML/CTF system is, including how well it addresses ML/TF risks.*

See: Financial Action Task Force, *Anti-money laundering and counter-terrorist financing measures: Australia* (April 2015), 42, available online: <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/Mutual-Evaluation-Report-Australia-2015.pdf>.

[15] The (published) cases taken to Court largely relate to non-compliance: for example see: *Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v Westpac Banking Corporation* [2020] FCA 410; *Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v Commonwealth Bank of Australia Limited* [2018] FCA 930; *Chief Executive Officer of Australian Transaction Reports and Analysis Centre v TAB Limited* (No 3) [2017] FCA 1296.

23. Further, to the extent that AUSTRAC has published case studies over the last ten years, none of the case studies suggested any wrongdoing by Australian lawyers, and only one report noted any attempt to involve a lawyer's account to launder money involvement.[16] In the latter case, the facts suggest that AUSTRAC may have been notified as a result of the lawyer's reporting of cash transactions pursuant to the *Financial Transaction Reports Act 1988* (Cth) (**FTR Act**).[17]

24. These questionable benefits from extending the AML regime to lawyers must be measured against the costs. The above submissions have outlined the unique relationship of the lawyer and client in the Australian legal system and how the implementation the AML regime would undermine the functioning of that relationship, access to justice and the administration of justice. However, in addition to these issues, the financial detriment to the Australian legal profession cannot be understated. The Australian legal profession is overwhelmingly comprised of small and micro businesses, noting that some 83.4 percent of private law firms[18] and all practising barristers[19] are sole practitioner/principal businesses.

25. In December 2016 and January 2017 Queensland Law Society conducted a survey of law firms to assess likely implementation costs of an AML/CTF regime akin to the existing Australian scheme being extended to legal practitioners.[20] The results indicate that set up and annual compliance costs for the AML/CTF regime for legal practices would be:

    - for larger firms (19 or more solicitors) around $748,000 per year;
    - for medium sized firms (6 to 9 solicitors) around $523,000 per year; and
    - for smaller firms (sole practitioners and up to 5 solicitors) around $119,000 per year.

26. The estimated magnitude of the compliance costs can be expected to significantly impact on the affordability of legal services, and the viability of law practices to be able to provide such services. Such impact can be anticipated to impede access most for the legal assistance sector, pro bono legal service providers, regional and rural Australians as well as ordinary members of the community.

Question Two

> *SENATOR WHISH-WILSON: Are you aware that countries such as the UK, Hong Kong, Malaysia, Singapore, New Zealand and Canada have gone down the road of putting these reporting requirements into common law for gatekeeper professions such as the legal fraternity?*[21]

27. The Law Council is aware that AML regulation has been extended to lawyers in some overseas jurisdictions. In the Law Council's view, such overseas examples have confirmed rather than assuaged the concerns and position as stated in the

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[16] See: AUSTRAC, *Case Studies*, available online: <https://www.austrac.gov.au/case-studies-capture-austracs-work-disrupting-financial-crime> and <https://www.austrac.gov.au/about-us/case-studies>.
[17] AUSTRAC, *Typologies and case studies report 2013*, Case Study 3, available online: https://www.austrac.gov.au/business/how-comply-guidance-and-resources/guidance-resources/typologies-and-case-studies-report-2013 .
[18] URBIS for the Law Society of New South Wales, *2011 National Profile*, October 2012 at page (i).
[19] Australian Bar Association, *Statistics 2015,* 30 June 2015 at page 3 (6005 practising barristers) Queensland Law Society*, Anti-Money Laundering: Where are we? And what next?* (10 June 2019), available online: <https://www.qls.com.au/About_QLS/News_media/News/Anti-Money_Laundering_Where_are_we_And_what_next>.
[21] Committee Hansard, '*Inquiry into foreign investment proposals*' Senate Economics References Committee, 7 August 2020, 7 (Senator Whish-Wilson).

aforementioned response to the Attorney-General's Consultation Paper.[22] We note in Canada the threat to client legal privilege, the damage that would result to the lawyer client relationship and the inconsistency with ethical obligations were considered matters of fundamental justice sufficient to warrant the exemption of the legal profession from AML/CTF regulation.[23]

28. It should also be stressed that the remaining countries noted above have not universally applied the same regime regulating banks to the legal profession. What has been proposed in Australia as 'tranche 2' is a system favouring ease of investigation for the regulator, at significant cost to both the Australian legal profession and the community. To this end, the Law Council notes again the comments above in respect of the comparable jurisdiction of the UK in Question One.

