"Money Laundering and Trust – What Role for Lawyers?"

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Criminals are now taking advantage of the globalization of the world economy by transferring funds quickly across international borders. Rapid developments in financial information, technology and communication allow money to move anywhere in the world with speed and ease. In Australia today, fewer than 10 per cent of transactions are carried out in bank branches.[1]

Take for example a recent complaint that I received in my office. The OLSC received a complaint from a bank in the UK about a sole principal law firm. The bank alleged that a fraudster withdrew $260,000 from a customer account, transferred the funds into the trust account of the law firm and instructed the law firm to transfer the funds into an offshore account. The Bank alleged that the law firm was negligent because it failed to question the identity of the requestor since he was not a customer of the firm, and did not take responsible steps to establish the purpose of the funds but were happy to take the commission and forward the funds on to another bank account. The Bank further alleged that the law firm assisted the perpetrators of the fraud by facilitating the transfer of funds, which initially resulted from fraudulent conduct on the Bank's customers.

Following notification of the complaint, the Law Society's Inspection & Investigation Department was asked to expedite a trust account inspection. The inspection revealed that in November 2003 an employee of the law firm received an email from a Hotmail account from a person referring to a previous telephone conversation confirming that the law firm act on that persons behalf. The person asked the employee of the law firm to accept the deposit of funds with the law firm for the purpose of purchasing machinery in London and on the basis that, "The vendor requires me to place the funds with a solicitor of my choice to ensure funds are available." The person also stated: "...please advise me of your trust account details immediately...so I can arrange the transfer of $260,000 immediately" and he then gave a reference which was the surname of two of the Bank's customers. The email also stated, "I confirm, you can deduct your costs from this amount before transferring." The person then gave billing details with an address in Sydney and stated "I look forward to receiving trust account details as the vendor and myself are anxious to settle this matter." The employee of the firm responded indicating that the firm would act and provided details of the firm's trust account.

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[1] http://www.ag.gov.au/www/agd/agd.nsf/Page/Anti-moneylaundering_Factsheets

A few days later $260,000 was deposited into the firms trust account. The employee of the firm sent an email to the fraudster advising him that the money had been transferred. In response the fraudster sent an email asking that the money be urgently transferred to an account at a Bank in London providing sorting code, account number and swift code. The fraudster then advised the employee of the law firm that after the employee had deducted the cost and transfer fees that he arrange for the quickest possible transfer. A transfer of $258,799.98 from the law firm to the account in England was conducted.

The employee of the law firm did not know the fraudster and the fraudster was not actually a client of the law firm. At the time of receiving instructions and the subsequent transfer the principal of the law firm was away on holidays. The employee proceeded on the basis that he had received instructions to act albeit by email and telephone.

The OLSC took the view that the principal's conduct in failing to ensure that the identity and contact details of the fraudster were adequately established, and failing to enquire into the basis for a trust account transaction which was significant demonstrates negligence in the sense of a failure to achieve a reasonable standard of competence and diligence in the conduct of his practice. The OLSC therefore determined to reprimand the principal.

This case is the first known case of money laundering via a law firm that has come to the attention of regulators in Australia. Unfortunately, it will not be the last. As worldwide financial services compete to achieve greater efficiencies in the provision of services, money laundering becomes easier to successfully achieve. Unfortunately, the deeper "dirty money" gets into the international banking system, the more difficult it is to identify its origin. Because of the clandestine nature of money laundering, it is difficult to accurately know the total amount of money that is laundered. In Australia it is estimated that up to $4.5 billion is laundered every year.[2] This makes the task of combating money laundering more urgent than ever.

Noting these changes in the money-laundering environment in December 2003 the Australian government announced a review of Australia's Anti – Money laundering/Counter Terrorist Financing system as part of the implementation of international standards issued by the Financial Action Taskforce (FATF).

This paper will explore the Australian Governments responses to combating organised crime in the 21st century. Part 1 of this paper will look at the international anti-money laundering movement and the role of the Financial Action Taskforce). A brief overview of the new 40 + 9 recommendations of the FATA will be discussed in this Part as well as the FATF's last review of Australia's anti-money laundering programme, which took place in October 2005. Part 2 of this Paper will look at Australia's response to the FATF's 2005 report and the new anti-money laundering legislation that has recently been

[2] http://www.ag.gov.au/www/agd/agd.nsf/Page/Anti-moneylaundering_Factsheets

enacted in Australia. Part 3 of this paper will discuss the implications for the professions of the anti-money laundering legislation, and in particular, the implications of the obligations for legal practitioners.

