MW Forensic
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Anti-Money Laundering Legislation

Money laundering involves the injection of funds generated from illegal activities into the banking system and other legitimate investment vehicles so as to disguise the nature of their origin.

The Federal Government's decision to reform Australia's anti-money laundering system in line with the revised Forty Recommendations of the Financial Action Task Force on Money Laundering will result in significant changes to Australia's money laundering legislation, including the *Financial Transaction Reports Act 1988*.

The international standards for combating money laundering and terrorist financing are contained in the Forty Recommendations of the inter-governmental body, the Financial Action Task Force on Money Laundering (FATF).

In June 2003, the Forty Recommendations were significantly extended to address new, and increasingly sophisticated, money laundering and terrorist financing techniques and systems, to include:

- expanded customer due diligence requirements for financial institutions;
- enhanced measures for dealing with higher money-laundering risks associated with correspondent banking relationships and politically exposed persons;
- enhanced transparency through measures to improve information on the beneficial ownership of legal entities; and
- the extension of anti-money laundering obligations to non-financial businesses and professions (including accountants and lawyers).

The Federal Government has announced its intention to implement the revised Forty Recommendations and has indicated that it aims to design a cost-effective anti-money laundering system that will meet international

The Government has initiated the process of public consultation by releasing a series of industry-specific issue papers, including one that is directly relevant to the financial sector: Anti-money Laundering Reform: Issue Paper 1: Financial Services Sector.

Additional information on anti-money laundering reform, can be found at http//www.ag.gov.au/aml.

The revised Forty Recommendations require countries to:

- criminalise money laundering and provide for the confiscation of the proceeds of crime;
- ensure secrecy laws do not inhibit the implementation of the Recommendations;
- introduce legislative requirements for financial institutions and designated non financial businesses and professions to:

  – undertake comprehensive, ongoing customer due diligence and record keeping;

  – report suspicious transactions;

  – develop programs against money laundering and terrorist financing; and

  – pay special attention to business relationships or transactions with persons from countries which do not comply with the Recommendations;

Inside this Issue

Anti-Money Laundering Legislation (continued)

- extend the requirements for customer due diligence, record keeping, suspicious transaction reporting and anti-money laundering/CTF programs to designated non-financial businesses and professions - including accountants and lawyers;
- impose sanctions for non-compliance with the Forty Recommendations;
- consider further measures to combat money laundering and terrorist financing;
- ensure that financial institutions and the designated non-financial businesses and professions are subject to adequate regulation and supervision, and are effectively implementing the Recommendations;
- establish a financial intelligence unit (FIU), and invest the FIU, law enforcement and industry supervisors with the necessary powers to ensure compliance with the Recommendations;
- prevent the unlawful use of legal persons and arrangements by money launderers; and
- put in place frameworks for international cooperation in combating money laundering and terrorist financing.

Why Accountants and Lawyers?

The Federal Government's Issue Paper No. 5 on Anti-Money Laundering (AML) Law Reform states:

"As anti-money laundering regulation has developed around the world money launderers have looked to create increasingly complex arrangements to conceal their tracks. To create complex arrangements often requires the services of lawyers, accountants and other professionals….

Of course not all of the services provided by such professionals are relevant in this context. Those most useful to would be money launderers are considered to be:

- *Creation of corporate vehicles such as managed investment schemes or trusts or other complex legal arrangements....*
- *Advice on purchase or sale of real property...*
- *Performing financial transactions...*
- *Managing assets in property or managed investment schemes...*
- *Gaining introductions to financial institutions."*

What is Required of Accountants and Lawyers

Accountants and lawyers, are subject to customer due diligence and reporting obligations where they are instructed in the planning or execution of financial transactions for their client concerning:

a. buying and selling of real property;

b. buying and selling of business entities;

c. managing of client money, financial products or other assets;

d. opening or management of accounts with a financial institution; or

e. creation, operation or management of corporations, trusts, partnerships or similar structures.

The ICAA has expressed its concerns about unrealistic and onerous compliance obligations on the accounting profession.

Professional practices should adopt a risk-based approach to money laundering including:

- Risk-based profiling of clients – by the type of industry they are in, etc;
- Know your customer and enhanced due diligence of higher risk customers – where did they source their wealth from?
- Monitoring customer activity;
- Implementing an AML program – assess risks, set policy and procedures, training, systems documenting, etc.

Does your existing customer data base give you any comfort that you know your client?

Personal Liability as Directors of Trust Companies

For asset protection and other reasons, many businesses are structured through trusts with a corporate trustee.

Following the recent decision of the Full Supreme Court of South Australia in *Hanel v O'Neill* (which has persuasive force in Victorian courts), directors of trustee companies now face the prospect of personal liability when a trust becomes insolvent.

