

Chapter 11

SOLICITORS AS CASH DEALERS

The N.C.A.'s Position

11.1 In paragraph 3.42 of its 1991 report on money laundering, *Taken to the Cleaners: Money Laundering in Australia*, the National Crime Authority made this recommendation.

[T]he definition of 'cash dealers' in the Cash Transactions Reports Act be widened to include solicitors.

The NCA made further reference to this matter in its submission to this Committee in February 1993, to which it attached a copy of the above report.¹

11.2 In making its recommendation the NCA was looking to inhibit money laundering through solicitors' trust accounts. Although a cash deposit of \$10,000 into a trust account would be reportable by the solicitor's bank, such reports would not identify the person paying the money to the lawyer who in fact is the one who pays it into the bank holding the trust account. This is because the deposit would usually be put into the bank as part of an aggregation of the cash lodged with the solicitor on a particular day. The solicitor then pays the total sum collected into the bank. Accordingly, the reports are of limited use to law enforcement agencies. AUSTRAC knows who the solicitor is who makes the aggregate deposit but do not know who it is that gives the component sums to the lawyer.

11.3 The NCA Report provided numerous examples of the involvement of solicitors, and particularly through their trust accounts, in money laundering schemes especially involving real estate transactions.² As solicitors are currently required to keep records of all transactions relating to their trust accounts, the NCA considered little additional work would be involved in preparing significant and suspect transaction reports.

¹ Submission No. 27, (NCA) pp. 9-10.

² *Taken to the Cleaners* Volume 2, Chapter 7

The Attorney-General's Department's Position

11.4 The Attorney-General's Department, in its submission to this Committee, commented upon proposals for broader coverage in the definition of 'cash dealer' as follows:

There would need to be significant benefits to outweigh the increase in paper reporting (and ethical problems in the case of solicitors) which would result from the suggested expansion of the definition.³

Its submission was that the FTR Act does not override legal professional privilege, and therefore suspect transaction reporting would be excluded.⁴ That view is examined later in this chapter.

AUSTRAC's Submission

11.5 In a supplementary submission, AUSTRAC attached a paper prepared in conjunction with the NCA, *Solicitors and the Financial Reports Act 1988*. This paper examined:

- data held by AUSTRAC on significant cash transaction reports made at banks involving solicitors, and
- case studies provided by various police forces and others to the analyst, Mr Phillip Hetherington, who prepared the report.

The paper found that solicitors in some areas of Australia are handling significant amounts of cash on behalf of their clients. With no reporting of the identities of these clients the money trail is effectively broken.

11.6 Examination of data accumulated in the study revealed a high proportion of reported transactions in the suburbs of Sydney and Melbourne, and in the Gold Coast area of Queensland. Other data showed these areas had a low number of firms with 10 or more solicitors; therefore

³ Submission No. 35, (A-G's) p. 6.

⁴ *ibid* p. 36.

it was smaller firms in these regions which were responsible for a high number of significant cash transactions.⁵

Volume of Transactions

11.7 The evidence showed solicitors as a group were the subject of a greater number of significant cash transactions than is the case with some existing categories of cash dealers. The total number approached that for bookmakers and TABs.⁶

11.8 Tables 10.1 and 10.2 below illustrate the comparisons between various cash dealers and include a separate table for solicitors (Table 10.2A). These statistics are not exhaustive, but provided a perspective of the likely volume of reporting should solicitors be included with other cash dealers.⁷

11.9 The Committee considered these figures provided sufficient evidence of the significance of cash handling by solicitors to establish a prima facie case for their inclusion in the definition of 'cash dealer' in the FTRA.

⁵ Submission No. 29, p. 15.

⁶ *ibid* p. 4.

⁷ *ibid* pp. 18-19.

**Table 11.1 - Reports Lodged BY Cash Dealer Groups
1 July 1990 - 30 June 1992**

Cash Dealer	Cash No. of Reports	Inwards Cash Reported (\$'000)	Cash No. of Reports	Outwards Cash Reported (\$'000)
Securities Dealers	34	393	11	299
Bullion Dealers	44	541	6	117
Bookmakers	8	337	986	16,318
TABs	642	13,543	1,528	33,602

**Table 11.2 - Reports ABOUT Cash Dealer Groups
1 July 1990 - 30 June 1992**

Cash Dealer	Cash No. of Reports	Inwards Cash Reported (\$'000)	Cash No. of Reports	Outwards Cash Reported (\$'000)
Securities Dealers	256	3,765	167	3,073
Bullion, Futures & Commodities Dealers	1,101	18,741	189	2,792
Occupation Code 9143 TABs, Bookmakers	2,398	38,718	602	13,367

**Table 11.2A - Reports Lodged About Solicitors
1 July 1990 - 30 June 1992**

Solicitors	1,670	40,100	955	18,600
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The Proposed Extension

11.10 To include solicitors in the definition of cash dealer would have the effect of requiring them to report:

- those transactions where they received amounts of \$10,000 or more, and international funds transfers of any amount to or from their trust accounts; and
- any transaction (whether involving the transfer of funds or not) where a solicitor has reasonable grounds to suspect that information he or she has concerning the transaction:
 - (i) may be relevant to investigation of an evasion, or attempted evasion, of a taxation law;
 - (ii) may be relevant to investigation of, or prosecution of a person for, an offence against a law of the Commonwealth or of a Territory; or
 - (iii) may be of assistance in the enforcement of the *Proceeds of Crime Act 1987* or the regulations made under that Act.⁸

⁸ *Financial Transactions Reports Act 1988* Section 16.