Part 1 – The International Anti-Money Laundering Movement

Financial Action Task Force on Money Laundering

The FATF was established by the G-7 Summit that was held in Paris in 1989 in response to concerns over money laundering. The Taskforce is an inter-governmental body, which sets standards, and develops and promotes policies to combat money laundering and terrorist financing. It currently has 33 members consisting of 31 countries and governments and two international organisations; more than 20 observers: five FATF-style regional bodies[3] and more than 15 other international organisations or bodies. The purpose of the Task Force is to examine money laundering techniques and trends, reviewing international action to combat money laundering and setting out the measures that still needed to be taken.[4]

In April 1990, the FATF issued a report containing a set of Forty Recommendations, which provided a comprehensive plan of action needed to fight against money laundering. The Recommendations, which were revised in 1996, set minimum standards for action for countries to implement the detail according to their particular circumstances and constitutional frameworks.[5] These recommendations include for example, guidance on how a countries legal system should criminalise money laundering[6]; the measures countries should adopt to combat money laundering; customer due diligence and record keeping[7]; reporting of suspicious transactions and compliance[8]; other measures to deter money laundering and terrorist financing[9]; measures to be taken with respect to countries that do not comply with the FATF Recommendations[10]; regulation and supervision[11]; competent authorities, their powers and resources[12]; transparency of legal persons and arrangements[13]; international co-operation[14]; mutual legal assistance and extradition[15]; and other forms of co-operation[16].

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[3] The relevant regional body for Australia is the Australia Pacific Group on Money Laundering (APG), which was established in 1997 at the 4th Asia-Pacific Money Laundering Symposium in Bangkok. For further information about APG see www.apgml.org

[4] see www.fatf-gafi.org

[5] The full text of the Recommendations are available on the Financial Action Taskforce website at www.fatf-gafi.org

[6] Recommendations 1-3.

[7] Recommendations 4-12.

[8] Recommendations 13-16.

[9] Recommendations 17-20.

[10] Recommendations 21-22.

[11] Recommendations 23-25.

[12] Recommendations 26-32.

[13] Recommendations 33-34.

[14] Recommendation 35.

[15] Recommendations 36-39.

[16] Recommendation 40.

In October 2001 the FATF expanded its mandate to deal with the issue of the financing of terrorism, and created 9 Special Recommendations on Terrorist Financing.[17] These 9 Special Recommendations contain a set of measures specifically aimed at combating the funding of terrorist acts and terrorist organisations. The Recommendations deal with ratification and implementation of UN instruments[18]; criminalising the financing of terrorism and associated money laundering[19]; freezing and confiscating terrorist assets[20]; reporting suspicious transactions related to terrorism[21]; internal co-operation[22]; alternative remittance[23]; wire transfers[24]; non-profit organisations[25] and cash couriers[26].

Australia's Compliance with the 40+9 Recommendations

As a member of the FATF Australia is obliged to undergo periodic assessments of its AML/CTF system against the international standards issued by the FATF. During 2005, the FATF conducted a mutual evaluation of Australia's AML/CTF system. This was Australia's third evaluation by the FATF and the first based on the FATF's current Recommendations. The FATF published a report on its evaluation of Australia's AML/CTF system on 17 October 2005.[27] The report is 180 pages long. The evaluation found Australia's AML and CTF laws complied with 31 of the 40 recommended international anti-money laundering standards and eight of the nine Special Recommendations issued by the FATF.

The key areas of non-compliance concerned customer due diligence, the identification and verification of potentially exposed persons, the under-resourcing of AUSTRAC, the range of sanctions that are currently available to AUSTRAC which are predominantly criminal or injunctive and the lack of licensing and registering of remittance dealers. The FATF Report further submitted that Australia was absolutely non-compliant with the wire transfer recommendation set out in VII of the Special Recommendations. According to the FATF in Australia there is no obligation to verify that the sender's information is accurate or to require that the account number be included, nor are there any requirements for domestic transfers to record originator information. The FATF were also concerned that there is no requirement in Australia to include the originator information with the transfer instruction either for international transfers or domestic wire and nor is there an obligation to ensure that occasional transfers are not batched when sent.

