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Money Laundering Through Real Estate: Why, and How, New Zealand has Sought to Regulate It

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Abstract New Zealand property markets have had problems with money laundering and foreign investment at times, which might have partially contributed to overheated real estate booms. Gatekeeper professions including real estate agents, lawyers and accountants were forced to address it via expanded AML regulatory measures. Challenges remain, even as neighbouring Australia begins its own journey towards regulating the sector.

1 Introduction

For a lot of people the most important and valuable possession they will come to own in a lifetime will be the house or apartment they live in. For some, the aspirational lifestyle ticket they seek may include a beach house or condominium as well. For others, real estate investments are an enticing way to grow wealth, trade up in societal levels, save for retirement, or perhaps fill a portfolio with residential rental properties or commercial real estate holdings.

In short, property investment is intrinsic to the western way of life for many ordinary citizens. Additionally, in New Zealand, Australia and Canada at least, the property sector is a very significant driver of economic prosperity. But the same sentiments are also true for criminals and those seeking to invest the profits of a lifestyle involving crime. Therein lies a regular conundrum which anti-financial crime policymakers come up against in their efforts to identify, contain and deter money laundering through real property.

This chapter seeks to explore the ways in which the proceeds of criminal endeavours may be applied into real estate markets, the concerns such laundering

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of money arouses, and then the attempts to build legal controls and oversight regimes to regulate the real estate sector for anti-money laundering ("AML") purposes.

In evaluating such sins and systems, this chapter primarily addresses the New Zealand experience, which has advanced rapidly as that country's anti-money laundering efforts have stepped up. To a lesser extent, key developments are noted in real estate AML controls under consideration in Western jurisdictions facing similar money laundering threats and challenges—namely, Australia and British Columbia, Canada.

The particular perspective offered comes from deep practitioner experience as a practising lawyer working across business client, regulatory enforcement and policymaker view-points on financial crime cases.

This chapter attempts to deal with those issues by focusing on New Zealand as a case study, with insights from the criminal law and the proceeds of crime recovery laws of the ways in which criminal funds have infiltrated real estate markets or investments. That reflects the author's view that the most helpful way to understand AML rules and regulatory regimes is as part of a tripartite system with (in most nations) three inter-dependent elements:

- The set of criminal laws that contain money laundering ("ML") definitions and offences;
- A framework for freezing, then potentially confiscating, assets for forfeiture under a criminal proceeds recovery ("CPR") legal regime;
- The regulatory system (part civil, part criminal) for AML controls and for countering the financing of terrorism ("CFT"), which require private sector reporting entities to help supply the information that continues to fuel the first two elements.

Dwelling on New Zealand's Anti-Money Laundering and Countering Financing of Terrorism Act 2009 ("AML/CFT Act")[1] in isolation or in advance of the other two elements can lead to a blinkered view of what AML is trying to achieve in real estate and other markets. It may miss the essential reason why regulatory compliance rules exists in the first place (risk of money laundering via property dealings) or the modern policing objective that overlays AML controls (asset seizures of tainted property).

After examining real estate risks and evidence, the particular regulatory controls imposed on reporting entities in New Zealand for AML and CFT purposes return to focus. This captured banks and financial institutions after 2013, and later evolved to real estate agents and brokers—alongside accountants, lawyers and conveyancers. A comparison with similar issues in Australia, still at the beginning of this journey to properly regulate the real estate sector for laundering threat, is made.

Brief commentary on related legislative measures to control inbound foreign property investment, and corporate or trust structures often seen in conjunction with property dealings, helps remind us that AML regulation cannot be seen in

[1] AML/CFT Act (NZ), New Zealand Parliament, public Act No 35 of 2009.

isolation. These investor and trustee controls, beneficial ownership data, and other government policy measures, all help curb abuse of the residential property market or landowner holding structures.

2 Evolution of the Money Laundering environment and Anti-Money Laundering Frameworks

These days New Zealand has a modern and comprehensive set of controls to make life difficult for those seeking to launder criminal proceeds in various parts of the economy, albeit with the usual range of strengths and weaknesses in terms of likely outcomes or effectiveness of these controls.

That has not always been the case.

Whilst New Zealand has been a member of the Financial Action Task Force ("FATF") since 1991 and its early support of multi-lateral crime prevention efforts through international advocacy led to the arrival of a basic sort of early AML statute,[2] the law in New Zealand did not keep pace with global developments. It remained misunderstood and rarely honoured by the business community, and was not updated to meet newer FATF recommendations ("FATF 2012") or expectations during later evaluation rounds.

Meanwhile, adding fuel to the international peer pressure, neighbouring Australia had in 2006 passed new Federal AML legislation.[3] New Zealand was then becoming seen as a laggard that had not progressed beyond the basics of implementing FATF standards for mostly cash-based reporting.

That led to considerable catch-up pressure (as the FATF evaluation process tends to impose upon small nations) to radically improve the regulatory regime, to equip it to deal with financial crime matters more effectively in the new century. That process had significant impact in 2008–9 as the spur to finally pass an all-embracing AML/CFT Act. That updated law was largely a response to criticisms contained in the mutual evaluation of New Zealand's legal regime publicly released in October 2009—during the same week that final reading to pass the new law was taking place in Parliament.

Given the scale of the 2009 changes and the compliance costs (falling heavily upon the banking sector initially) important policy choices had to be made about how wide coverage should go at the start. A broader 'Phase 2' coverage that would encompass real estate agents and other professionals was always contemplated at the outset as policymakers were framing the original draft AML/CFT Bill in 2008. But for various reasons the political change to bring professions under the regime did not

[2] FTR Act (NZ), public Act No 9 of 1996 - since repealed on 1 August 2019, once the full Phase II AML coverage later legislated in 2017 became operative over other professional sectors.

[3] In the shape of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Commonwealth).

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