29. Further, it is significant that FATF, the international driver of such regulation, has itself recognised that a flexible approach must be taken in response to the implementation of its recommendations:

> *Countries have diverse legal, administrative and operational frameworks and different financial systems, and so cannot all take identical measures to counter these threats. The FATF Recommendations, therefore, set an international standard, which countries should implement through measures adapted to their particular circumstance.*[24]

30. It is also worth noting that FATF's recommendations state, with regard to the regulation of designated non-financial businesses and professions (including lawyers), that:

> *This may be performed by (a) a supervisor or (b) by an appropriate self-regulatory body, provided that such a body can ensure that its members comply with their obligation to combat money laundering and terrorist funding.*[25]

31. In the context of an already extensively regulated profession, combined with little evidence that Australian lawyers are engaging or facilitating money laundering, it does not follow that the most appropriate solution to risk of money laundering is the simple extension of the existing AML/CTF regime to lawyers. Rather, the existing regulation of the legal profession is appropriate to manage such risks.

Question Three

> *SENATOR WHISH-WILSON: The legal profession, as one of the key gatekeepers, is not accepting of anti-money laundering reporting requirements. Could you take it on notice to provide suggestions to the committee for tightening up on your profession's potential involvement in reporting suspicious transactions?*[26]

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[22] Law Council of Australia, *Legal Practitioners and Conveyancers, a model for regulation under Australia's anti-money laundering and counter-terrorism financing regime* (7 February 2017), available online: <www.lawcouncil.asn.au/resources/submissions/a-model-for-regulation-under-australia-s-anti-money-laundering-and-counter-terrorism-financing-regime>.
[23] Canada (Attorney-General) v Federation of Law Societies of Canada 2015SCC 7.
[24] Financial Action Task Force, International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations (Updated October 2018), 6.
[25] Ibid, 22.
[26] Committee Hansard, '*Inquiry into foreign investment proposals*' Senate Economics References Committee, 7 August 2020, 9 (Senator Whish-Wilson).

32. As stated above, the extension of the existing AML regime is not the only, nor the appropriate, solution to the risk of money launderers seeking to make use of the legal profession. To this end, the Law Council again reiterates the position conveyed in its aforementioned response to the Attorney-General's Consultation Paper.[27]

33. However, it is again noted that the legal profession is already extensively regulated, in a manner that is, the Law Council considers, appropriate relative to the unique role and obligations of the profession. This regulation is again outlined, for the Committee's information at **Attachment A**. This includes lawyers' existing obligations under the FTR Act to report to AUSTRAC details of 'significant cash transactions' over $10,000.

34. The legal profession is focused on the rule of law and observance of laws by the community. While reporting on a client's activities to authorities is not consistent with a properly functioning legal profession which must ensure clients have confidence in the confidential nature of their relationship with their lawyer, the legal profession's suggestions for tightening compliance include the publication and refinement of guidelines to prevent inadvertent participation in activities contrary to the AML regime.

35. The publication of these guidelines and education in relation to the guidelines is an ongoing suggestion and a firm commitment by the legal profession for the avoidance of and unwitting involvement in crime. For example, see:

    - the Law Council's Anti Money Laundering Guide;[28] and
    - the Queensland Law Society Ethics Centre *Guidance Statement No. 13 – Proceeds of crime compliance and Anti-money Laundering.*[29]

[27] Law Council of Australia, Response to Consultation paper: Legal Practitioners and Conveyancers, a model for regulation under Australia's anti-money laundering and counter-terrorism financing regime (7 February 2017), <www.lawcouncil.asn.au/resources/submissions/a-model-for-regulation-under-australia-s-anti-money-laundering-and-counter-terrorism-financing-regime>.

