THE AML/CTF LEGISLATION - USING RED TAPE TO FIGHT CRIME!

BY ANTHONY MORRIS KC

It is a truism that, whenever governments attempt to prevent or restrict illegal conduct by regulatory measures, two outcomes are inevitable. For the innocent, the outcome is increased cost and inconvenience. For the guilty – people who are, by definition, not averse to subterfuge and chicanery – it may take some little time to rearrange their affairs for the purpose of bypassing the bureaucratic roadblocks placed in their way. But the ultimate outcome for them is inapplicability and irrelevance.

As time passes, the regulatory measure remains in force. In Shakespeare's era, it may have been accurate to describe bureaucrats as "*Drest in a little brief authority*".[1] But no

[1] *Measure for Measure*, Act 2, Scene 2

self-respecting jack-in-office of modern times willingly allows his authority, howsoever diminutive, to have a shelf-life which is anything less than sempiternal.

So, the gulf between these impacts – the burden on the innocent majority, and the inconsequentiality for the guilty minority – continues to widen. For the latter, once an effective stratagem has been found to circumvent the prescript, this stratagem can only be refined, improved, standardised and habituated. For the former, it is an immutable law of nature that no administrative process, once instituted, ever becomes more efficient or less costly.

It may seem, therefore, that fighting crime through bureaucratic regulation is the worst of all ideas. But something even worse is now afoot. It has all the limitations and disadvantages of traditional attempts to fight crime with red tape, but with an added layer of vexation and expense. Instead of having the public service administer the chosen regulatory measures, that duty and responsibility is imposed on the private sector, with public servants retaining the authority of oversight, but without the cumbrance of having to deal with the public or, indeed, to do any of the real work.

At first glance, this may seem like a positive move: after all, the private sector will surely do things more efficiently – and a whole lot cheaper – than the public sector. And this would undoubtedly be true, if the private sector were given any discretion or latitude in administering the regulations. But any possible benefits flowing from private sector administration are nullified by the promulgation of a set of rules – published as more than 80 chapters – stipulating precisely what a private sector administrator is required to do, and how it must be done.[2] Any departure from these rules is punishable by a "*civil penalty*" of up to $33 million in the case of corporations, and up to $6.6 million in the case of individuals.[3]

THE AML/CTF LEGISLATION

Welcome to the Brave New World of the AML/CTF Act and the AML/CTF Rules. Two things should be said, immediately, about these enactments.

The first concerns the name, almost invariably abbreviated to the acronym "*AML/CTF*". This is part of a relatively new trend in Federal legislation, by which

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[2] *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007* ("**the AML/CTF Rules**")

[3] *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* ("**the AML/CTF Act**"), Section 175

enactments are no longer identified by one or two words specifying the subject-matter with which the specific instrument is concerned: think of the *Copyright Act* or the *Bankruptcy Act*.

The second pertinent observation is that, as both the AML/CTF Act and the AML/CTF Rules have been fully operational since December 2007, many readers may wonder why they have not encountered them, and assume that they must be relatively benign if they have caused no obvious perturbation in the 17 years they have been in force. But it is the same with all legislation which curtails civil liberties in a way which afflicts the innocent and the guilty alike. Of course it will be invoked, in the first instance, against the 'low-hanging fruit': against people (whether guilty or innocent) who may be viewed as suspicious, shifty, dodgy, or generally disreputable, and therefore deserving of close scrutiny.

The main function of the legislation is to institute a system by which "*reporting entities*" may interrogate customers and potential customers on a wide range of topics, including such things as the customer's business activities; the purpose of specific transactions; the income or assets available to the customer; the customer's source of funds, including the origin of funds; the customer's financial position; the beneficial ownership of the funds used by the customer; and the beneficiaries of the transactions being facilitated by the "*reporting entity*" on behalf of the customer.

The AML/CTF Rules also provide for mandatory "*verification*" of information supplied by the customer from "*reliable and independent documentation*" or "*reliable and independent electronic data*".[4]

REPORTING ENTITIES

Who, then, are these "*reporting entities*", empowered to demand personal information and to require that this information be verified? According to the most recent annual report of the oversight authority,[5] there are 17,875 of them.[6]

The "*reporting entities*" include all classes of financial institutions: banks, building societies, credit unions, authorised deposit-taking institutions, factors and forfaiters;

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[4] AML/CTF Rules, rule 4.2.7

[5] the Australian Transaction Reports and Analysis Centre ("**AUSTRAC**")

[6] Australian Transaction Reports and Analysis Centre 2023-24 Annual Report at: https://www.austrac.gov.au/sites/default/files/2024-10/AUSTRAC%20Annual%20Report%202023-24.pdf

suppliers of goods under commercial lease or hire-purchase arrangements; issuers of credit cards, debit cards or stored value cards; issuers of money orders, postal orders or travellers' cheques; foreign currency and digital currency exchanges; businesses providing electronic funds transfer or remittance arrangements; stock brokers and commodities exchanges; life and sinking-fund policy insurers; issuers of pensions or annuities; trustees of superannuation and approved deposit funds; retirement savings account providers; safety deposit box and custodial or depository service providers; and money-lenders of every description.; also bullion dealers, and gambling (including gaming machine) businesses.[7]

Some such businesses are excluded as "*reporting entities*", if the value or scope of their operations falls below a certain threshold. And, even if a business is a "*reporting entity*", some transactions are excluded from the Act's purview if the monetary value is low enough.

But even a customer who is aware of all possible exclusions, and of the dollar value of the threshold applying to each, may be unable to determine if a particular institution or transaction falls within the statutory scheme, unless the customer is also aware of the full nature and extent of the institution's operations. The idea of publishing a comprehensive list of the 17,875 "*reporting entities*", and of the extent to which transactions conducted by each of them are subject to the Act and Rules, has apparently not occurred to any of the bureaucrats who supposedly oversee the scheme.

CRIMINAL SANCTIONS

Most significantly, a customer who provides false or misleading answers or documentation to a "*reporting entity*", or who fails to disclose "*any matter or thing without which the information is misleading*", commits an offence. The Act prescribes maximum penalties of 10 years' imprisonment or $3.3 million.[8]

This only applies if the information or document is given under the AML/CTF Act or the AML/CTF Rules. However, presumably through oversight, nothing in the Act or the Rules requires that customers be warned that they are being interrogated under the Act or Rules, let alone their consequent exposure to criminal liability. If one were (for instance) tempted to exaggerate the value of one's real or personal assets when

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[7] AML/CTF Act, Section 6

[8] AML/CTF Act, Sections 36 and 37

applying for an overdraft, one has no way of knowing if the answers will be relied upon for AML/CTF purposes, or merely to ensure that the bank's lending criteria are satisfied.

An anomalous feature of the legislation is that, while suppliers of information are held criminally liable for the slightest misstatement or omission, those responsible for collecting the information – and for passing it on to the relevant authorities – are not. As already mentioned, "*reporting entities*" and their staff are subject to very steep "*civil penalty*" provisions. But there is a world of difference between a "*civil penalty*" – with no criminal record – and something quite so uncivil as being jailed for up to 10 years.

What makes this truly bizarre is that, whereas an individual's ineptitude or dishonesty may result in a failure to capture relevant information about that one individual, the ineptitude or dishonesty of "*reporting entities*" may result in a failure to capture relevant information about thousands, perhaps tens of thousands, of individuals.

Maybe the Act was drafted on the assumption that the management and staff of "*reporting entities*" are upright citizens, who can be trusted to perform their functions both proficiently and forthrightly. But members of the legal profession – and not only those who practise in the criminal jurisdiction – are well aware that improbity and fallibility, as features of the human condition, are not confined to any class or sector of society.

