

The staff at Gordon & Jackson wish you a happy Christmas and a peaceful and prosperous New Year.

Overview of the **Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth)**

by Nik Dragojlovic

The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth)* ("**AML/CTF Act**") establishes a framework for ensuring the integrity of financial transactions in Australia and, as the title suggests, is aimed at preventing money laundering and terrorist financing. The AML/CTF Act expands upon the existing financial reporting requirements of the *Financial Transaction Reports Act 1988 (Cth)*, and it is envisaged that the *Financial Transaction Reports Act* will be repealed once all the provisions of the AML/CTF Act have been implemented¹. The AML/CTF Act is modelled on equivalent legislation in the UK and USA². It was enacted under the Commonwealth's external affairs power³ and is intended to satisfy Australia's international obligations which have been set out in various treaties and conventions.

The AML/CTF Act imposes obligations on "reporting entities". A reporting entity is defined in section 5 as "a person who provides a designated service". The types of designated services are set out in section 6 and include a wide range of financial services and gambling services. The AML/CTF Act adopts a risk-based approach, meaning that reporting entities are required to determine the best method for achieving compliance with the AML/CTF Act, having regard to the risks applicable in the circumstances. The primary obligations imposed on reporting entities are –

- a) identification and verification of their customers⁴;
- b) reporting of suspicious matters or certain transactions above a threshold⁵;
- c) development and maintenance of an AML/CTF program⁶; and
- d) record keeping requirements⁷.

The Australian Transaction Reports and Analysis Centre (**AUSTRAC**) is Australia's anti-money laundering and counter-terrorism financing regulator and is responsible for overseeing compliance with the AML/CTF Act. Until the introduction of the AML/CTF Act, the role of AUSTRAC was restricted to analysis and reporting. The AML/CTF Act now gives considerably more power and purpose to AUSTRAC's function and role. Section 229 of the AML/CTF Act provides for the CEO of AUSTRAC to make subordinate legislation known as the AML/CTF Rules. The AML/CTF Rules set out the procedures necessary for a reporting entity to achieve compliance with the AML/CTF Act. Thus a number of the obligations under the AML/CTF Act merely state that a reporting entity must "(a) take such action as is specified under the AML/CTF Rules; and (b) do so within the time limit allowed under the AML/CTF Rules"⁸. A thorough understanding of the AML/CTF Rules is therefore essential to ensure effective compliance.

The AML/CTF Act creates criminal offences in relation to certain conduct⁹. For example, section 136 of the AML/CTF Act imposes a maximum 10 years imprisonment or 10,000 penalty units, or both, if a person knowingly gives false or misleading information to a reporting entity or the AUSTRAC CEO. The AML/CTF Act also contains civil penalty provisions¹⁰ which are enforced in the Federal Court. Section 175 of the AML/CTF

Christmas Closure

Our office will close at 1pm on Friday 21st December and reopen at 9am on Thursday 3rd January 2008.

Ross Gordon will be available on 0412 265 997 should you need to contact a clerk or brief one of our barristers over the Christmas break

Recent Seminar

Our most successful recent seminar "Workplace Relations Review-Is your client at risk of ending up in court?" presented by David Langmead, Barrister, Kate Hawkins, Magistrate and Leigh Johns, Chief Counsel of the Workplace Ombudsman and chaired by Andrew Kirkham QC on the 12th September 2007 is available on our website at www.gordonandjackson.com.au (under Publications-Seminars). Keep your eye out for our next seminar planned in March 2008.

¹ The provisions of the AML/CTF Act are being gradually phased in stages between December 2006 and December 2008

² *The Financial Services and Markets Act 2000 (UK); The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001 (USA).*

³ See s.3 of the AML/CTF Act.

⁴ Part 2 of the AML/CTF Act.

⁵ Parts 3 and 4 of the AML/CTF Act.

⁶ Part 7 of the AML/CTF Act.

⁷ Part 10 of the AML/CTF Act.

⁸ For example, see identification procedures in Part 2 of the AML/CTF Act.

⁹ Part 12 of the AML/CTF Act.

¹⁰ Part 15 of the AML/CTF Act.

