Law Council
OF AUSTRALIA

Protecting the client relationship – lawyers and anti-money-laundering laws

Speech given by Ross Ray QC, President, Law Council of Australia

at the 21st LAWASIA Conference, Kuala Lumpur

30 October 2008

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Introduction

The Law Council of Australia has a long association with LAWASIA, having drafted its constitution in 1966. The Law Council has supported the growth of LAWASIA over the years and is pleased that LAWASIA has grown to consist of a Council comprising the peak legal bodies of 25 countries and individual members from over 50 countries in the Asia Pacific region.

The issue of lawyers and anti money laundering (AML) certainly fits within a number of the objectives of LAWASIA relating to the maintenance of the rule of law and upholding the status of the legal profession within the region.

This issue has been of major interest at the international level with ongoing discussions to finalize an important Guidance Document for lawyers discussed below.

This issue has also been of particular interest to the Law Council of Australia as the Australian Government is currently in the process of examining the extension of AML laws specifically to the legal profession. The Law Council has been discussing this issue for some time with the Australian Government.

AML has also been of great interest in the Asia/Pacific region with the relevant regional intergovernmental body, the Asia/Pacific Group on Money Laundering being the largest such regional body in the world.[1]

The money laundering and terrorist financing problems

The term 'money laundering' was first used in the United States in the 1920s by police officers in relation to the ownership and use of launderettes by mafia or organized crime groups. The ownership and operation of launderettes gave such groups the means to give a legitimate appearance to money obtained from criminal activities. Such groups declared their illegal proceeds to be profits gained through the operation of the launderettes and these proceeds were thus 'laundered'.[2]

An American judgment of 1982 concerning the confiscation of laundered Columbian drug proceeds was apparently the first judgment to use the term 'money laundering'.[3]

[1] See www.apgml.org/jurisdictions/

[2] Stessens, G, *Money Laundering: A New International Law Enforcement Model*, Cambridge University Press, 2000 at 82

[3] Ibid at 83

Money laundering continues to be understood as the process by which criminals give a legitimate appearance to large amounts of money obtained through crime. Criminals take steps to sever the link between the money and the crime by which it was obtained. They do this in order to avoid detection of the crime and confiscation of the money or other proceeds. Law enforcement agencies try to identify the proceeds of the crime in order to confiscate them and also to detect the original or 'predicate' offence.[4]

As crime and money laundering have become increasingly international in nature, an international response has developed in relation to AML. Part of this international response has involved the identification of a close connection between international terrorism and money laundering because proceeds of crime are often used to finance terrorist activities. This identification has led to the development of international bodies dealing with both AML and counter terrorist financing (CTF) laws.

The International Monetary Fund has estimated that money laundering could account for between 2% and 5% of global Gross Domestic Product per year. Even on 1996 figures, this would indicate that money laundering involves at least $590 billion (US) to $1.5 trillion (US) per year. The major sources of these funds are illicit drug manufacturing and trafficking; arms and people smuggling; corruption; fraud and extortion.[5]

While such estimates have been made, some commentators and interested bodies have made the point that it is impossible to produce an absolutely reliable estimate of the amount of money laundered.[6] It then becomes difficult to assess the impact of AML/CTF legislation, which is of considerable importance to those affected by it, particularly lawyers. Unless AML legislation can be proved to be effective, lawyers and their clients should not be subjected to onerous obligations associated with such legislation.

The international response

One of the earliest international initiatives was a Recommendation titled 'Measures against the Transfer and Safeguarding of the Funds of Criminal Origin" which was adopted by the Committee of Ministers of the Council of Europe in 1980.[7]

The first international instrument to specifically address the issue of AML was the Basle Statement of Principles of 1988 issued by the banking supervision

[4] Ibid at 5

[5] See www.fatf-gafi.org

[6] Stessens G, note 2 at 87-89; see also www.fatf-gafi.org

[7] Stessens G, note 2 at 16

authorities of 12 western countries. The Statement contained a number of ethical principles and practices including the 'Know your Customer' Rule. The Basle Statement was adopted in a number of countries and was the precursor to the Recommendations of the Financial Action Task Force (FATF), which have set the international standards in relation to AML/CTF measures.[8]

FATF was established by the G7 countries at a summit in Paris in 1989. It has now expanded to 34 members including Australia, China, Japan, New Zealand and Singapore, as well as a number of European and North, South and Central American countries. It also includes the European Commission and the Gulf Co-operation Council as members.[9]