Even if such an assumption were explicable in 2006, Australia has since seen the revelations of the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, examining sectors of the business community which are all "*reporting entities*".[9] Were that not enough, the report in Victoria of *An inquiry into the suitability of Crown Melbourne Limited to hold a Casino Licence,*[10] and a similar report for the NSW Independent Casino Commission regarding The Star Casino in Sydney,[11] provide compelling proof that "*reporting entities*" which are most vulnerable to being used as platforms for money laundering are undeserving of the trust which the Act reposes in them, whether in terms of competence or integrity.

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[9] see https://www.royalcommission.gov.au/banking

[10] see https://rccol.archive.royalcommission.vic.gov.au/

[11] see https://www.nicc.nsw.gov.au/casino-regulation/bell-review-of-star

AUSTRAC

The entire cost of implementing and operating this 'Heath Robinson' scheme of juggernaut dimensions is foisted on customers: either directly, through fees and margins paid to the "*reporting entity*", or indirectly, to the extent that their taxes fund (according to AUSTRAC's 2023-24 report) a staff of over 500 "ongoing employees", and a budget of more than $100 million.[12]

Incidentally, this annual report is well worth looking at, if only to marvel at the third page, which is entirely given over to an "*Acknowledgement of Country*", and the fourth page, which is devoted to the reproduction of an indigenous artwork, presumably commissioned by AUSTRAC at taxpayers' expense. For those of us who lack expertise at interpreting the symbolism inherent in such works, this is accompanied by a detailed explication by the artist from the firm of 'Twenty Seven Creative', described as "*An Indigenous art, design & communications agency*", apparently operating from the back of a café in suburban Brisbane.

The artist's exegesis helpfully explains that "*The background is made up of a fishing net which represents the capture of criminals*" and "*The dotted patterning represents many different Country [sic.] across Australia*"; that "*The main theme is teamwork, and how AUSTRAC works together with industry and its partners to fight financial crime*"; and that "*The symbol found central to the artwork shows people seated in a yarning circle to represent AUSTRAC's organisational culture – united, accountable, empowered, courageous, inclusive*", along with "*symbols that represent AUSTRAC's strategic objectives: to discover, understand, strengthen, disrupt and optimize*" and "*innovative tools that were used in everyday life*" such as "*Fighting shields [to] represent protection of the community, [and] the boomerang [which] represents innovation and the different ways that AUSTRAC is fighting financial crime*".

The remaining 206 pages of the annual report may safely be passed over. It would, however, be a pity to miss the modest disclosure on page 31 that "*AUSTRAC demonstrated strong performance against our purpose in 2023-24*" and "*successfully delivered outcomes*": all this, it seems, by dint of achieving nothing less than 68% of its performance targets.

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[12] Australian Transaction Reports and Analysis Centre 2023-24 Annual Report

THE BANK'S INVITATION TO AN AML/CTF INTERROGATION

How, then, does all of this impact on the ordinary law-abiding citizen? The writer can only speak from personal experience, although his experience has been corroborated in discussions with colleagues and friends. While this experience relates specifically to his own bank (**the Bank**), anecdotal reports suggest that similar experiences are not uncommon with, at least, the other three major trading banks.

The writer's introduction to the Brave New World of AML/CTF began in a way which did not immediately sound any alarm bells. His accountants suggested that he change to a different accounting software package, which – amongst other advantages – offered closer integration with electronic data supplied by banks. This required some liaison with the Bank, which the writer would have preferred to leave to his staff.

However, one perennial problem which is unavoidable for a sole practitioner is that the Bank (and presumably other banks) refuses to speak with anyone other than the principal. If the writer conducted an incorporated practice, or even practised in co-partnership, banks would readily respond to enquiries from staff of the practice. But, for good reason, barristers are required to be sole practitioners. The writer has signed countless forms, authorising members of his staff to communicate with and to instruct the Bank on his behalf, and even offered to indemnify the Bank for any consequences, but to no avail. So, this inconvenience has persisted for nigh on 40 years, and shows no signs of going away.

The usual 'work around' is for the writer to telephone the Bank; to navigate a series of menu options, none of which ever seems to be even remotely proximate to the purpose of the call; to endure an indefinite wait, accompanied by elevator music and interspersed with repeated advertisements and assurances that "*your call is important to us*"; eventually to be connected with a human being (more often than not, the wrong human being); to negotiate an identification process which involves recounting such memorable facts as the name of one's first pet or the first school which one attended; with one's identity thus firmly established, to then transfer the call to a member of one's staff who is equipped to ask the pertinent questions, issue the necessary instructions, record any useful information supplied, and implement any advice offered; and, finally, to be reconnected to the call for the purpose of confirming that any instructions given by one's staff carry one's personal authority and *imprimatur*.

Having succeeded in recalling both the name of the street in which his first childhood home was situated and his wife's date of birth, the writer imagined that he had reached the point where his identity was satisfactorily established, only to be told that he would have to attend at his usual branch and formally identify himself with a government-issued photo-identity card. He explained that this would be difficult, as his usual branch had been 'temporarily' closed during the COVID pandemic, and was yet to reopen; but he was assured that he could attend at any branch. He was further advised that relevant instructions would be emailed to him.

Within minutes, the writer received both a text message and an email, each politely inviting him to visit a branch of the Bank to identify himself with a government-issued photo-identity document. There was no hint that this was to be a full AML/CTF interrogation, although – having some limited knowledge of the legislation – the writer was able to guess that this might be so, in circumstances where most customers would have been oblivious to the secret purpose behind the Bank's apparently benign invitation.

ATTENDANCE FOR THE BANK'S AML/CTF INTERROGATION

Having ascertained that it is not the Bank's practice to book times for such assignations, the writer presented himself at an inner-city branch early the following morning, equipped with a print-out of the email inviting his attendance, and with his driver's licence. The expiry date on the licence had recently elapsed, and, although the writer had already renewed his licence, due to a delay in generating licence cards within the Queensland Transport Department, the new card was not expected for another three weeks. The writer was therefore also furnished with a letter from the Department, explaining this situation, and confirming that, despite the stated expiry date, the current licence continued to be valid until a new licence was issued.

For those who have not had the misfortune in recent times to attend what used to be called a "banking chamber", the modern iteration bears little resemblance to what was common in the Twentieth Century. Gone are the service counters and the staff "*just sitting in a cage totting up things*" (as Nöel Coward memorably put it)[13]; gone is the branch accountant's office, enclosed in glass from waist-height so he could observe what went on with the tellers and other underlings; gone is the manager's

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[13] *Shadow Play* (a one-act play forming part of a cycle of plays collectively called *Tonight at 8.30*), first performed at the Opera House, Manchester, on 18 October 1935

office, the only fully private enclosure, reserved for distinguished clients and confidential commerce.

In place of orderly queues awaiting the next available teller, every available seat is occupied by sanguine customers, resignedly waiting to be called to one of the free-standing work-stations – somewhat like market stalls – where even the most private business is transacted in the full view and earshot of the milling crowds. No longer resembling so much a place of mercantile transactions, the premises have an ambience more akin to a down-at-heel railway waiting-room, or an inner-suburban methadone clinic.

This is the scene to which the writer was admitted, the morning after he received the Bank's obscurant invitation, in fact seeking his attendance for an AML/CTF interrogation.