[28] Law Council of Australia, *Anti Money Laundering Guide for Legal Practitioners* (updated January 2016), available online: <www.lawcouncil.asn.au/docs/94749cb5-3c56-e711-93fb-005056be13b5/1601-Policy-Guideline-Anti-Money-Laundering-Guide-for-Legal-Practitioners.pdf>.

[29] This Guidance statement recommends, for example, that solicitors 'always carry out due diligence by establishing and verifying client identity': Queensland Law Society Ethics Centre, 'Guidance Statement No. 13 – Proceeds of crime compliance and Anti-money Laundering' (Accessed June 2019), available online: https://www.qls.com.au/Knowledge_centre/Ethics/Guidance_Statements/Guidance_Statement_No_13_%E2%80%93_Proceeds_of_crime_compliance_and_Anti-Money_Laundering

ATTACHMENT A

Regulation of the Australian legal profession

The development of best practice recommendations for the legal profession must necessarily consider the extent to which existing legal profession regulation is relevant to managing AML/CTF risks.

While the AML/CTF regime is regulated at the federal level, the Australian legal profession is regulated at the state and territory level. Notwithstanding a push for the national or uniform regulation of the profession,[1] there remains some variation across the states and territories. For this reason, and for ease of reference, we have primary focused in this paper on:

- The *Legal Profession Uniform Law (NSW and Vic, with WA expected to join in 2020)*.

- The Australian Solicitors' Conduct Rules (**ASCR**), which were endorsed by Law Council Directors in June 2011 and have been adopted as the professional conduct rules for solicitors in: South Australia,[2] Queensland,[3] New South Wales and Victoria,[4] and the Australian Capital Territory.[5] The ASCR were adopted in accordance with the processes of each jurisdiction, which vary considerably. Non-ASCR jurisdictions continue to maintain their own professional conduct rules, although Tasmania is expected to implement the ASCR sometime in 2020. [6]

- To the extent that they are relevant in this context (noting direct briefing)- the Australian Bar Association (**ABA**) professional conduct rules, which have existed in various iterations since 1993. The National Conduct Rules were implemented in New South Wales and Victoria,[7] Queensland,[8] South Australia,[9] Western Australia,[10]

[1] All states and territories bar South Australia enacted Legal Profession Acts that were based on a National Model Bill:
- *Legal Profession Act 2006* (ACT);
- *Legal Profession Act 2004* (NSW) (operative from 1 October 2005 to 30 June 2015);
- *Legal Profession Act 2006* (NT);
- *Legal Profession Act 2007* (Qld);
- *Legal Profession Act 2008* (WA);
- *Legal Profession Act 2007* (Tas);
- *Legal Profession Act 2004* (Vic) (operative from 12 December 2005 to 30 June 2015).
- South Australia by contrast maintained (and continues to maintain) its *Legal Practitioners Act 1981* (SA).

However, jurisdictional differences resulted in the practical application of this policy objective falling short of true uniformity. Following this, the Council of Australian Governments (COAG) put the regulation of the legal profession on its agenda in 2009. This eventually cumulated in the *Legal Profession Uniform Law* (NSW and Vic), which commenced on 1 July 2015. Western Australia is due to join the Uniform Law in 2020.

[2] Effective from July 2011 as the *Law Society of South Australia, Australian Solicitors' Conduct Rules.*

[3] Effective from June 2012, as the *Australian Solicitors' Conduct Rules 2012*.

[4] Effective 1 July 2015, as the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015.*

[5] Effective 1 January 2016, as the *Legal Profession (Solicitors) Conduct Rules 2015*.