The first report of FATF was issued in 1990 and contained an analysis of the extent and nature of money laundering and an overview of AML programs. This report led to the Forty Recommendations which deal with both repressive and preventive measures to combat money laundering.[10] The Forty Recommendations are regularly reviewed and amended, if necessary.[11]

In 2001, FATF expanded its mandate to include the financing of terrorism and created a set of Eight Special Recommendations on Terrorist Financing, which complement the Forty Recommendations. In 2004, these were expanded to Nine Special Recommendations.[12]

The FATF Recommendations are collectively known as the 40 + 9 Recommendations.[13]

FATF also conducts mutual evaluations of countries in relation to their implementation of the Recommendations. Other FATF-style regional bodies also conduct such evaluations, as do the International Monetary Fund and the World Bank. The Asia/Pacific Group on Money Laundering (APGML) is particularly active in conducting mutual evaluations.[14]

The implications of the FATF Recommendations for Lawyers

The FATF Recommendations include repressive measures such as the criminalization of money laundering and preventive measures such as

[8] Ibid at 17

[9] See www.fatf-gafi.org

[10] Stessens G, see note 2 at 108

[11] Reviews took place in 1996, 2003 and 2004, see www.fatf-gafi.org

[12] See www.fatf-gafi.org

[13] Ibid

[14] See www.fatf-gafi.org and www.apgml.org

requirements for financial institutions and others to identify customers or clients; exercise customer or client due diligence; keep records; implement AML programs and report suspicious transactions.[15]

Lawyers are included in a class of Designated Non-Financial Businesses and Professions (DFNBPs), which is subject to certain Recommendations. Most other Recommendations apply to countries, financial institutions, competent authorities and supervisors.[16]

Lawyers who prepare for or carry out the following activities for clients are required to comply with client due diligence and record-keeping requirements:

- Buying and selling of real estate
- Managing of client money, securities or other assets
- Management of bank, savings or securities accounts
- Organisation of contributions for the creation, operation or management of companies
- Creation, operation or management of legal persons or arrangements and buying and selling of business entities[17]

Lawyers are required to develop AML programs and report suspicious transactions when they engage in the above activities but importantly are not required to report such transactions if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege.[18]

Countries need to ensure there are effective systems for monitoring the compliance of lawyers with AML/CTF requirements on a risk-sensitive basis. Such systems can involve monitoring by a government authority or a self-regulatory organization.[19]

Competent authorities are required to establish guidelines and provide feedback to assist lawyers with AML/CTF requirements, in particular suspicious transaction reporting.[20]

[15] See ww.fatf-gafi.org for the Forty Recommendations
[16] Ibid
[17] Ibid, Recommendation 12
[18] Ibid, Recommendation 16
[19] Ibid, Recommendation 24
[20] Ibid, Recommendation 25

Lawyers are defined as sole practitioners, partners or employed professionals within firms. 'Internal' lawyers in other types of businesses or government agencies are excluded.[21]

The Interpretive Notes to the FATF Guidelines make the point that countries do not need to make laws or regulations exclusive to lawyers in order to have them comply with the above customer due diligence, record-keeping, AML programs and suspicious transaction reporting requirements.[22]

The Interpretive Notes also provide that each jurisdiction can determine what matters fall under legal professional privilege or professional secrecy and jurisdictions may allow lawyers to report suspicious transactions to appropriate self-regulatory organizations in certain circumstances.[23]

The implications of these requirements have led to considerable discussion between FATF and the International Bar Association (IBA) on behalf of the legal profession.

The implications of these requirements have also been the subject of academic commentary noting that it is difficult to impose the same type of preventive AML measures on lawyers as on others because of lawyers' professional functions and specifically their duty of confidentiality to their clients. It has also been noted that where lawyers have been subjected to suspicious transaction reporting requirements, this has been done to a very limited extent.[24]

Some of the discussions between the IBA and FATF in relation to these issues have focused on the development of a FATF Risk Based Approach Guidance for Lawyers (the Guidance), which has only just been finalized in Rio de Janiero on 17 October 2008.[25]

The FATF Risk-Based Approach Guidance for Lawyers

The IBA advises that the Guidance sets out a risk-based approach to assessing the likelihood of money laundering taking place in any case or with any client. The Guidance also provides recommended approaches to the implementation of effective monitoring processes and training programs in law firms.[26]