It may have been a moot question whether the licence had in fact expired, given that its validity had been extended by the issuing authority. But, under the threat of a $33 million "*civil penalty*" for the Bank and up to $6.6 million for himself, it was doubtless prudent of the senior officer not to take any risks. Still, the hitherto concealed purpose of the interview was no longer *sub rosa*. The writer left, and proceeded to his home, where he collected a copy of his passport.

THE BANK'S AML/CTF INTERROGATION

Returning to the same branch, the writer's experience was little different from what had occurred earlier that day, although on this occasion he was kept waiting for under three-quarters of an hour. At that point, another senior bank officer – she turned out to be the branch manager – emerged from another back room, approached the writer, and escorted him to the most prominent and least confidential workstation, situated directly adjacent to the main entry.

The writer again produced the email inviting his attendance, showed the manager his passport, and also showed her the text message received on his telephone. She scanned the passport and handed it back, barely glancing at the email or text message. Then the interrogation began in earnest.

She commenced by stating that it was "*necessary*" – not asking whether it was necessary – to update the writer's email address and telephone number. The writer's response was to remind her that she had just seen an email and a text message, both sent by the Bank to the writer, on the preceding afternoon. Why, then, did she feel that any update was "*necessary*"?

The manager went on to discuss the writer's mailing address, which he confirmed as unchanged, and his 'land line' number. Would he like to change any of these details? The writer's response was that he had not come to the bank to change any such details; he had attended, as requested, to prove his identity. If any other details had already become or subsequently became outdated, he would notify the bank accordingly, as he had done many times over the preceding forty years.

This produced from the manager a lengthy, somewhat discursive and rambling, and not entirely accurate lecture regarding the Bank's obligations under "*federal regulations*", which – at one point – she identified as the "*AML/KYC*" regulations. This malapropism was not, it seems, a reference to the well-known American chain of fried chicken franchises, but to a provision in the AML/CTF Rules where the "*Key terms and concepts*" are listed to include: "*KYC information means 'know your customer information'*."[14] Once the writer twigged to this, he asked – admittedly in a rhetorical fashion – why 40 years had not been long enough for the Bank to get to know him.

Next, the manager asked about the writer's residential address, mentioning the address shown in the Bank's records. The writer told her that this was no longer his residential address; that the Bank had been notified of this fact, in writing, when the writer relocated; that he could produce the correspondence if required; and, moreover, that the Bank could not possibly have any real doubt on this issue, since it attended upon settlement of the sale of the writer's previous residence, was reimbursed all outstanding debts, and released the mortgage.

However, as the writer went on to explain, he was reluctant to inform the Bank of his present residential address, because he had found that – over 40 years – despite repeated requests to send all banking correspondence to his mailing address (i.e., his professional chambers), every so often bank employees would look at the file, and take it upon themselves to reverse this instruction and send correspondence to his home. This was inconvenient, as all his accounts were kept at his chambers, and when he was absent from home for an extended period of time there was a risk that important correspondence would remain unanswered. While he had no concerns about the Bank knowing his residential address, he wanted an assurance that the Bank would not, yet again, replace his mailing address with his residential address.

Needless to say, no such assurance was forthcoming. The manager merely insisted that the writer was required to disclose his residential address. One of the

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[14] AML/CTF Rules, rule 1.2.1

advantages of being kept waiting for so long was it gave the writer an opportunity to peruse the legislation, from which it appeared that, under subrule 4.2.4(4) of the AML/CTF Rules, the "*KYC information about a customer who notifies the reporting entity that he or she is a customer of the reporting entity in his or her capacity as a sole trader*" relevantly includes "*the full address of the customer's principal place of business (if any) or the customer's residential address*" [emphasis added]. The writer drew attention to this provision, and questioned the source of any requirement to provide both addresses. Why, moreover, was it helpful for the Bank to know where a sole trader sleeps, in addition to knowing where he can be found during business hours?

The manager again insisted that this information was required by "*the AML/KYC regulations*"; stated that she did not have to go ahead with the interview if the writer was unwilling to co-operate; told him that all access to his accounts and credit cards would be suspended until he was prepared to do so; terminated the interview; and ordered the writer to vacate the bank's premises.

A FURTHER BANK AML/CTF INTERVIEW

At this second branch, the concierge escorted him to a waiting area set aside for "*business customers*", where the waiting time was anticipated to be no more than 10 minutes. In fact, it was considerably less.

The writer was then interviewed in a private room (rather than a public lobby), seated (rather than standing). He was neither lectured about the Bank's AML/CTF obligations, nor hectored with accusations about his "*uncooperative*" attitude to meeting those requirements. The interviewer began by actually reading the invitation, then checked the Bank's database records, and volunteered the observation that the writer was a long-standing and compliant customer, and there was plainly no need to update any contact details. The entire process, lasting just minutes, was conducted in a calm, professional and civilised manner.

There was just one sticking point. Asked whether any information held by the Bank might be inaccurate, the writer raised the issue of his residential address, explaining the problems previously encountered. The interviewer handled this issue with consummate *sangfroid*. The Bank should have deleted the previous residential address as soon as it was notified of a relocation, and it was unacceptable that banking correspondence had been sent to any address other than the designated mailing address. Strictly, the Bank required only one contact address, and accountholders were not obliged to disclose more than that. However, it might prove

to be in the interests of the accountholder if the Bank were able to make contact using an alternative address in an emergency. If the writer was willing to furnish his residential address, the interviewer would do everything within his power to ensure that this address was not misused. In the face of such a well-reasoned and cogent rationalisation, the writer could scarcely dissent.

INTERVIEW EPILOGUE

The experience was practically at an end, but not quite. Over the three succeeding days, the writer was thrice contacted by representatives of the Bank.

The first call was described as a 'follow-up call', because the last interview had not recorded the sources of the writer's income. The writer explained that, for the past 40-odd years, all of his income had passed through his accounts with the Bank; to the best of his recollection, every cent of that money had been received either in the form of cheques, bank transfers, or, more recently, electronic funds transfers; if there was even a single instance of a cash deposit – he could not recall any – the amount would be trivial; and, accordingly, the Bank already held a comprehensive record of the sources of income.

Taken aback, the caller said: "*What we require is for you to tell us the sources of your income*". The writer responded: "*Certainly. The sources are, in each case, the respective payers of the amounts deposited to my account. Is that sufficient?*"

"*What were the payments for?*"

"*In most instances, my professional services as a barrister. I did work, and I was paid for my work. Sometimes there was also a refund of out-of-pocket expenses incurred in connexion with the provision of professional services. No doubt there were other reasons.*"

"*So, you are conducting a business?*"

"*I would not describe it as a business. Would you call a doctor who provides medical services a 'businessperson'? A dentist who operates a dental practice? A vet who treats animals? Hopefully, we all endeavour to provide our professional services in a way which might be considered businesslike. But I would not say that we are each conducting a business.*"

"*Yes, but for our records, can I describe the source of your income as 'business'?*"

"*How you describe it in your records is entirely a matter for you. It is not a description which I would use.*"

"*I am only given a list of options to choose from, such as employment income, investment income, or business income. Is it okay if I put your income down as business income?*"

"*As I said, what you put in your own records is a matter for you. I am answering questions under threat of up to 10 years' imprisonment if I give an answer which is false or misleading. I will therefore only provide answers that are strictly accurate, and I am not going to select an inappropriate description from a list merely because it is the nearest option to a correct answer. If that is unacceptable, maybe you should get somebody from the bank's legal department to explain to me why I am obliged to do so.*"

In the result, it took about six weeks for bank statements to start arriving at my home address. This resulted in another visit to the Bank, and another lengthy process of explaining why I did not want mail sent to my home.