[6] Northern Territory has the *Rules of Professional Conduct and Practice (effective from 10 April 2002);* and Tasmania currently has the *Rules of Practice 1994,* although it will adopt the *Australian Solicitors Conduct Rules* sometime in 2020.

[7] *Legal Profession Uniform Conduct (Barristers) Rules* (effective 1 July 2015).

[8] Bar Association of Queensland *Barristers' Conduct Rules* (effective 23 December 2011).

[9] South Australian Bar Association Inc *Barristers' Conduct Rules* (effective 14 November 2013).

[10] Western Australian Bar Association *Barristers' Rules* (effective 5 October 2011).

and Tasmania.[11] The Northern Territory has maintained earlier conduct rules.[12] While these Rules cover the same content and substance, the Uniform Law jurisdictions have a slightly different numbering sequence. For ease of reference we refer to the Uniform Law version of the Barristers' Rules (**Barristers' Rules**) in this paper.

The existing regulatory framework applying to lawyers sets out a number of core standards to be observed. Lawyers are subject to professional and statutory obligations that are designed to promote the highest standards of professional conduct and ethical standards in the provision of legal services to clients.

In general terms, legal profession legislation such as the Uniform Law and state and territory Legal Profession Acts addresses matters of practice management, whereas the state and territory conduct rules concern legal professional ethics.

Legal professional legislation

Using the Uniform Law as a guide for state and territory professional legislation, the matters regulated include the following:

- Chapter 4 of the Uniform Law is concerned with business practice and professional conduct. The objectives of that chapter are '… *to ensure appropriate safeguards are in place for maintaining the integrity of legal services'*. Detailed provisions have been enacted relating to, for example, trust money and trust accounts, and business management and control (including compliance audits and management system directions).

- Part 4.3 of the Uniform Law regulates the charging of legal costs and the making of costs agreements between legal practitioners/firms and clients (and also third party payers of legal costs). [13] For example, section 172 provides that the legal costs charged are no more than what is fair and reasonable in all the circumstances, including that they are:
    - proportionally and reasonably incurred; and
    - of a proportionate and reasonable amount.

- Section 173 similarly requires that law practices refrain from acting in a way that unnecessarily results in increased legal costs, including unnecessary delay.

- Section 174 to 178 addresses the costs disclosure obligations to the client.

- Sections 179 to 185 govern costs agreements. In respect of any costs disputes that may arise, sections 196 to 205 address the costs assessment process to be used to resolve cost disputes. These sections include provisions which govern costs disclosure and charging obligations to third-party payers (both associated and non-associated third-party payers). For example, section 176 of the Uniform Law sets out costs disclosure obligations to third party payers.

[11] *Legal Profession (Barristers) Rules* 2016 (Tas) (effective 1 October 2016).
[12] Northern Territory has the *Barristers' Conduct Rules* (effective 20 March 2003), and Tasmania the Tasmanian Bar Association's *Professional Conduct Guidelines*.
[13] This is largely replicated in non-Uniform state and territory Legal Profession Acts: for example, section 300 of the *Legal Profession Act* 2006 (ACT).

- Chapter 6 of the Uniform Law provides for external intervention in the business and professional affairs of law practices in response to a range of specific circumstances as well as "where any other proper cause exists in relation to the law practice". [14] This includes, for example, the appointment of external examiners to conduct external examination of trust records, and the ability of regulatory authorities to appoint external investigators, and/or conduct compliance audits.

- Chapter 5 of the Uniform Law provides a scheme for the discipline of the Australian legal profession. This includes, for example, the initiation and prosecution of proceedings by the designated local regulatory authority. The disciplinary framework applies to conduct that amounts to either '*unsatisfactory professional conduct*' or '*professional misconduct*'. Such conduct includes a contravention of the Legal Profession Uniform Rules made under Part 9.2 of the Uniform Law. In addition, there is a duty imposed on independent regulators of the legal profession, including the Legal Services Council and designated local regulatory authorities, to report suspected offences after an investigation or otherwise.