Gordon & Jackson

Owen Dixon Chambers West
205 William St Melbourne 3000
DX 94 Melbourne
Ph 9225 7333 Fax 9225 7907

Web www.gordonandjackson.com.au
Email clerks@gordonandjackson.com.au

Act allows the Federal Court to impose a civil penalty order of up to 20,000 penalty units in the case of a natural person and 100,000 penalty units in the case of a body corporate. The CEO of AUSTRAC is the only person who is able to apply for a civil penalty order¹¹. Section 191 of the AML/CTF Act also allows the CEO of AUSTRAC to issue “remedial directions” in circumstances where he is satisfied that a reporting entity has contravened or is contravening a civil penalty provision (and a contravention of a remedial direction itself constitutes a breach of a civil penalty provision). Section 197 of the AML/CTF Act allows the CEO of AUSTRAC to accept enforceable undertakings in relation to compliance with the AML/CTF Act and the AML/CTF Rules.



The requirements of the AML/CTF Act and the AML/CTF Rules are considerable and far-reaching. The number of persons and organisations that fall within the definition of “reporting entity” is likely to be significant. In addition to the technical expertise that reporting entities will require in order to develop the relevant AML/CTF programs and implement the identification and verification procedures, it will be imperative for reporting entities to also obtain specialist legal advice to ensure they properly understand their legal obligations. This is particularly so in light of the risk-based approach that has been adopted. In this regard, it will be important for legal practitioners to impress upon clients their ability to contribute to the AML/CTF process at the initial (compliance) advice stage as well as in the course of any subsequent enforcement proceedings.

Nik Dragojlovic practises primarily in the area of commercial litigation and specialises in federal anti-money laundering and counter-terrorist financing legislation.

¹¹ Section 176 of the AML/CTF Act.

Victorian Charter of HUMAN RIGHTS & RESPONSIBILITIES by Anne Sheehan

On 1 January 2008 the substantive provisions of the Victorian Charter of Human Rights and Responsibilities Act 2006 (“the Charter”) comes into operation. The Charter will effect the operation of the law in Victoria in a myriad of ways, from the public official at the coal face who must give proper consideration to a relevant human right in all their actions, and in their decision making, (s 38(1)), to the Courts where statutory interpretation takes on a fundamental new perspective. The Charter requirement that “so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights” (s 32) places human rights in a central position with respect to all Victorian legislation. This is a significant change to conventional statutory interpretation which only allows reference to materials other than the statute under consideration where there is ambiguity. The Charter applies to all statutes and their interpretation, ambiguity is not required.

The protection of human rights provided by the Charter applies to all persons, but not to corporations (s 6 (1)). The human rights the Charter “seeks to protect and promote” (s 7(1)) are a select set of civil and political rights derived from the International Covenant on Civil and Political Rights (“ICCPR”). Those rights which are defined in ss 8-27 are identified as: recognition and equality before the law, the right to life, protection from torture and cruel, inhuman or degrading treatment, freedom from forced work, freedom of movement, privacy and reputation, freedom of thought, conscience, religion and belief, freedom of expression, peaceful assembly and freedom of association, protection of families and children, taking part in public life, cultural rights, property rights, right to liberty and security of person, humane treatment when deprived of liberty, children in the criminal process, fair hearing, rights in criminal proceedings, right not to be tried or punished more than once, and the protection from retrospective criminal laws.

The Charter specifically acknowledges that international law may be considered in interpreting a statutory provision (s 32(2)). There is a wealth of international law on ICCPR rights and human rights as defined in other legislative instruments; the Explanatory Memorandum to the Charter makes specific reference to the International Court of Justice, Inter American Court of Human Rights and the United Nations Treaty Human Rights Committee. In addition New Zealand, Canada and the United Kingdom are sources of case law in interpreting human rights. Closer to home the ACT has been interpreting its Human Rights Act 2004 (ACT). Whilst considerable assistance can be gained from that wealth of jurisprudence, the differences between the various human rights instruments and their specific definitions of the rights and their interpretive provisions means that care must be taken when relying upon those authorities.

The Charter draws upon the South African Bill of Rights in listing the relevant factors in applying the “reasonable limits” or proportionality test. In essence a limit on human rights that can be justified in accordance with the test in s 7(2) will not be incompatible with the right. The touchstone is whether the reasonable limits “can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom”. The United Kingdom and Canadian human rights instruments have similar tests.