LESSONS

There are some lessons which may offer some guidance to anyone interested in making the process less invasive or more efficient and workable.

1. First, any rational human being must surely see that the 81 chapters of the AML/CTF Rules are excessively prescriptive. The expression 'micromanagement' is barely adequate to describe the level of detail with which the routine requirements imposed on "*reporting entities*" are defined, enumerated, and explained. It would obviously be impossible for mid-tier administrators in a "*reporting entity*" even to remember, let alone to recall and apply, every step which they are required to take. Especially given the extraordinary harshness of the potential penalties for non-compliance, uncertainty naturally leads to excessive caution. There is no other possible explanation for a bank officer's insistence that the writer furnish both office and residential addresses, when the AML/CTF Rules explicitly stipulate that either suffices.

In this context, some further reference to AUSTRAC's 2023-24 annual report is apposite.[15] It reveals that one of AUSTRAC's performance measures is that at least 74% of "*industry associations representing AUSTRAC's reporting entities*" should assess "*AUSTRAC's level of collaboration in the development of AML/CTF Rules and policy settings to be USUALLY collaborative*". Why AUSTRAC chose this very specific figure of 37 out of every 50 respondents is not explained. In any event, AUSTRAC not only failed to meet this target, but failed woefully. Only 43% of respondents were

[15] Australian Transaction Reports and Analysis Centre 2023-24 Annual Report

prepared to concede that the level of cooperation was, at least, "*USUALLY collaborative*". No doubt a much smaller percentage thought the level of cooperation to be "*UNUSUALLY collaborative*".

AUSTRAC also hoped that at least 50% of "*reporting entities*" would acknowledge that AUSTRAC's "*sector-based risk insight products*" had achieved, as a bare minimum, "*a MODERATE … influence on their risk mitigation attitudes or behaviours*". Reviewing AUSTACT's latest annual report, there is no indication that it actually manufactures any "*products*", from which it may be inferred that this term is used as jargon to describe fardels of information or advice furnished to "*reporting entities*". But, in the result, AUSTRAC did not receive a positive response from a solitary "*reporting entity*" for even a single one of their "*insight products*".

Yet another statistic concerns the "*Percentage of event [or] workshop attendees [or] e-learning participants who reported a MODERATE (or higher) improvement in their understanding of the AML/CTF obligations as a result of their attendance [or] completion*". AUSTRAC set itself the modest target of 75%, and beat this target with an 83% result. But what this means is that, of middle-management personnel nominated to participate in AUSTRAC events, workshops or e-learning sessions, more than one out of every six achieved little or no improvement in "*their understanding of the AML/CTF obligations*". By any standard (other than that which AUSTRAC sets for itself) this outcome would be considered an abysmal failure.

2. Secondly, what is plainly required is for "*reporting entities*" to be allowed a greater level of discretion and latitude regarding the processes and procedures adopted to fulfil their statutory obligations. This is, perhaps, merely a concomitant of the conclusion that the AML/CTF Rules are excessively prescriptive. But when the focus of the prescribed regimen is for a "*reporting entity*" to "*know your customer*", it becomes pointless unless some weight is given to the knowledge thusly acquired. If the approach adopted by the Bank reflects that of other "*reporting entities*", getting to "*know your customer*" becomes an end in itself, rather than a means to achieve a greater end.

That said, the very idea that AUSTRAC might allow an increased level of discretion and latitude to "*reporting entities*" is self-evidently futile. Reference to AUSTRAC's 2023-24 annual report demonstrates an attitude of smug self-satisfaction – despite the statistical data to the contrary – which allows no scope even for contemplating that anyone else's views are worthy of consideration. Little wonder, then, that as few as 43% of respondents considered AUSTRAC's attitude to be "*USUALLY*

collaborative" or better; that one in six participants in AUSTRAC events, workshops and e-learning sessions came away with no appreciable improvement in "*their understanding of the AML/CTF obligations*"; or that AUSTRAC's "*sector-based risk insight products*" did not achieve, for a single one of the "*reporting entities*", even "*a MODERATE … influence on their risk mitigation attitudes or behaviours*".

Indeed, the very language of the report epitomises why AUSTRAC is incapable of devolving discretion or latitude even to the nation's largest and most experienced trading banks. One need only reflect on the 'word salad' published under the singularly opaque subheading, "*ENABLING CAPABILITIES*":[16]

> AUSTRAC's trusted and innovative enabling capabilities underpin our ability to effectively and efficiently deliver on our purpose. Most significant are our people and data capabilities, which ensure our agility and performance as an organisation.
>
> Our flexible approach to workforce, with our mature technology services, ensure AUSTRAC remains adaptable, effective and contemporary. We recognise that our inclusive and collaborative workforce culture and the commitment and expertise of our staff are central to our ability to deliver outcomes.
>
> Managing and enhancing the value of the financial data we receive from industry and other partners is critical to achieving our mission. The complex and evolving threat environment requires us to search for new data sources and develop advanced tools to analyse and correlate high-volume information quickly.

Not since 1958, when Peter Sellars recorded a comedy track called "*Party Political Speech*"[17] – a speech which could be used by any politician, from any side of politics, on any occasion, and on any topic – has anyone cobbled together such a concatenation of important-sounding words to say so very little. The only obvious difference (apart from the fact that the satire developed by Sellars was deliberate rather than unconscious) is that Sellars, being a competent wordsmith, avoided indirect language; eschewed tautologies, split infinitives, and other grammatical solecisms; and took the trouble to ensure that the verbiage, however crepuscular, made some sense. He would not, for example, have left a reader or listener wondering how it is even logically possible for a "*capability*" to be, at one and the same time, "*trusted*" yet also "*innovative*"; or how the possession of "*technology*"

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[16] Australian Transaction Reports and Analysis Centre 2023-24 Annual Report

[17] Peter Sellars, "*Party Political Speech*", on *The Best of Sellers*, side 2, track 2, Parlophone, 1959

which is described as "*mature*" – which may either be a euphemism for 'elderly', or, in a financial context, refer to something (like an insurance policy, a loan, or a security) which has reached the end of its term and is about to expire – enables AUSTRAC to remain "*contemporary*".

AUSTRAC's concentration on woke 'virtue signalling' – and its devotion to facile catchphrases, either trite or meaningless – might (most generously) be regarded, not as causes, but as symptoms of AUSTRAC's incapacity to express even basic concepts with clarity or precision. For instance, describing as its "*partners*" those "*reporting entities*" which are compelled, on pain of multi-million-dollar penalties, to abide by AUSTRAC's dictates, might in a different context be considered an out-and-out falsehood. But, hidden amongst verbiage notable only for its vagueness and imprecision, this may be passed off as just another euphemism.

And this, in the final analysis, is the real reason that "*reporting entities*" cannot be allowed a greater degree of discretion or latitude. Although banks and other financial institutions can get away with the tactical concealment of unwelcome truths from unsuspecting customers – as the Bank has so ably demonstrated – the law does not allow them actively to mislead or to deceive customers. Yet any regimen which allowed them sufficient discretion or latitude to explain what is really going on would destroy AUSTRAC's entire *modus operandi*.

3. Thirdly, banks and similar "*reporting entities*" need to be as frank, open and candid with customers as the AML/CTF legislation permits.