The significance of the latter point, is that a contravention of the professional conduct rules, being the ASCR or the Barristers' Rules is '… *capable of constituting unsatisfactory professional conduct or professional misconduct, and may give rise to disciplinary action by the relevant regulatory authority* …'.[15] These conduct rules accordingly fulfill important function in regulating the profession.

Professional and ethical rules

We address some of the relevant professional conduct rules below.

Rules concerning the provision of advice and acting on lawful instructions

Solicitors are obligated to act only in accordance with the *lawful* instructions of their clients. The fundamental obligations of legal practitioners in providing advice on these matters is encapsulated in Rule 8 of the ASCR:

> *Rule 8: Client instructions*
>
> *8.1 A solicitor must follow a client's lawful, proper and competent instructions.*

Rule 8 requires a legal practitioner to "know their client" and to check that the advice sought is in relation to a lawful activity. The latter involves practitioners to consider the true purpose of their client's activities and the extent to which they may be furthering or obscuring any illegal or criminal purpose.

It is worth noting at this juncture that practitioners are still subject to general criminal provisions such as Division 400 of the *Criminal Code 1995* (Cth), which prohibits the dealing with monies, whether knowingly or negligently, that are, or at risk of being, the proceeds of crime.[16] Practitioners who accordingly fail to determine whether their client is seeking advice for a proper and lawful purpose runs the risk of criminal sanction.

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[14] Section 326(e)
[15] Rule 2.3 *Australian Solicitors' Conduct Rules*.
[16] In the comparable jurisdiction of the United Kingdom, cases such as these have resulted in prison terms: *R v Duff* [2002] EWCA Crim 2117; *R v Griffiths* [2006] EWCA Crim 2155.

Rules concerning other fundamental ethical duties

The relevant ASCR is below:

> *Rule 4: Other fundamental ethical duties*
>
> *4.1 A solicitor must also:*
>
> *4.1.1 act in the best interests of a client in any matter in which the solicitor represents the client;*
>
> *4.1.2 be honest and courteous in all dealings in the course of legal practice;*
>
> *4.1.3 deliver legal services competently, diligently and as promptly as reasonably possible;*
>
> *4.1.4 avoid any compromise to their integrity and professional independence; and*
>
> *4.1.5 comply with these Rules and the law.*

The equivalent Barristers' Rules are:

> *Rule 3: The object of these Rules is to ensure that barristers:*
>
> *(a) act in accordance with the general principles of professional conduct;*
>
> *(b) act independently;*
>
> *(c) recognise and discharge their obligations in relation to the administration of justice; and*
>
> *(d) provide services of the highest standard unaffected by personal interest.*
>
> *Rule 4: These Rules are made in the belief that:*
>
> *(a) barristers owe their paramount duty to the administration of justice;*
>
> *(b) barristers must maintain high standards of professional conduct;*
>
> *(c) barristers as specialist advocates in the administration of justice, must act honestly, fairly, skilfully, bravely and with competence and diligence;*
>
> *(d) barristers owe duties to the courts, to their clients and to their barrister and solicitor colleagues;*
>
> *(e) barristers should exercise their forensic judgments and give their advice independently and for the proper administration of justice, notwithstanding any contrary desires of their clients; and*
>
> *(f) the provision of advocates for those who need legal representation is better secured if there is a Bar whose members:*
>
> *(i) must accept briefs to appear regardless of their personal beliefs;*
>
> *(ii) must not refuse briefs to appear except on proper professional grounds; and*

(iii) compete as specialist advocates with each other and with other legal practitioners as widely and as often as practicable.

These rules establish the fundamental ethical duties set out in ASCR and Barristers' Rules, and are the foundation for other, more specific, rules.

The key concepts embodied in these rules are that lawyers are to act in the best interests of their clients and to avoid any compromise to their own integrity and professional independence.