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[17] The full text of the 9 Special Recommendations are available on the Financial Action Taskforce website at www.fatf-gafi.org
[18] Recommendation I.
[19] Recommendation II.
[20] Recommendation III.
[21] Recommendation IV.
[22] Recommendation V.
[23] Recommendation VI.
[24] Recommendation VII.
[25] Recommendation VIII.
[26] Recommendation IX.
[27] A copy of the Report is available on the FATF's website at www.fatf.gafi.org

The new AML/CTF Act and Rules address the issues highlighted in the FATF Report and are designed to ensure that Australia is on par with the international best practice principles for detecting and deterring money laundering.

The Anti-Money Laundering and Counter-Terrorism Financing Act (AML/CTF) 2006

The new AML/CTF Act was proclaimed on 12 December 2006. It will replace the existing *Financial Transaction Reports Act 1988* (FTRA). The Act will be supplemented by Regulations together with legally binding AML/CTF Rules and non-binding guidelines to be issued by the Australian Transaction Reports and Analysis Centre (AUSTRAC).[28] The draft AML/CTF Rules set out specific requirements on matters such as customer identification, ongoing customer due diligence, reporting of suspicious matters and AML/CTF programs. Further consultation on the revised and new AML/CTF Rules is to take place in early 2007[29].

Unlike the anti-money laundering legislation in Canada, which effected every profession at the same time and caused much confusion, the Australian legislation is designed to be rolled out in a series of stages over a 24-month period, commencing 13 December 2006. The first 'tranche', or stage, of the new legislation focuses on the financial services sector, the gambling sector and bullion dealers. A second tranche of legislation and regulations will be developed once implementation of the first tranche has begun, and will focus on lawyers, accountants, real estate agents and jewellers.

There will be a prosecution-free period of 15 months from the date a section becomes active, provided that the reporting entity has taken reasonable steps towards compliance. The exemption does not however appear to extend to criminal breaches of the Act.

The core obligations

The legislation imposes obligations on businesses or individuals, known as "reporting entities" offering specific services that could be exploited to launder money or to finance terrorism. Those services are referred to in the Act as "designated services". There are more than 70 specific services so identified. These services are set out in section 6 of the Act and include for example, opening an account; accepting money on deposit; making a loan; issuing a debit card; issuing travellers' cheques, and sending and receiving instructions on electronic funds transfers.

Unlike the previous anti-money laundering legislation, the obligations under the new regime are no longer linked to 'significant cash transactions'. Instead, an 'activities' based definition is used where a person who provides, deals in or handles a 'financial product' will be subject to customer due diligence

[28] The full text of the draft Rules are availabl on AUSTRAC's website at www.austrac.gov.au

[29] see http://www.austrac.gov.au/about_austrac/legislation/aml_ctf_act/index.html

(CDD) and enhanced reporting obligations. These reporting obligations, which are set out in Part 3 of the Act include for example:

- undertaking specified customer identification procedures before providing a designated service (except for certain low-risk services and for the provision of a designated service before the commencement of the relevant sections for which modified identification procedures apply);
- undertaking ongoing customer due diligence including monitoring the reasonable risk that the provision of a designated service may involve or facilitate money laundering or financing of terrorism;
- allowing an authorised agent to undertake the relevant form of customer identification on behalf of a reporting entity;
- reporting certain suspicious matters, transactions over $10,000 and international funds transfer instructions to AUSTRAC;
- not entering into a correspondent banking relationship with a shell bank;
- keeping a record of the particular customer identification procedure and the information obtained in the course of carrying out that procedure for seven years after the end of the relationship between the reporting entity and the relevant customer, and
- retaining a record of the adoption of a AML and CTF program and a copy of the program itself for the period whilst the program was in force up to and including seven years after the date the program stopped being in force.

Developing and maintaining an anti-money laundering program

A "reporting entity" is required under the Act to establish, maintain and comply with an anti-money laundering program. There are three different types of anti-money laundering compliance programs under the Act. These 3 programs, which are set out in Part 7 include:

(1) a standard program that applies to a particular reporting entity[30];
(2) a joint program that applies to each reporting entity within a designated business group[31]; and
(3) a special program that applies to a particular reporting entity that is an AFS Licensee who arranges for a person to receive a designated service[32].