For instance, there is no need to issue invitations politely suggesting that the customer should attend a branch, armed with a government-issued photo-identity document, in order to identify oneself. Although AUSTRAC may not like it, customers would be much more impressed if a bank were to tell them – truthfully – that the bank is obliged by federal law to carry out periodic identity checks overseen by AUSTRAC, and can be exposed to very heavy fines if they don't; that the customer is required to participate in an intensive interrogation for this purpose; that the customer may be refused access to all bank accounts and credit cards unless this occurs promptly; and that the customer should set aside half a day, partly because the bank's staff are overwhelmed with the number of interrogations which they are obliged to conduct, but mostly because AUSTRAC has provided an 81-chapter set of rules containing a check-list of matters which the interrogation has to cover.

Not only for good measure, but also to reassure the customer that nothing is being concealed, the 'invitation' should also contain a warning that providing false or

misleading answers or documents in the course of such an interrogation – or even failing to provide information which, if not disclosed, might render another answer false or misleading – will expose the customer to a maximum penalty of 10 years' imprisonment or a maximum fine of $3.3 million.

4. Fourthly, banks and similar "*reporting entities*" should be assisting their staff to conduct these interrogations in a way which makes appropriate allowance for the natural hostility which the great majority of Australians experience when they are treated as if they were criminal suspects.

The first step is, manifestly, the selection of appropriate staff to conduct interrogations: staff who are, at least, empathetic (if not sympathetic) with the customer's natural aversion to interrogation; staff who take the trouble to ensure that the customer's time is not wasted by asking questions to which they already hold the answer; staff who have the capacity to explain the process accurately, without either being condescending to the customer, or making up explanations to conceal the staff member's own ignorance. Staff who should be excluded from the process, at all times, are those so puffed up with their own sense of self-importance that they regard it as a personal affront even to be asked to explain what is going on; also those who are so insecure or lacking in self-confidence that they take any adverse comment on the process as a personal insult, most likely the result of sexism, racism, or some other unspeakable prejudice.

It would also be very helpful if customers who voluntarily attend for such an interrogation were treated – at least until the contrary is proved – as the innocent victims of an absurd bureaucratic regime, rather than the source of a problem which merely adds to the burden placed upon bank staff who are already overworked. Allowing customers to make appointments for their own interrogations would be a good start. Interrogating them while seated in a private office, rather than standing in a public lobby, would also help. Giving a realistic estimate of how long the interrogation is likely to take would be useful. And being prepared to explain why particular information is being sought – rather than merely asserting that it is part of a "*KYC*" process required by "*Federal regulations*" – might go some way towards assuaging the customer's disgruntlement.

Whilst the AML/CTF legislation continues in force without amelioration of its most oppressive features – which undoubtedly means for the foreseeable future – banks and similar "*reporting entities*" owe it to themselves, no less than they owe it to their customers, to make a virtue of necessity. It can either be an oppugnant encounter, or

it can be used as an opportunity to strengthen personal relationships between the customer and the financial institution. Having the right people, professionally trained and properly equipped, will go a long way towards achieving the latter outcome.

WHY THIS MATTERS TO BARRISTERS

If the falderal of "*know your customer*" requirements and the other gobbledygook contained in the 80 chapters of the AML/CTF Rules is currently no more than an inconvenience and irritation to barristers, that is all about to change. With effect from 1 July 2026, every barrister in Australia (save, perhaps, those who are full-time employees of Crown prosecution services and other government agencies) will become a "*reporting entity*" for the purposes of the AML/CTF Act, exposing them to all of the requirements contained in those 80 chapters, and a personal "*civil penalty*" of up to $6.6 million for any non-compliance.

The relevant legislation[18] was passed by Parliament on 29 November 2024, and received Royal Assent on 10 December. However, in respect of what are called "*tranche two entities*" – including the legal profession – it will not commence until 1 July 2026, and registration will not be open until 31 March. AUSTRAC has promised to "*develop guidance and educational materials that will support newly regulated entities in implementing effective AML/CTF measures within their businesses*",[19] but this is yet to materialise, and is unlikely to be of any better quality than the so-called "*support*" already provided to banks. It remains uncertain whether the amendments, as currently drafted, will be revised prior to the implementation date; what is certain is that some such regime will come into force in under 10 months.

Thanks to the collective efforts of the bar associations throughout Australia – including, especially, David Marks KC on behalf of the Queensland Bar – this situation is not quite so bad as was previously feared. After long-running negotiations, Federal authorities were persuaded to exempt barristers from reporting obligations where a "*designated service*" is being provided by a barrister on the instructions of a solicitor, and the solicitor is subject to the same reporting

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[18] the *Anti-Money Laundering and Counter-Terrorism Financing Amendment Act 2024* ("**the amending Act**")

[19] *Overview of the AML/CTF Amendment Act* at:
https://www.homeaffairs.gov.au/criminal-justice/Pages/overview-of-the-amlctf-amendment-act.aspx

obligations. But this still leaves a catchment which is – to borrow a phrase recently repopularised by Louisiana's Senator John Kennedy –"as big as Dallas".

For a start, all barristers who accept (or continue to hold) direct access briefs after 1 July next year will be subject to reporting obligations, compelling each of them to:

- register as a "*reporting entity*" (and pay any prescribed registration fee);
- prepare an AML/CTF programme for the barrister's practice;
- appoint somebody (most likely, the barrister himself or herself) as the AML/CTF compliance officer for the barrister's practice;
- undertake criminal checks, both of himself or herself, and of every person employed in the barrister's practice; and
- once those requirements are met, potentially undertake "*know your customer*" scrutiny on every direct access client.

This burden may be expected to fall most heavily on barristers with the least resources to address such requirements, and the lowest incomes generated as a result of their professional endeavours: that is, the most junior members of the bar who depend – wholly or partially – on direct access briefs. But, in one (very limited) sense, barristers who routinely accept direct access briefs may be the lucky ones, as they will know what they have to do.

For the rest of the Bar, including those who have never held a direct access brief and who have no intention of accepting one in the future, the risks are less like facing an artillery barrage, and more like stepping on a landmine.

WHEN ARE BARRISTERS OBLIGED TO ACT AS "*REPORTING ENTITIES*"?

For one thing, much depends on the status of the solicitor from whom instructions are received. A barrister who accepts instructions from a lawyer practising outside Australia – for instance, to appear in an international arbitration, or to advise on a commercial dispute arising in another jurisdiction, even though the governing law is Australian, and, in the event of litigation, the case will likely come before an Australian court – has no protection. Nor is a barrister protected if instructions are accepted from a solicitor (even one who holds a current practising certificate) who is employed as the client's in-house lawyer. Nor, it seems, if the barrister is retained, in the usual way, by an independent law firm to advise or appear for the firm. Nor if the barrister is retained by a community legal service, or a body like LawRight Court and Tribunal Services (which generally handles judicial referrals for *bro bono*

assistance). Nor if the Barrister is retained to represent the Bar Association or the Law Society, or accepts direct access instructions at the request of either body.

Indeed, as currently drafted, it is doubtful whether a barrister has any protection in respect of instructions received from an in-house solicitor for a governmental body, such as Legal Aid, ASIC, the ACCC, the ATO, the Queensland Crime and Corruption Commission or the National Anti-Corruption Commission, the Crown Solicitor (State or Federal), the Attorney-General (State or Federal), the Director of Prosecutions (State or Federal), or even AUSTRAC itself.

Perhaps more significantly, the barrister's protection stems from sharing with a solicitor responsibility for providing a "*designated service*". But, in the current version of the amending Act, the question of what is a "*designated service*" is obscure to the point of opacity.