Rules concerning disreputable conduct and public confidence in the legal profession

The relevant ASCR is below:

> *Rule 5: Dishonest and disreputable conduct*
>
> *5.1 A solicitor must not engage in conduct, in the course of practice or otherwise, which demonstrates that the solicitor is not a fit and proper person to practise law, or which is likely to a material degree to:*
>
> *5.1.1 be prejudicial to, or diminish the public confidence in, the administration of justice; or*
>
> *5.1.2 bring the profession into disrepute.*

The equivalent Barristers' Rule is:

> *Rule 8: A barrister must not engage in conduct which is:*
>
> *(a) dishonest or otherwise discreditable to a barrister;*
>
> *(b) prejudicial to the administration of justice; or*
>
> *(c) likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute.*

Rule 5 of the ASCR and Rule 8 of the Barristers' Rules address the important public policy reasons for preserving public confidence in the legal profession and the administration of justice. Conduct that undermines public confidence in the profession, the courts and the administration of justice both discourages compliance with the legal system. It also restricts access to justice, insomuch that a general public that is distrustful of lawyers and the legal system is less likely to seek redress.

Rules concerning the paramount duty to the administration of justice

Connected to ASCR Rule 8, discussed above, are the Rules relating to the administration of justice. The relevant ASCR is below:

> *Rule 3: Paramount Duty to the Court and the Administration of Justice*
>
> *3.1 A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.*

The equivalent Barristers' Rule is:

> *Rule 23: A barrister has an overriding duty to the court to act with independence in the interests of the administration of justice.*

These rules set out the fundamental ethical principle that the paramount duty of a lawyer is to the court and the administration of justice.

That is, for the legal system to function the lawyer must conduct him or herself in such a way that facilitates efficient and effective processes of the court in the exercise of judicial functions, [17] and maintains the integrity of the system.[18] From this flow specific duties of the lawyer as an officer of the court. This was addressed in, for example, *Rondel v Worsley*,[19] where Lord Reid said:

> *[Counsel] has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests*. [20]

In this way, clear ethical lines are drawn in circumstances where otherwise conflicting obligations may exist. Practitioners are reminded that where any ethical conflict arises, their duty to the court and the administration of justice are paramount in dealing with that conflict.

Rules in relation to supervision

Practitioners also have ethical obligations to supervise the provision of legal services by solicitors for whom they are responsible, to observe all the of the ethical obligations outlined above:

> *Rule 37: Supervision of Legal Practitioners*
>
> *37.1 A solicitor with designated responsibility for a matter must exercise reasonable supervision over solicitors and all other employees engaged in the provision of the legal services for that matter.*

Senior practitioners can be sanctioned by the relevant state or territory local regulator should they fail to properly supervisor their junior staff, should those staff breach the ASCR or any other applicable regulations. Sound practice management accordingly should involve training junior staff about the risks and issues raised in this paper, and for senior staff to ensure that matters involving a risk of money laundering are being properly managed.

Regulation regarding customer due diligence

Professional Conduct Rules require that a legal practitioner:

- must provide clear and timely advice to assist a client understand relevant legal issues and to make informed choices about action to be taken during the course of a matter[21];
- must follow a client's lawful, proper and competent instructions[22]; and
- avoid any compromise to their integrity and professional independence[23].

[17] See *Rondel v Worsley* [1969] 1 AC 191, 227-228, per Lord Reid.
[18] See *Moti v The Queen* (2011) 245 CLR 456 and *JB v The Queen* (No 2) [2016] NSWCCA 67; see also *Warren v Attorney-General for Jersey* [2011] 1 AC 22, 32, and *R v Maxwell* [2010] 1 WLR 1837.
[19] [1969] 1 AC 191.
[20] At 227.
[21] Australian Solicitors' Conduct Rules, Rule 7.1.
[22] Australian Solicitors' Conduct Rules, Rule 8.1
[23] Australian Solicitors' Conduct Rules, Rule 4.1.4

Implicit is the above (and other) professional duties is a requirement that a law practice adequately establishes a client's identity and purpose in giving instructions. As Dal Pont notes:[24]