The standard and joint programs are then divided into two parts, Part A and Part B. Part A of the program is designed to identify, mitigate and manage the risk a reporting entity may face, and Part B of the program sets out the applicable customer identification procedures for customers of the reporting

[30] Part 7, Division 3, section 83
[31] Part 7, Division 3, section 85.
[32] Part 7, Division 3, section 86.

entity. As part of the program, a Money Laundering Compliance officer must be appointed.

At the end of a specified period the reporting entity is required to produce a report setting out the reporting entities compliance with their specific requirements.

The civil penalty regime

Many of the obligations in the Act are described as 'civil penalty provisions'. Where breach of such an obligation occurs, the Australian Transaction Reports and Analysis Centre (***AUSTRAC***) can apply to the Federal Court for a 'civil penalty order' and, if the court is satisfied that a person has contravened a civil penalty provision, it may order the person to pay a pecuniary penalty to the Federal Government. Unlike some overseas AML/CTF regimes, the civil penalty regime does not target individuals. AML/CTF obligations which give rise to civil penalties are only imposed on 'reporting entities'. [33]

Where the person is a body corporate, the penalty must not exceed $11 million and in all other cases it must not exceed $2.2 million. In considering the amount of any pecuniary penalty, a court must take into account certain criteria including:

- the nature and extent of the contravention;
- the nature and extent of any loss suffered as a result of the contravention;
- the circumstances in which the contravention took place; and
- whether the person has been found by a federal, state or foreign court to have engaged in similar conduct; or by a court in proceedings under the *Financial Transaction Reports Act 1988* (Cth) to have engaged in similar conduct.

The high maximum penalty level introduced by the Act is intended to reflect penalties imposed under the US AML/CTF regime.[34]

The obligations under the Act with respect to the legal profession

Although the first tranche of the Act is supposed to only relate to the financial services sector, the gambling sector and bullion dealers, the Act is likely to affect the provision of legal services. It can be argued that "legal work" clearly falls within the scope of "designated service." For example, lawyers clearly undertake property settlements. Item 31 provides that a designated service includes "accepting money or property from a transferor entity to be transferred under a designated remittance agreement" and Item 32 refers to "making money or property available to an ultimate transferee entity as a result of a transfer under a designated remittance agreement."[35] Similarly,

[33] The enforcement regime is set out in Part 15 of the Act.
[34] According to a paper *Summary of the Main Difference between the Revised Exposure Draft Bill 2006 and the Introduction Bill* issued by the Attorney General's Department.
[35] For a further discussion see A. Levine, "A study in fine print", *Lawyers Weekly*, 26 January 2007 at 25-26.

designated services also include the services of lawyers acting as trustees; lawyers providing custodial or depository services eg. Certificate of title; lawyers accepting money on deposits from clients and placing them into their trust account in order to pay for legal fees.[36]

In addition to these services, lawyers providing a financial service such that may be provided by some incorporated legal practices and multi-disciplinary practices will also clearly be included under the Act. Legal service providers in most jurisdictions in Australia are (or are soon to be) permitted to incorporate and provide legal services to clients either alone, or alongside other service providers (including non-legal service providers). Traditionally, lawyers have worked either as sole practitioners or in partnership with other lawyers, with the prevailing thought about incorporation being that a lawyer's duties to client and court (including the duty to maintain client confidence) would be incompatible and irreconcilable with a director's duty to shareholder (generally interpreted as a duty to return profit).

However, the advent of incorporation of legal practices has not at this point in time seen the conflict one might expect between these competing duties. The legislature sought to address the potential conflict by requiring that ILPs have at least one legal practitioner director (being a director as defined in the *Corporations Act 2001 (Cth)* who is also the holder of an unrestricted practising certificate. The *Legal Profession Act 2004 (NSW)*, the act which governs the conduct of lawyers in New South Wales, also imposes a series of onerous obligations upon the legal practitioner director to ensure that the principal duties to client and court are not subjugated to the profit motive, or to other requirements (for example, disclosure requirements) imposed under the *Corporations Act*. To the extent that there is an inconsistency between the terms of the *Legal Profession Act* and the *Corporations Act*, the *Legal Profession Act* prevails, thereby ensuring that the duties which so vitally underpin the independence of the legal profession are not eroded to the point of meaninglessness.

In a hypothetical multidisciplinary incorporated legal practice we might have a solicitor, an accountant, a tax agent and a financial adviser. A hypothetical client approaches the practice for some assistance in estate planning. The client is fairly wealthy and wishes to leave their estate to three of their children equally divided between them, but the client wishes to ensure that their eldest child who has become an heroin addict receive nothing from the estate.