It does not help that the amendments were evidently drafted by a person who is entirely devoid of legal knowledge, qualifications or experience of any kind. Hence, one of the multitudinous instances of a "*designated service*" is "*acting as, or arranging for another person to act as, … a power of attorney of a body corporate or legal arrangement*".[20] Apparently, the draftsperson was unaware that a "*power of attorney*" is a document by which an individual or legal entity (the donor) appoints another individual or legal entity (the donee) to act as the donor's agent or attorney: hence, the only way for a barrister to be "*acting as … a power of attorney*" is by having the terms of appointment tattooed on his or her epithelium. Although vellum was historically used for documenting legal instruments, it was traditionally made from the hide of a dead animal rather than that of a living legal practitioner.

Moreover, the amorphous expression "*legal arrangement*" is defined to include "*an express trust*" and "*a joint venture*".[21] Seemingly, the draftsperson has some difficulty in distinguishing between a legal entity and a legal relationship, to the point of imagining that a legal relationship (rather than the parties to it, such as the trustee of a trust or the participants in a joint venture) is capable of appointing a barrister, or anyone else, to "*act as a power of attorney*".

Yet, given the width of the definition of "*designated service*", there are countless ways that instructions which do not initially involve the provision of a "*designated service*" may be transformed into a situation where the AML/CTF Act and Rules are engaged.

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[20] Item 7 in Table 6 in subsection 6(5B) of the AML/CTF Act as introduced by the amending Act

[21] Section 5 of the AML/CTF Act as amended by the amending Act

Take the simple case of a barrister who has been retained to defend a person accused of common assault. Such a retainer would not ordinarily involve the provision of a "*designated service*". However, following a restorative justice conference, issues may arise regarding payment of compensation to the victim. Depending on the sum involved and the precise form which the transaction may take, advice given by the barrister may amount to a "*designated service*". And, unless the solicitor is directly involved in the provision of that advice, the situation may be one in which responsibility for providing the "*designated service*" is the barrister's alone.

The same applies to a barrister retained in Family Law proceedings. The barrister's initial instructions may not contemplate that a property settlement will even arise for discussion. But if the judge directs the parties to go outside with their legal representatives and discuss a resolution of all outstanding issues, is a barrister – one who does not have the support of an instructing solicitor present at court – obliged to tell the judge that this is impossible, because any advice about a property settlement could constitute a "*designated service*", and the barrister is not registered as a "*reporting entity*" under the AML/CTF Act?

Similar issues confront any barrister engaged in traditional civil litigation, whether the claim is for a debt, common law damages, or something more sophisticated. If negotiations arise in the absence of the instructing solicitor, the barrister may be providing a "*designated service*" – even if the only matter up for discussion is a simple monetary payment – should the structure of the proposed transaction require a transfer of property, some form of corporate restructuring or the removal or replacement of corporate directors, debt or equity financing, or (as improbable as this may seem if the expression is taken literally) the appointment of a person to "*act as a power of attorney*".

To mention just one more example, every barrister involved in probate, testamentary or estate litigation (including family maintenance claims) will inevitably find themselves in a situation which involves "*assisting a person in the planning or execution of a transaction ... to sell, buy or otherwise transfer a body corporate or legal arrangement*",[22] or "*assisting a person to plan or execute, or otherwise acting on behalf of a person in, the creation or restructuring of ... a body corporate... or ... legal arrangement*".[23] Although the definition of "*legal arrangement*" only relevantly includes an "*express trust*", defined to include "*a trust expressly and intentionally created in writing by a settlor but does not*

[22] Item 2 in Table 6 in subsection 6(5B) of the AML/CTF Act as introduced by the amending Act

[23] Item 6 in Table 6 in subsection 6(5B) of the AML/CTF Act as introduced by the amending Act

include a testamentary trust",[24] and therefore excludes – at least implicitly – any "*testamentary trust*", this offers no protection where the proposed outcome of such litigation involves the "*transfer*" or "*restructuring*" of a family company or family trust which existed prior to the testator's demise.

Even without stepping outside the doors of the courtroom, a barrister may inadvertently find himself or herself providing a "*designated service*". For instance, while the provisions of the current Bill contain a 'carve out' for certain transactions "*pursuant to, or resulting from, an order of a court or tribunal*", such exemptions do not extend to either:

- the giving of an undertaking given to a court by which the parties agree to perform a transaction of the relevant kind; or
- submissions made in accordance with an agreement reached between the parties to seek an order which (if granted) would contemplate or require a transaction of the relevant kind.

LEGAL PROFESSIONAL PRIVILEGE

If these may be considered the conventional weapons now directed at members of the legal profession, there is also a nuclear threat: a closely concealed attempt to undermine the sanctity of legal professional privilege.

Superficially, the amending Act purports to reinforce such privilege. Indeed, braggadocio published on government websites claims that the amending Act "*clarifies the treatment of legal professional privilege under the AML/CTF Act*", and that it "*will preserve the core intention of the doctrine of legal professional privilege*", yet, at the same time, states that it will "*ensure that reporting entities who handle client information can comply with their obligations*".[25] It is a remarkable piece of prestidigitation even to pretend that these objectives are compatible, let alone to advance the fiction that they are somehow reconciled by the amending Act.

Subsection 242(1) of the AML/CTF Act, as amended, provides that:

> (1) Nothing in this Act affects the right of a person to refuse to give information (including by answering a question) or produce a document if:
>
> (a) the information would be privileged from being given on the ground of legal professional privilege; or

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[24] Section 5 of the AML/CTF Act as amended by the amending Act

[25] *Overview of the AML/CTF Amendment Act* at:
https://www.homeaffairs.gov.au/criminal-justice/Pages/overview-of-the-amlctf-amendment-act.aspx

> (b) the document would be privileged from being produced on the ground of legal professional privilege.

On its face, this may seem to preserve the *status quo ante bellum*. But this is qualified by subsection (2), which stipulates that:

> (2) The fact that a person has provided a description of information or documents that may be or are privileged from being given or produced on the ground of legal professional privilege does not, of itself, amount to a waiver of the privilege.

Quite how it is possible to provide a "*description of information or documents that may be or are privileged*", without violating the privilege, is not immediately apparent. Perhaps a description such as "*information communicated to me orally in conference for the dominant purpose of furnishing legal advice*", or "*a document created solely to convey legal advice, containing words of the English language printed in black ink using size 12 Times New Roman font, on white A4 paper*", would be sufficiently generic to preserve the privilege. But it seems unlikely that subsection (2) was enacted only to state the obvious: that a "*description*" which does not allude to the substance of the "*information or documents*" cannot be considered a waiver of privilege.

The clue to what subsection (2) really contemplates may be found in a series of further amendments directed to members of the legal profession and their clients – an unlucky total of 13 such provisions in all – each of which requires the production, in specified circumstances, of what is called an "*LPP form*". This is defined in an emendation to the AML/CTF Act's definition section (Section 5), providing that:

> **"LPP form"**, in relation to information or a document, means a written notice that:
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> (a) is in an approved form; and
>
> (b) specifies the basis on which the information or document is privileged from being given or produced on the ground of legal professional privilege; and
>
> (c) contains any other information required by the approved form; and
>
> (d) is accompanied by any documents required by the approved form.

This makes it clear that AUSTRAC intends to tell members of the legal profession, and their clients, precisely how privileged information and documents are to be "*described*" in an "*LPP form*".

Were there any doubt that something more than meets the eye is contemplated by these amendments, the enactment of the new Section 242A supports a virtually irrebuttable presumption that AUSTRAC hopes to make use of "*LPP forms*" – and especially the descriptions which they contain – in a manner which will render nugatory any protection which legal professional privilege would otherwise afford. The Section provides:

242A. Guidelines in relation to legal professional privilege

(1) The Minister may, by notifiable instrument, make guidelines in relation to making or dealing with claims or assertions of legal professional privilege in relation to information or documents required to be given under or for the purposes of this Act.