> *A Lawyer should take reasonable measures to ascertain a client's identity as soon as practicable before accepting instructions to act.*

This is consistent with the AUSTRAC Compliance Guide statement that "the primary purpose of Part B is to ensure the reporting entity knows its customers and understands their customers' financial activities."[25]

Further, the *Legal Profession Uniform General Rules 2015* made under the Uniform Law, require a law practice to maintain a register of files opened. This must record the following:[26]

> (a) the full name and address of the person;
>
> (b) the date of receipt of the instructions;
>
> (c) a short description of the services which the law practice has agreed to provide;
>
> (d) an identifier.

Similar details are required in relation to safe custody documents; recording transactions in trust ledger accounts and a register of controlled money.[27]

There are certain areas of law that have more stringent identification and verification requirements for certain transfers and transactions**.** For example, the *Conveyancing Rules*[28] in NSW require under Rule 4.1.2:

> *A Representative must take reasonable steps to verify the identity of:*
>
> *(a) Clients: each Client or each of their Client Agents; and*
>
> *(b) persons to whom certificates of title are provided:*
>
> *(i) any Client or Client Agent, prior to a Representative giving a certificate of title to that Client or Client Agent; and*
>
> *(ii) where a Representative acts for a mortgagee, any existing mortgagor, former mortgagor or their agent, prior to the Representative giving a certificate of title to that existing mortgagor, former mortgagor or their agent.*

Rule 4.1.4 provides that legal practitioners and conveyancers can discharge this requirement by either taking reasonable steps to verify the identity of the person, or to apply the Verification of Identity Standard (**VIS**).

The VIS is outlined in Schedule 8 of the *NSW Participation Rules for Electronic Conveyancing* to require a face to face interview[29] and the review of certain original documents verifying the identity of the person.[30] It also requires that certain searches be undertaken to verify the

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[24] G E Dal Pont, *Lawyers' Professional Responsibility*, 6th ed, 2017, [3.35]
[25] Please see the following archived copy of the now superseded: AUSTRAC, 'Compliance Guide- Chapter 6', (19 May 2019, archive available online): https://web.archive.org/web/20180914215504/http://austrac.gov.au/book/export/html/462
[26] Section 93 *Legal Profession Uniform General Rules* 2015.
[27] Section 147 *Legal Profession Uniform General Rules* 2015.
[28] Section 12E of the *Real Property Act* 1900 (NSW).
[29] Rule 2, Schedule 8, *NSW Participation Rules for Electronic Conveyancing.*
[30] See Rule 3.4 of Schedule 8, *NSW Participation Rules for Electronic Conveyancing.*

information and documentation provided by the client. Schedule 8 is an exhaustive document that is available here.

The Participation Rules have notably also been adopted in Victoria, Queensland, Western Australia and South Australia, which requires adherence to the VIS. It is worth noting that these Rules permit "Identity Verifiers" to use Identity Agents to undertake these tasks.[31] There are also websites that offer verification of identity for this purpose. One such service is the Document Verification Service (**DVS**), managed by the Department of Home Affairs. The DVS is an online, electronic verification system that is real time and secure. Through the DVS, reporting entities can match some government-issued identification documents with those issued by government organisations, to check that the documentation is correct and current.

The VIS also forms part of the 'industry safeguards' incorporated into the Property Exchange Australia (**PEXA**) e-conveyancing network, regulated by the Australian Registrars' National Electronic Conveyancing Council. PEXA is presently utilised in Victoria, New South Wales, Queensland, South Australia and Western Australia and will shortly become mandatory in some states.[32]

Regulation regarding cash transactions

Legal practitioners have obligations (pre-dating the AML/CTF legislation) under the *Financial Transaction Reports Act 1988* (**FTR Act**) to report to AUSTRAC details of 'significant cash transactions'.