Whereas it is possible that the advice that the hypothetical client receives from any of the stated members of the practice could be the same, what if it were not? The difficulties in "writing someone out of a will" in the face of the possibility of a claim under the Family Provisions Act would be well known to lawyers. An accountant may be nothing more than a holder of an accountancy degree. If they had become a Certified Public Accountant or a Chartered Accountant they would have had to do additional educational work and be subject to forms of regulation greater than someone who simply held a

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[36] See Table 1, Section 6 of the Act.

degree, but still arguably not as extensive as that which applies to legal practitioners. Taxation advisers and financial advisers may or may not be licensed and the question of whether they carry any professional indemnity insurance would need to be explored.

In this example the question of whether or not the advice given or the services provided is actually legal advice or a legal service is left up in the air. Is the service or advice legal advice if it is given by the lawyer and not so if given by one of the non-lawyers? Is all of the advice or service provided made "legal" by the fact that it is given by a lawyer, or can a lawyer give non-legal advice or services within such a practice?

There appears to be serious consequences following from the choice of adviser by our hypothetical client. Working with the lawyer would attract the operation of his or her mandatory professional indemnity insurance should an issue of negligence arise, as long as the work performed was "legal work". Were the lawyer to misappropriate the client's money, the Fidelity Fund which applies only to legal practitioners would compensate the loss dollar for dollar. Can the same be said of negligent advice or unlawful activities by the non-lawyer members of the incorporated legal practice?

My Office is in fact aware that a number of multidisciplinary incorporated legal practices are actually providing financial services as defined by the *Financial Services Reform Act 2001*, yet are exempt from the Act as legal practices (unless they are marketing financial schemes). Pursuant to the new Act therefore, lawyers, as "reporting entities" who are providing a designated service of the kind set out above will thus be affected by the Act and obliged to undertake the following measures to comply with the requirements of the Act:

- Undertaking a money laundering and terrorism financing risk assessment on their existing business functions;
- Developing and implementing compliance programs and ensuring that all staff are trained;
- Developing and implementing systems to identify high-risk customers and monitoring those customers to report suspicious transactions;
- Ensuring all staff are aware of what a "suspicious matter reporting obligation" is and how not to breach the tipping-off rules;
- Establishing systems and processes for collecting and retaining both identification and transaction related records;
- Providing their business details are recorded on a register of "providers of designated remittance services" that is maintained by AUSTRAC.

This brings up new challenges for me as a regulator as I now have an expanded power to regulate non-legal practitioners in addition to legal practitioners. I am thus now forced to look at business practice generally through the prism of legal ethical practice. An unfortunate consequence of this

is that those who are not legal practitioners may have no understanding of the principles being applied. This tension between the ethics of business practices and the ethics of the legal profession raises a specific concern about the implications of the AML/CTF legislation as it would be applied to the legal profession.

Implications of the reporting requirements for the legal profession

The implications of the reporting requirements under the Act have raised numerous concerns by the professions, specifically, that the government does not understand the true impact of the reforms it is proposing.[37] For the legal profession, the reporting requirements present a substantial danger to the foundations of the practice of law and adversely interfere with the relationship between lawyers and clients[38]. The Law Council of Australia, the peak national body representing the legal profession, has made several submissions throughout the extensive consultation process on the Act outlining their concerns about the draft Bill.

According to the Law Council one of the greatest threats about the new Act is that the proposed compliance requirements for lawyers are incompatible with the principles of client confidentiality and legal professional privilege. Throughout the three year consultation process on the draft Bill the Law Council argued that the provisions unfairly compromised the significance of the lawyer-client relationship and therefore "..undermine[d] the independence of the legal profession, compromise[d] public faith in the confidentiality of the lawyer-client relationship and potentially place[d] lawyers in a conflict of duty."[39] The Law Council have also expressed their concerns that the proposed new compliance arrangements placed an unreasonable cost burden on legal firms, particularly small firms and sole practitioners, raised the potential for actions of lawyers to attract criminal liability and created a need for lengthy education programs to explain any reforms.[40]

A major concern for the Law Council is the obligation to report 'suspicious transactions', which is found in clause 41 of Division 2, Part 3 of the Act. The obligation to report suspicious transactions requires a reporting entity to report certain 'suspicious matters' that are related to the provision or prospective provision of a designated service. Clause 41 thus requires legal practitioners, as "reporting entities" to report customers where there are reasonable grounds to suspect that information obtained may be relevant to the following:

- the potential evasion of taxation law[41];

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[37] S. Fagg, "Clean up time", *Lawyers Weekly*, 8 December 2006 at p.21

[38] Law Council of Australia, "Revised Anti-Money Laundering and Counter-Terrorism Financing Exposure Draft Bill, 28 August 2006 at p.4.