(2) Without limiting subsection (1), the guidelines may deal with the following matters:

(a) arrangements for making or dealing with claims or assertions of legal professional privilege in relation to the exercise of other powers under this Act, including the use of LPP forms;

(b) facilitating the resolution of disputes in relation to legal professional privilege.

(3) Before making guidelines under subsection (1), the Minister must consult with such persons (if any) as the Minister considers appropriate.

Putting to one side the banal requirement for the Minister to "*consult with such persons (if any) as the Minister considers appropriate*" – and even if it be assumed, according to what Samuel Johnson described (albeit in a different context) as a "*triumph of hope over experience*",[26] that the Minister's consultative process will pay the slightest heed to anyone other than AUSTRAC – the Minister is constrained by the implicit presumption that "*the use of LPP forms*" is to become one of the "*powers under this Act*" exercisable by AUSTRAC.

It takes very little experience of semi-autonomous governmental investigative agencies, and they way that they operate in practice, to know precisely what this portends. It may be summed up in a Latin maxim – one which the writer, in fact, only just coined – *si non per ianuam principalem, tum per aditum famuli* ("if not through the front door, then through the servants' entrance"). Ever since President Roosevelt created the Office of Strategic Services (OSS), predecessor to the Central Intelligence Agency (CIA), such agencies have reacted to the knowledge that information exists which is potentially of interest, but which cannot lawfully be accessed by overt means, as a challenge to obtain access to the same information by covert means.

Viewed in that light, the imposition of mandatory "*LPP forms*", and their contemplated use as one of the "*powers under this Act*" exercisable by AUSTRAC, implies two *sequelæ*. First, if the claim of privilege can be challenged, it will be. Secondly, if not, any "*description*" of the privileged information or documentation, combined with knowledge of its existence and the (implicit) admission of its relevance to AUSTRAC's enquiries, will provoke redoubled efforts to obtain access by ulterior expedients.

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[26] "A gentleman who had been very unhappy in marriage, married immediately after his wife died: Johnson said, it was the triumph of hope over experience." James Boswell, *The Life of Samuel Johnson* (1791), vol. II, p. 182

This may involve pressuring the client to waive privilege: "*But Mr Smith, if you are innocent as you claim, why should you have anything to hide?*". Alternatively, it may involve finding other repositories of the same information or documentation who are either more "cooperative", less familiar with their legal rights and obligations, less fastidious about maintaining their obligations of confidentiality, or more vulnerable to coercive pressure. In the final resort, AUSTRAC may utilise a "*monitoring warrant*" under Part 13 of the AML/CTF Act, in which event there is nothing in the Act to prevent any "*LPP form*" being used as an evidentiary basis for obtaining the warrant.

Legal professional privilege belongs to the client, not the legal practitioner. Barristers (and other lawyers) have no direct personal interest in maintaining legal professional privilege in respect of advice or other professional services provided to clients. The only exception is where the privileged information or documentation may expose the lawyer's own complicity in unlawful or improper conduct, and in such cases an ineluctable conflict of interest would require that the lawyer cease acting for the client.

However, the absence of a direct personal interest is not the end of the matter. For a start, each of the thirteen new provisions in the amending Act which excuse non-compliance with obligations that might otherwise fall on a lawyer depends, not only on the production of an "*LPP form*", but also on the holding of a "*reasonable*" belief that privilege applies. If privilege is successfully challenged, a lawyer may be exposed to the same "*civil penalty*" provisions as if no privilege issue had been raised, depending on:

- whether the lawyer actually formed the relevant belief (i.e., a positive belief that privilege applied, rather than – for example – a belief that it might arguably apply); and
- if so, whether that belief was held "*reasonably*".

There is also the risk of liability for professional negligence if the circumstances are such that privilege might have been attracted, but was ceded due to the lawyer's neglect. One example is where the lawyer makes a single communication, partly to provide legal advice and partly for another purpose, such that the communication does not satisfy the 'sole purpose' test in *Grant v. Downs*,[27] or even the 'dominant purpose' test in *Esso Australia Resources Ltd v. Federal Commissioner of Taxation*,[28] being

[27] (1976) 135 CLR 674

[28] (1999) 201 CLR 49

an outcome which might have been prevented if the discrete purposes had been addressed in separate communications. Another example is where privilege is waived, due to the lawyer's oversight or imprudent advice.

More fundamentally, however, any attack on the sanctity of legal professional privilege ultimately has a destructive impact on the administration of justice. The most infamous and egregious reported instance of breached legal professional privilege – compounded by countless other derelictions of professional and ethical misconduct – occurred in the case of former Victorian barrister Nicola Gobbo ("*Lawyer X*"), who was recruited as a police informant against her own clients, including organised crime figures. As the High Court unanimously remarked in that case:[29]

> [Gobbo]'s actions in purporting to act as counsel for the Convicted Persons while covertly informing against them were fundamental and appalling breaches of [Gobbo]'s obligations as counsel to her clients and of [Gobbo]'s duties to the court. Likewise, Victoria Police were guilty of reprehensible conduct in knowingly encouraging [Gobbo] to do as she did and were involved in sanctioning atrocious breaches of the sworn duty of every police officer to discharge all duties imposed on them faithfully and according to law without favour or affection, malice or ill-will. As a result, the prosecution of each Convicted Person was corrupted in a manner which debased fundamental premises of the criminal justice system. It follows, as Ginnane J and the Court of Appeal held, that the public interest favouring disclosure is compelling: the maintenance of the integrity of the criminal justice system demands that the information be disclosed and that the propriety of each Convicted Person's conviction be re-examined in light of the information. The public interest in preserving [Gobbo]'s anonymity must be subordinated to the integrity of the criminal justice system.

Plainly, these remarks were not prompted by any sympathy with organised crime, nor with criminals generally. Nor, in the present context, is the threat to legal professional privilege a matter of concern because it may lead to the exposure of persons engaged in money laundering or the financing of terrorism. On the contrary, in both instances the concern is the abrogation of principles far more important than the identification, apprehension and conviction of offenders in individual cases.

In short, if clients cannot trust in the confidentiality of privileged communications with their legal representatives, the entire system breaks down. People will choose to seek advice elsewhere, or not to seek advice at all. Inevitably, the advice on which such people rely will not only be of a poorer quality, but less informed by considerations of the adviser's professional and ethical obligations. The burden placed on courts and tribunals by self-represented and ill-informed litigants will

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[29] *AB (a pseudonym) v. CD (a pseudonym)*, [2018] HCA 58 at paragraph [10]

increase. The 'safety valves' which exist within the judicial system, depending largely on discussions and negotiations which lawyers are only able to undertake with the benefit of privileged instructions, will cease to exist. The public's consequent loss of faith in the legal profession and the judicial system will be irremediable.

The consequences for barristers will be no greater, and indeed are likely to be significantly less acute, than in the case of the solicitors' branch of the profession. But solicitors enjoy the benefit of staff, infrastructure and resources which are already well-equipped for dealing with the challenges which will ensue upon implementation of the amending Act. Barristers have no experience, and rarely have access to the staff, infrastructure and resources, necessary to participate in a regulatory scheme which is already demonstrated to be an overwhelming burden, even in the case of Australia's major trading banks.