A "significant cash transaction" is where the cash transaction involves the transfer of currency of AUD$10,000 or more (or foreign currency equivalent) in value.[33]

Section 15A of the FTR Act provides that when a transaction is entered into 'in the course of practicing as a solicitor' and 'entered into by, or on behalf of, a solicitor' an obligation to report is triggered. AUSTRAC has provided some examples in its now superseded *Compliance Guide* as to when this occurs:

> The following examples indicate when a significant cash transaction reporting obligation may arise:
>
> - A client enters into a transaction with their solicitor and the transaction involves the transfer of cash to the value of AUD10,000 or more to the solicitor
> - Solicitor A, who is acting on behalf of a client, enters into a transaction with Solicitor B which involves the transfer of cash to the value of AUD10,000 or more to Solicitor B
> - A person makes a payment of cash to the value of AUD10,000 or more into a solicitor's trust account.

Section 15A(3B) provides that this reporting obligation does not apply in situations where a solicitor or law practice has already reported the subject transaction under section 43 of the AML/CTF Act in relation to threshold transactions.

The reportable details for a significant cash transaction are detailed in Schedule 3A of the FTR Act and includes information such as:

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[31] For example, Rule 4.2.1 of Schedule 8, *NSW Participation Rules for Electronic Conveyancing.*
[32] Law Institute Victoria, 'Electronic Conveyancing Resources & Advocacy', available online: https://www.liv.asn.au/Professional-Practice/Areas-of-Law/eConveyancing---100--Digital-Lodgement/Resources
[33] Section 3, *Financial Transaction Reports Act 1988* (FTR Act).

- the nature of the transaction;
- the details for the solicitor or law practice;
- details such as the name and address for any other party to the transaction; and
- the total amount of Australian and Foreign funds involved in the transaction.

However, as addressed in section 3.7, Rule 9.2.2 in the ASCR provides exceptions to the duty to keep information confidential:

> *9.1 A solicitor must not disclose any information which is confidential to a client and acquired by the solicitor during the client's engagement to any person who is not:*
> *9.1.1 a solicitor who is a partner, principal, director, or employee of the solicitor's law practice, or*
> *9.1.2 a barrister or an employee of, or person otherwise engaged by, the solicitor's law practice or by an associated entity for the purposes of delivering or administering legal services in relation to the client,*
> *EXCEPT as permitted in Rule 9.2.*
> *9.2 A solicitor may disclose information which is confidential to a client if:*
> *9.2.1 the client expressly or impliedly authorises disclosure,*
> *9.2.2* ***the solicitor is permitted or is compelled by law to disclose,***
> *9.2.3 the solicitor discloses the information in a confidential setting, for the sole purpose of obtaining advice in connection with the solicitor's legal or ethical obligations,*
> *9.2.4 the solicitor discloses the information for the sole purpose of avoiding the probable commission of a serious criminal offence,*
> *9.2.5 the solicitor discloses the information for the purpose of preventing imminent serious physical harm to the client or to another person, or*
> *9.2.6 the information is disclosed to the insurer of the solicitor, law practice or associated entity.*

The obligations under the FTR Act accordingly fall under this exception.

Failure to comply with the FTR Act can result in a fine of up to 10 penalty units for incomplete information, up to 2 years imprisonment for a failure to provide information, and up to 5 years imprisonment for false or misleading information. [34] Moreover, a failure to comply can result in finding of unsatisfactory professional conduct or professional misconduct.

An example of the existing regulations being effective in this area is in *Council of the Law Society of NSW v Galloway*,[35] where a solicitor was found guilty of professional misconduct, fined and had conditions attached to his practicing certificate for a failure, among other things, to report a series of significant cash transactions to AUSTRAC pursuant to his obligations under the FTR Act. It is notable that his failures were found not to be dishonest so much as negligent, for his failure to properly supervise the management of the firm's trust account.[36]

[34] Part V, FTR Act
[35] *Council of the Law Society of NSW v Galloway* [2012] NSWADT.
[36] Above n 143, at [7].