The Charter does not create a cause of action but may be piggy-backed onto an action. Where a person has an action in respect of an act or decision on the basis it was unlawful, unlawfulness arising because of the Charter can be specifically relied upon. A breach of the Charter alone does not give a right to damages (s 39). Section 39 does not have a close equivalent provision in the United Kingdom, New Zealand or the ACT, and how it is interpreted will be the subject of close interest. Whilst the situation is relatively straight-forward when the alleged breach of human rights is with respect to a decision which is already capable of judicial review, the situation is not



clear where it is alleged that the breach of human rights relates to the actions of a public authority that would normally entitle a person to judicial review pre-Charter. It remains to be seen whether in a case where the basis of judicial review under traditional grounds fails but unlawfulness under the Charter is established, whether a remedy is available. It is likely that with the incorporation of human rights into every aspect of decision-making that the distinction in time will become academic.

The most widespread application of the Charter in the Courts will be the requirement to interpret legislation compatibly with human rights. In comparison it will be a rare case where the declaratory powers of the Supreme Court come into play. Where the Supreme Court finds that a statutory provision cannot be interpreted consistently with human rights it may make a "declaration to that effect", s 36(2). The declaration is not one of invalidity or enforcement, s 36(5), but commences a process for the Executive to consider the issue. The responsible Minister must within 6 months, prepare a written response to the declaration and publish it (s 37).

As Victoria joins the rest of the world in acknowledging the centrality of human rights in all aspects of the actions and decision-making of public authorities, the challenge is to utilise the Charter to the fullest in the protection of those rights.

Anne Sheehan practises in the areas of human rights and administrative law.

We welcome the following Readers who are available to take briefs:

Bruno Kiernan LLB, BA, MBA

In the period 1985 to 1998 Bruno was principal of Bruno Kiernan and Associates and then senior partner of Kiernan Bryant & Bourke. Both firms focused on criminal law and coronial inquests. During this period Bruno became well known for acting on behalf of several families at Inquests into fatal shootings by police.

In 2000 Bruno completed an MBA at Melbourne University and worked as a senior associate at a leading management consulting firm until 2004. In this period Bruno delivered professional development programs to executives in both private corporations and government departments.

In 2005 Bruno recommenced practising law and joined leading family law firm Carew Counsel. From 2005 to 2007, Bruno variously instructed or appeared as counsel in parenting and property hearings before the Family Court and Federal Magistrates' Court. He also instructed or appeared as counsel in de facto hearings before the County and Supreme Courts.

In 2007 Bruno was appointed a Family Law Dispute Resolution Provider by the Attorney General's Department (Cwth). Since signing the Bar Roll, Bruno has continued a focus on the Family Law and DeFacto jurisdictions.



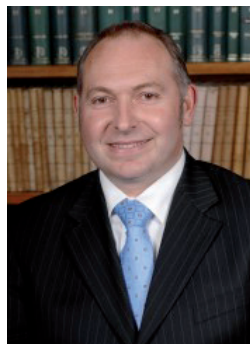
Douglas Laidlaw LLB, B. Comm

Douglas is available to appear and advise in a broad range of civil and criminal matters. His principal areas of practice include commercial, property, wills and estates, and defacto property disputes. He has appeared on behalf of clients in a large number of mediations.

Before coming to the Bar, Douglas was a partner in the Western District law firm of Mackay Taylor in Warrnambool from 1995 to 1999, and subsequently Jellie Laidlaw McDonald Wilson from 1999 till coming to the Bar in 2007. Regional practice entailed litigation practice of diverse range.

As a solicitor, Douglas maintained an accredited specialisation in commercial litigation from 1996. In 2005 he undertook training as a Mediator.

Douglas also serves as an officer in the Royal Australian Infantry on a part time basis. He is currently posted to the Australian Command and Staff College, Canberra. In the 2006 Australia Day Honours, he was awarded the Conspicuous Service Cross for service in Malaysia during the 2005 tsunami whilst posted as Officer Commanding Rifle Company Butterworth.



Clive Madder LLB, MA

Before coming to the Bar, Clive was a senior associate at DLA Phillips Fox, where he worked in the Insurance and Risk Management team practising in commercial and insurance litigation. His work included professional liability disputes, general insurance claims and advice, claims for economic loss, and trade and transport related contractual claims.

He has a particular expertise in international trade and is the current chairperson of the Victorian branch of the Maritime Law Association of Australia and New Zealand (MLAANZ).

Clive practises in all areas of commercial law.



Emily Porter LLB(Hons), BA

Emily's background is in commercial litigation, with a specific focus on building, construction and town planning disputes, often involving State and local government.