[39] Law Council of Australia, "Anti-Money Laundering Law Reform Issues Paper 5: Legal Practitioners, Accountants and Company and Trust Service Providers", 4 May 2004 at p. 1; "Revised Anti-Money Laundering and Counter-Terrorism Financing Exposure Draft Bill, 28 August 2006 at p.4.

[40] Ibid.

[41] Section 41(1)(f)(i)

- offences against the law of the Commonwealth or a Territory[42];
- enforcement of the Proceeds of Crime Act 2002[43];
- preparatory to or the past commission of a financing of a terrorism offence[44], and
- preparatory to or the past commission of a money laundering offence[45].

Where these conditions are satisfied, a legal practitioner is required to provide a report to AUSTRAC containing details specified in the AML/CTF rules within 24 hours in relation to section 41(1)(g) or (h) or within three days of the reporting entity forming the suspicion for offences in sections 41(1)(d), (e), (f), (i) or (j).

In commenting on the Exposure Bill the Law Council expressed concern that provisions impact a lawyer's obligation to maintain client confidentiality, conflicts with the role of legal practitioners and their duty to the client and to the court. According to the Law Council of Australia, the reporting requirement remains at odds with the fundamental role of legal practitioners and is in particular, in conflict with the principle of legal professional privilege. The Law Council similarly submits that the customer identification requirement, the requirement to undertake procedures to verify a customer's identity including the collection of such information as the customer's names, addresses and date of birth will also be in conflicts with legal professional privilege.[46] According to the Law Council, although the Act does include an express provision that the Act does not "affect the law relating to legal professional privilege"[47], the provisions still have the effect of undermining client confidentiality.[48]

Legal professional privilege is a fundamental rule central to the practise of law. The rule exists for the benefit of the client and is the client's privilege and not the lawyer's privilege, which is intended to be protected. It is a privilege that protects confidentiality of certain communications made in connection with the giving or obtaining of legal advice or the provision of legal services. The provisions of the Act are however wholly inconsistent with this notion. This inconsistency has been recognised and constitutionally challenged by other jurisdictions. In the United Kingdom for example the Law Society of England and Wales during the passage of European and UK money laundering legislation strenuously argued for privilege to be effectively protected. Article 23 of the recent Third Directive of the European Council and Parliament on the Prevention of Money Laundering and Terrorist Financing, now provides that lawyers can be exempted from the suspicious transaction reporting requirements in respect of information they receive from a client in the course of ascertaining the client's legal position and representing the client in legal proceedings, including when providing advice on instituting or avoiding

[42] Section 41(1)(f)(iii)
[43] Section 41(1)(f)(iv)
[44] Section 41(1)(g)
[45] Section 41(i)
[46] The customer identification requirement is set out in Part 2 of the Act
[47] Section 242 of the Act.
[48] S. Drummond, "AML still threatens privilege", Lawyers Weekly, 9 February 2007.

such proceedings. The decision of the UK Court of Appeal in the case of *Bowman v Fels* 2005 EWCA Civ.226 has reiterated the principle of legal professional privilege in the UK AML/CTF regime.

In support of their submission the Law Council of Australia relied on the principles contained in each Australian State and Territory's professional conduct rules such as the duty to the client to act honestly and fairly in the clients best interests and maintain their confidences. The Law Council submitted the obligation to report suspicious transactions pertaining to the provision of designated services gives rise to a conflict between the duty to the client and the legal practitioner's interests. The Law Council further submitted that the obligation weakens the independence of the legal practitioner that it is necessary to act in the client's best interests and therefore erodes the lawyer-client relationship.