WHAT THE FUTURE HOLDS FOR BARRISTERS

One prediction which the writer has – and hopes will be proved wrong – is that implementation of the amending Act will inevitably have an immediate negative impact on access to justice for the most impecunious of litigants. No sane person would take on a personal liability of up to $6.6 million merely for the privilege of giving *pro bono* advice or assistance. Provisions which contemplate the participation of barristers in court-supervised *pro bono* mediations – such as Part 6 of the *Civil Proceedings Act 2011* (Q.), Chapter 9 Part 4 of the *Uniform Civil Procedure Rules 1999* (Q.), and the Supreme Court's *Practice Direction no.17 of 2022* – might as well be repealed, as all will become 'dead letters' overnight. The same applies to the Federal Court's scheme (pursuant to arrangements with the State and Territory Bars) of "*Court Referral for Legal Assistance*": see, in particular, Division 4.2 of the *Federal Court Rules 2011* (Cth.).

Even for litigants who can afford to make some modest contribution towards the cost of their own representation, the outlook is bleak. Only the most desperate of barristers – or those who figure that they have nothing to lose – will accept direct access briefs. Those previously content to accept solicitors' instructions without requiring that the solicitor participate in all conferences with clients, and attend court to instruct, will be well-advised not to continue that practice.

And, for everyone, the cost of access to justice will leap. Someone has to pay for the time and expense involved in undertaking all of the futile jiggery-pokery which

AUSTRAC has foisted on every "*reporting entity*" as a precursor to registration; in registering as such; and then in carrying out the perniciously invasive "*know your customer*" farce with one's own professional clients. A large part of this cost will be ongoing: AML/CTF programmes will doubtless require regular updating as AUSTRAC thinks up and mandates new ways for lawyers to badger and humiliate their own clients; one's personal circumstances from time to time may require the appointment of an alternative AML/CTF compliance officer for the practice; new staff will be required to undergo criminal checks; the 80 chapters of the AML/CTF Rules will doubtless evolve into an ever-greater catalogue of purposeless and worthless "*know your customer*" charades; and regular compliance will have to continue, not only with new clients, but also with existing clients as circumstances change.

Experience with similar legislation in the UK – specifically, the *Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017* – reveals that legal practitioners have resorted to "*a box-ticking culture of 'defensive reporting'*," which is explained as "*a strategy in which regulated entities file low-quality reports without clear suspicions of financial crime to eliminate their exposure to prosecution*".[30] This predictable reaction suggests that the entire process has simply become busywork for legal practitioners, of no real use to regulatory authorities, and of no assistance in identifying, apprehending or convicting criminals engaged in money laundering or the financing of terrorism: in all, a waste of everyone's time and resources.

At the same time, it appears that the cost of complying with the UK approach, combined with the risk of prosecution or professional disciplinary action in the event of non-compliance, has put many of the nation's smaller legal practices out of business, to the point that traditional 'High Street' law offices are largely a thing of the past. This is at least partly because such operators "*often lacked the staff or technological infrastructure to implement the necessary controls, conduct customer due diligence ..., and maintain compliant documentation*".[31] It has also led to widespread

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[30] Isabelle Nicolas, *Striking the balance: anti-money laundering goals and legal privilege in Australia*, Current Issues in Criminal Justice: 2025, vol. 37, no. 2, pp. 208-227 at p. 219. https://doi.org/10.1080/10345329.2024.2420146

[31] BDO Australia, *Practical implementation of the AML/CTF Act: Lessons learned from New Zealand and the UK*, at: https://www.bdo.com.au/en-au/insights/forensic-services/practical-implementation-of-the-aml-ctf-act-lessons-learned-from-new-zealand-and-the-uk

'outsourcing' of compliance services, both in the UK and New Zealand.[32] This, in turn, has increased the cost of legal representation, and further reduced access to justice, as only the larger (and more expensive) city and provincial firms can afford the cost of compliance.

That said, it appears that the New Zealand model (where compliance is monitored only by the regulatory authority) is somewhat more relaxed than in the UK (where compliance is also monitored by professional disciplinary bodies). "*Every week there is a shame file in the Law Society Gazette in London of people where there has been no harm proved, but where a manual has not been updated this year, a video has not been watched by a new member of staff, or a new 'product' has not been added to a list of designated services with a further 15 processes added to the manual*."[33]

Most significantly of all, New Zealand barristers were successful in negotiating for themselves a much wider range of exemptions than apply to Australian barristers under the amending Act, allowing them to focus on protecting their clients' legal interests rather than acting (at the clients' expense) as an unpaid "*grass*", "*narc*", "*snitch*", "*rat*", "*canary*", or "*stool pigeon*" against the very people whose legal interests it is their duty to protect.

IS THE AMENDING ACT OPEN TO CHALLENGE?

This is the regime for which all of us must prepare: a regime which places all of us is a position analogous to that of Nicola Gobbo. That will remain the position unless and until the High Court determines that the application of such a regime to members of the legal profession throughout Australia is unconstitutional.

There is – in the writer's view – some scope for optimism. The regime introduced by the amending Act for the legal profession, and especially for barristers, is arguably incompatible with "*an aspect of the doctrine of separation of powers, serving to protect not only the role of the independent judiciary but also the personal interests of litigants in having those interests determined by judges independent of the legislature and the executive*";[34] arguably inconsistent with "*The integrity of the courts [which] depends on their acting in accordance with the judicial process and, in no small measure, on the maintenance of public*

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[32] *ibid.*

[33] as related by David Marks KC

[34] per Toohey J. in *Kable v. Director of Public Prosecutions (NSW)*, [1996] HCA 24, (1996) 189 CLR 51 ("***Kable***") at para [30], see also per His Honour in *Harris v. Caladine*, (1991) 172 CLR 84 at 153

confidence in that process";[35] arguably irreconcilable with the principle that "*no State or federal parliament can legislate in a way that might undermine the role of ... courts as repositories of federal judicial power*", such that "*neither the Parliament of [a State] nor the Parliament of the Commonwealth can invest functions in the Supreme Court of [a State] that are incompatible with the exercise of federal judicial power*", and that "*Neither Parliament, for example, can legislate in a way that permits the Supreme Court while exercising federal judicial power to disregard the rules of natural justice or to exercise legislative or executive power*";[36] arguably inconsonant with the well-settled precept that neither state nor federal legislation can impose upon a court "*functions which are incompatible with the discharge of obligations to exercise federal jurisdiction*" so as to undermine the doctrine of the "*separation of judicial power [as reflected in] Ch III of the Constitution*".[37]

This may, perhaps, be a lengthy bow to draw. But given the remarks of the High Court in relation to Ms Gobbo's abominable derelictions of her ethical and professional obligations,[38] one may anticipate a measure of sympathy with such an argument. It is far from tenuous to suggest that the exercise of federal judicial power may be significantly impeded – if not rendered impossible – under a regime in which every lawyer in the country is required to act as a "*mole*" or "*double agent*": whilst pretending to act for the client, secretly assisting law enforcement agencies in building a case against the client.[39] A regime in which every lawyer is subject to a reporting obligation based on nothing more than that the lawyer "*suspects on reasonable grounds*"[40] either that the client has committed, or that the client may intend to commit, an offence.

At least, one is entitled to hope that such an argument may succeed.

Without such a hope, describing any of this as a 'Brave New World' is obviously ironic. Yet, if one does not laugh at such nonsense, there is little alternative but to cry.

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[35] per Gaudron J. in *Kable* at para [26]

[36] per McHugh J. in *Kable* at para [19]

[37] per Gummow J. in *Kable* at para [49]

[38] *AB (a pseudonym) v. CD (a pseudonym)*, [2018] HCA 58 at paragraph [10]

[39] the secrecy requirement, previously contained in Section 123 of the AML/CTF Act, have been strengthened by the amending Act

[40] AML/CTF Act, Section 41