Most recently, she was Associate to the Honourable Justice Peter Gray in the Federal Court of Australia. Before that role, she was a Senior Solicitor with the Victorian Department of Human Services, where she advised on a considerable number of projects involving public housing developments, workplace discrimination, government contracting, legislative drafting, and intellectual property.

At Holding Redlich and Ebsworth & Ebsworth she acted for and against the State government on disputes involving major construction projects, including advising the project inspector appointed to the Basslink Project and a secondment to the John Holland Group on-site at the Melbourne Sports and Aquatic Centre development. She has had the conduct of domestic building and town planning disputes at VCAT, acting for developers, builders, home owners and retailers. More generally, she has experience in the areas of property, retail and commercial leases, debt recovery, testators' family maintenance and insolvency.

Emily is currently completing a Master of Laws degree at the University of Melbourne and is a non-resident tutor at Ormond College in the areas of Administrative and Property law. She is committed to social justice and is looking forward to developing a practice in administrative and public law. She is reading with Richard Niall.



Jamie Richardson LLB(Hons), Dip Law

Jamie was called to the Bar in England and Wales in 1999. He then practised in the offshore jurisdiction of Jersey in commercial litigation and banking for 3 years.

He subsequently requalified as a Victorian legal practitioner in 2004. Before coming to the Bar in Victoria Jamie was a senior associate in the commercial litigation departments at Ebsworth & Ebsworth and Gadens.

Jamie practices in all areas of commercial litigation with a special emphasis on professional indemnity, insurance, trusts(express and implied), corporations, and asset tracing.

Jamie has written articles for the Law Institute Journal, the ACLA Journal, Asian Counsel and has given various seminars and presentations.



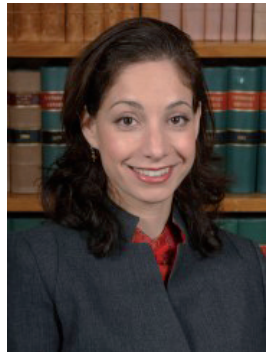
Marie Wilkening–Le Brun LLB (London),BA(Hons), Post Grad Dip Criminology,

Marie undertook her LLB at University College London graduating and obtaining prizes at both intermediate and final examinations. She also gained her Bachelor of Arts and post graduate diploma in Criminology from the University of Melbourne

Marie was admitted to practice in England and Wales in 2002. She was admitted in Victoria and New South Wales in 2005. Marie has gained experience in large and suburban firms in both Australia and the UK, which has provided her with a wide range of practical legal experience.

She has practiced in commercial litigation at Moores Legal in Box Hill and the Cambridge law firm Hewitsons.

She has experience in contractual disputes, commercial law, commercial & retail tenancies, Magistrates courts civil jurisdiction, trade practices, tort and professional negligence.



The following member has joined the list:

Peter Harris LLB, BA, Dip Ed

Peter Harris came to the Bar in 1983 after several years working as a Senior Adviser in the Commonwealth Department of Labour, where he advised on legislative policy in the area of industrial relations.

At the Bar he accepts briefs in respect of industrial disputes, intra-union disputes and employment law matters in the Australian Industrial Relations Commission, the Federal Court and in State courts exercising a common law jurisdiction. He was counsel for the appellant in *Gregory v Philip Morris* (1988) 80 ALR 455, a decision which opened aspects of the law of employment to further development. He has co-authored articles on employment law with Sean Millard, Solicitor, namely: "Workplace Bullying and Harassment", Law Institute Journal, (Workplace Relations Special Issue, 2004) and "Union Rights of Entry to the Workplace", Law Institute Journal, (Workplace Relations Special Issue), November 2005. He has given presentations at seminars conducted by the Leo Cussen Institute and the Law Institute of Victoria.

In recent times he has developed a practice with respect to professional registration and disciplinary tribunals. He has appeared as Counsel assisting the Victorian Institute of Teaching and is a Chairperson of a Discipline Appeals Board in the Education Sector.

Having read with Russell Byard (now a Senior Member of VCAT) Peter developed an interest in local government law, in particular in prosecuting for local authorities in matters in the Food Act and the Health Act. He also developed a general practice in criminal law in the Magistrates' and County courts and appeared as junior counsel on appeal in *R v. Vollmer & Ors* [1996] 1 VR 95.

Peter has wide experience in administrative tribunals and administrative law generally, both as an advocate and as a member of tribunals. He has been a member of the Refugee Review Tribunal, the Migration Review Tribunal and the Social Security Appeals Tribunal.