Secondly, the Law Council relied on the duty to preserve client confidences to demonstrate that the Bill is incompatible with the role of a legal practitioner. The Law Council argued that practitioners are bound by a conduct rule which prevents them from disclosing to any person, who is not a partner proprietor director or employee of the practitioner's firm, any information which is confidential to a client and acquired by the practitioner's firm unless the client authorises disclosure or the practitioner is compelled by law to disclose the information. The Law Council submitted that in light of this rule the Bill overreached the bounds of good policy and significantly undermined the role and function of a legal practitioner in the proper administration of justice.[49] In its latest submission regarding the Revised Exposure Bill on 28 August 2006, the Law Council commented as follows:

> "Client confidentiality guarantees that clients can speak to their lawyers about their difficulties and problems in the knowledge that this information will not be disclosed to a third party. In this way the client can obtain legal advice and takes full account of the client's circumstances.
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> In this role the lawyer is under legal and ethical obligations as a consequence. For instance, a lawyer is required to advise a client to obtain other legal representation should the client wish to plead 'not guilty' to a crime that he has confessed to the lawyer as having committed and which satisfies the elements of the crime. If the client insists that the lawyer continue to represent him, the lawyer must never mislead the court in the presentation of evidence.
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> The administration of justice needs and relies on client confidentiality. If the Revised Exposure Draft Bill is passed into law in its current form, lawyers will be required to report the suspicious transactions of their clients to a law enforcement authority which will irretrievably damage the trust that exists between lawyers and their clients. Many people will come to feel that they cannot be completely candid with their lawyers, very probably in circumstances where they have nothing to fear. But they will not get the legal advice they need and deserve as lawyers are likely to be

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[49] Law Council of Australia, "Anti-Money Laundering Law Reform Issues Paper 5: Legal Practitioners, Accountants and Company and Trust Service Providers", 4 May 2004 at p.10-11.

informed of part of the facts. From a public policy perspective, this result has far reaching consequences on the administration of justice."[50]

The Law Council of Australia also argued that the legal practitioners duty to the court and to the public poses a significant risk of being impeded when they may be required to report their client and that the role and function of legal practitioners is completely different to that of other service providers. According to the Law Council, the difference arises in relation to the practitioner's duty of care toward their client, which is prescribed by law. [51]

It is hoped that the issues raised by the Law Council will be considered during the drafting stage of the next tranche of reforms, which are said to directly relate to legal practitioners. It is also hoped that the Law Council's concerns are considered during the 15-month assessment period, prior to the commencement of any prosecutions for non-compliance with the AML/CTF legislation.

Conclusion

Recently, an Australian Crime Commission led Taskforce, known as Taskforce Gordian made numerous arrests against an alleged criminal syndicate operating across Australia responsible for laundering $93 million overseas, which were the proceeds of drug trafficking. Commenting on the successful arrests the Minister for Justice and Customs, Chris Ellison, said "These outcomes reinforce the Howard Government's ongoing commitment to reducing money laundering and sends a clear message - that those who launder the proceeds of crime will be pursued – and they will pay."[52]

There is no doubt that there is a real need in Australia today for effective legislation to curtail money laundering. This need for legislation has been recognized and is being acted upon throughout the world as we begin to come to terms with unprecedented changes in the 21st century. Terrorism and money laundering are now a regular part of the vernacular thanks to events like 9-11 and the Bali bombings. Legislation aimed at combating these crimes should not however have to place an excessive burden on society and should not by any means violate the foundations of law. Unfortunately however the new AML/CTF legislation in Australia appears to do both. This is no-where more clear than in the practice of law.

The independence of the legal profession is an essential element of a pluralist democratic society and should not be compromised. Accordingly, legislation dealing with money laundering should not unduly encroach into the independence of the profession.

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[50] Law Council of Australia, "Revised Anti-Money Laundering and Counter-Terrorism Financing Exposure Draft Bill, 28 August 2006 at p.4-5.

[51] Law Council of Australia, "Anti-Money Laundering Law Reform Issues Paper 5: Legal Practitioners, Accountants and Company and Trust Service Providers", 4 May 2004 at p.11-12

[52] "ACC Taskforce Gordian: Money laundering and drug trafficking arrests", 7 October 2006, available at www.ag.gov.au/agd/www/justiceministerhome.nsf

It is the experience of the OLSC that organizational culture is the best defence against unethical behaviour. Proof of this fact is validated by our successful approach to the regulation of ILPs using the concept of appropriate management systems. Issues such as recruitment, staff retention and education including ethical education is an essential weapon for the world against money laundering.