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[21] Ibid, Glossary

[22] Ibid, Interpretive Notes

[23] Ibid, Interpretive Notes

[24] Stessens, G see note 2 at 138-139

[25] See http://www.anti-moneylaundering.org/AboutAML.aspx#FATF

[26] Ibid

The IBA also notes that, although there is little or no evidence of lawyers being unwittingly involved in money laundering, the Guidance provides the basis for lawyers to develop a common sense, proportionate approach to client due diligence.[27]

The Guidance makes it clear that unless legal advice and representations consists of preparing or carrying out transactions related to the specific activities in Recommendation 12 mentioned above, such advice and representation is not subject to the FATF Recommendations. Therefore, the Recommendations do not cover, for example, an initial meeting before any preparatory work is done.[28]

The Guidance also specifically states that the lawyer-client relationship is protected by law, regulations, rules and codes of conduct (such as legal professional privilege) in many countries.[29]

The Guidance does not address FATF Recommendations relating to suspicious transaction reporting in detail and the IBA observes that significant concerns remain in many jurisdictions about the requirement for lawyers to report suspicious transactions and that it intends to continue its dialogue with FATF in this regard.[30]

One of those jurisdictions is Australia and the Law Council has been involved in considerable discussion with the Australian Government on this and related AML issues.

The Australian situation

In 2005, FATF conducted a mutual evaluation of Australia's AML/CTF measures and assessed many of the measures as less than compliant with the FATF Recommendations.[31]

As a result in 2006, the Australian Government passed the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, which provides the framework for greater implementation of the FATF Recommendations. A number of new measures are being progressively implemented under two separate stages of legislative activity.[32]

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[27] Ibid

[28] See note 25

[29] Ibid

[30] Ibid

[31] See www.fatf-gafi.org

[32] See http://www.ag.gov.au/www/agd/agd.nsf/Page/Anti-money_laundering

The first stage of legislative activity was directed at the financial sector, gambling sector, bullion dealers and businesses that provide particular 'designated services'. This first stage will be fully implemented by December 2008.[33]

The second stage of legislative activity is to be directed at a number of other individuals and entities, including lawyers.[34]

The previous Australian Government commenced consultations on the proposed second stage legislation in 2007 but these consultations were interrupted by a change of government in late 2007.[35]

The Law Council made strong representations during the 2007 consultations in relation to the following matters:

- The fact that the designated services included as being provided by lawyers went beyond those provided in the FATF Recommendations
- The broad nature of relevant definitions used also went beyond the FATF Recommendations
- The issue of whether the proposed legislation was the best means of addressing the purported facilitation of money laundering by the legal profession given that little information had been provided about how lawyers have unwittingly facilitated money laundering
- The existing extensive regulation of the legal profession in Australia and how this should be taken into account by the proposed legislation
- The position that a suspicious transaction reporting obligation would infringe on the professional secrecy involved in the lawyer client relationship[36]

The Law Council understands that the new Australian Government is reconsidering its approach to AML/CTF legislation in relation to lawyers.

The Law Council will continue to argue strongly that:

- Accurate information on the extent of money laundering and terrorist financing is required in order to assess the effectiveness of existing

[33] Ibid

[34] Ibid

[35] See http://www.ag.gov.au/www/agd/agd.nsf/Page/Anti-moneylaundering_SecondTrancheofReforms

[36] See www.lawcouncil.asn.au, Tranche Two AML Legislation Submission to the Attorney-General's Department, 6 September 2007

AML/CTF laws that apply to other individuals and entities and to assess what laws should apply to lawyers

- Such information should include money laundering typologies, particularly in relation to how lawyers have been used unwittingly in the process

- Any legislation should accurately reflect that only certain FATF recommendations apply to lawyers and the provisions of the Risk Based Approach Guidance for Lawyers

- The professional secrecy and legal professional privilege obligations of lawyers indicate that they should not be subject to suspicious transaction reporting requirements or that such requirements should be extremely limited

The Law Council has asked the Australian Government for further information on typologies involving lawyers. So far, the Government has only provided hypothetical scenarios of how lawyers might be used in money laundering transactions and it appears that none of these scenarios would have been any different with AML legislation specific to lawyers.

The Law Council understands that the IBA has also asked for such information from FATF on behalf of the international legal profession.

The Law Council will continue to support the efforts of the IBA in seeking such information and maintaining dialogue with FATF, particularly on suspicious transaction reporting by lawyers. The Law Council encourages all national and regional professional bodies representing lawyers to do the same. It is only through the provision of such information and the maintenance of such dialogues that lawyers can be satisfied that AML legislation is justified and does not interfere unduly with the lawyer client relationship which is fundamental to the rule of law.

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