Section 197 of the *Corporations Act* 2001 provides that if a trustee company cannot discharge a liability and is not entitled to be indemnified against that liability out of trust assets, then a director of the trustee may be liable for that liability.

Of particular relevance is the finding that section 197 can apply to a situation where the trust deed provides a right of indemnity but there is a deficiency in trust assets (such as where a trading business fails).

In effect Section 197 removes the protection to direc-

Family Court's New Powers

From 17 December 2004, the Family Court has the power to order that a husband's and wife's liabilities be apportioned between them. These orders would bind creditors, including banks.

The new powers result from changes to the Family Law Act that allow the Court to treat liabilities in the same way as their property is treated.

When ordering that secured debts be apportioned (such as the loan mortgaged over the family home), the Court can order that only part of the liability remain secured by the mortgage and the balance is transferred to alternative security.

However, there are safety net provisions for creditors within these changes. The creditor must receive notice of such orders being sought and they have a right to be heard. The Court can only make such orders if it is reasonably necessary, appropriate and will not result in


Munday Wilkinson

Our Aim

Munday Wilkinson is a boutique forensic accounting firm.

We offer the legal profession, and others, quality service and technical proficiency commensurate with that of the Big 4.

At the same time we are able to provide a more personalised service as we operate in a framework that enables us to be very responsive to our clients while at the same time delivering a high quality service in a cost effective manner.

Our Services

We have extensive experience in:

- business and company valuations
- quantification of economic loss
- loss of earnings assessments /reviews
- family law investigations, valuations, tax issues for proposed settlements
- fraud reviews and investigations
- due diligence reviews
- professional negligence matters concerning accountants, tax advisors, auditors and directors
- compulsory acquisitions
- solvency issues
- expert determinations
- expert witness

Munday Wilkinson is now Melbourne's largest dedicated forensic accounting firm comprising three directors, a consultant and an administration assistant. We can provide forensic accounting services for a wide variety of dispute related matters from the small to the large.

4th National Forensic Accounting Conference

More than 160 forensic accountants attended The Institute of Chartered Accountants in Australia's Forensic Accounting Special Interest Group's recent national conference including Bruce Wilkinson and Russell Munday.

The program included an impressive array of speakers including judges, members of the Bar, solicitors and accountants. Some topics on the agenda included:

Keynote address by
The Honourable Justice Peter McClellan,
Chief Judge, Land and Environment Court

Justice McClellan discussed some of the recent reforms in his court including:

- requiring experts to confer before the hearing;
- adoption of court or joint appointed single experts; and
- concurrent evidence.

Justice McClellan, believes these reforms are bringing very significant change to the "culture" of his court and he claims there are moves afoot to adopt similar reforms in a number of other jurisdictions.

Report on the Forum of Expert Evidence - Elizabeth Brimer, Barrister

Elizabeth Brimer reported on a Forum on Expert Evidence that was held in Melbourne in November 2004. This forum was organised by the International Institute of Forensic Studies and the Australian Advocacy Institute in partnership with the Institute of Chartered Accountants Forensic Accounting Special Interest Group.

Issues addressed at the forum included:

- Use of Single Experts.
- Why divergence of views exist between experts.
- New rules in the Supreme Court of Queensland – where a single expert is appointed, the rules require the parties to agree on a statement of facts on which the expert is to report.
- Hot Tubbing.
- Joint Conferences and Reports – experts considered that these work well when they exclude the lawyers being present.
- Accreditation – should the quality of expert witnesses be regulated and, if so, how?
- Duty of expert to assist the Court – Where do experts go to get instruction if experiencing a particular difficulty?
- In many courts the Expert's report becomes the evidence in chief of the expert witness.

Panel Discussion on Accreditation/Designation

The National Committee of the Forensic Accounting Special Interest Group have just released a Green Paper on this issue.

Forensic accountants who are members of the Institute of Chartered Accountants in Australia are accredited as accountants through the Institute's requirements relating to education, practical experience, training and professional standards and ethics. Also expert witnesses are now bound by codes of conduct under the rules of most courts.

The difficulty with accrediting forensic accounting is that the area is too broad. It can relate to valuations, auditing, tax, fraud investigation, etc. It would be too difficult to accredit all these technical areas under one accreditation.

Issues facing the Valuation Profession – Trevor Vella, Director Horwath (NSW)

Topics discussed by Trevor Vella included:

- Absence of formal Australian professional accreditation system for share/business valuers
- The absence of professional standards relating to the conduct of valuations
- What "value" means
- What constitutes a valuation – appraisal, limited appraisal, calculation
- Transparency regarding estimation of capitalisation rates, discount rates etc.
- The extent to which valuers should have regard to the decisions of the courts in determining the valuation approach to be taken.
- Establishment of Business Valuation Special Interest Group.

Further Information

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