The Solicitor-Client Relationship

11.11 The relationship between a solicitor and his or her client is a fiduciary one, imposing special obligations on the solicitor.⁹ One aspect of the relationship is the duty of a solicitor not to disclose to third parties certain information confidentially revealed to him or her in his or her capacity as a solicitor, and that duty continues after the relationship of solicitor and client has ceased.¹⁰

Legal Privilege

11.12 Mr. Justice Murphy who was one of the majority in *Baker -v- Campbell* (1983) 153 C.L.R. 52 had this to say at page 86:

"Scope of the Privilege.

Under common law as recently declared for Australia, client's legal privilege protects from disclosure any oral or written statement, or other material, which has been created solely for the purpose of advice, or for the purpose of use in existing or anticipated litigation (*Grant -v- Downs* (83); see also *National Employers' Mutual General Insurance Association Ltd. -v- Waind* (84)). This defines the scope of the privilege more narrowly than elsewhere. In the United Kingdom it is enough if the dominant purpose for coming into existence of the material is legal advice or litigation (*Waugh -v- British Railways Board* (85)).

The privilege does not attach to documents which constitute or evidence transactions (such as contracts, conveyances, declarations of trust, offers or receipts) even if they are delivered to a solicitor or counsel for advice or for use in litigation. It is not available if a client seeks legal advice in order to facilitate the commission of crime or fraud or civil offence (whether the adviser knows or does not know of the unlawful purpose) (see *Reg. -v- Cos and Railton* (86); *Bullivant -v- Attorney-General (Vict.)*(87); *R. -v- Smith* (88)); but is of course available where legal advice or assistance is sought in respect of past crime, fraud or civil offence. Hence the subject matter of the privilege is closely confined; in brief it extends only to oral or other material brought into existence for the sole and innocent purpose of obtaining legal advice or assistance."

⁹ *Nocton v Ashburton* [1914] AC 932 at 952.

¹⁰ *Ott v Fleishman* [1983] 5 WWR 721, BC.

11.13 Dawson J who like Murphy J was part of the majority in *Baker -v- Campbell* said at p.132:

"To view legal professional privilege as being no more than a rule of evidence would, in my view, be to inhibit the policy which supports the doctrine. Indeed, now that there appears to be a tendency to compel the disclosure of evidence as an adjunct to modern administrative procedure (see, e.g. *Commissioners of Customs and Excise -v- Harz (83)*), it may well be necessary to emphasize the policy lest it be effectively undermined. For there can be no doubt that freedom of communication between a legal adviser and his client may be greatly diminished by a requirement that the information might eventually be used in some action against the client, whether in administrative or judicial proceedings.

In my view, the doctrine of legal professional privilege is, in the absence of some legislative provision restricting its application, applicable to all forms of compulsory disclosure of evidence."

11.14 The Law Society of NSW made the following summary points about privilege:

- it is conducive to justice for clients to be assured that communications between them and their solicitors will remain confidential, or at least not to be disclosed beyond the implied authority given to the solicitor by them;
- our system of law requires solicitors to refrain from making judgments impugning the veracity of what their clients tell them, unless they have reason to make further inquiry of the client. Requiring solicitors to inform authorities of their personal suspicions about the conduct of clients is wholly incapable of being reconciled with this fundamental principle of our legal system;
- solicitors are, for the purposes of the solicitor-client relationship, agents of their client and are thus not free to act beyond the scope of their authority;

- the client privilege flowing from the solicitor-client relationship is subject to a number of restraints imposed by the common law and express legislative dictate, such as:
 - the sole purpose test;¹¹
 - the rule that privilege does not extend to communications in furtherance of a crime or fraud;¹²
 - the rule that privilege can be abrogated by Act of Parliament, etc.¹³

11.15 As Murphy J said in the passage quoted at paragraph 11.12, the privilege is limited. *Allen Allen & Hemsley -v- Deputy Commissioner of Taxation* considered the position of a taxation auditor who sought access to the trust account ledgers of a firm of solicitors. The auditor was acting under an authorisation from the Commissioner of Taxation under section 263 of the *Income Tax Assessment Act 1936*. The firm declined to give access, claiming that legal professional privilege attached to entries in the ledgers. The Court held that while the doctrine of legal privilege was not excluded by section 263, **only in the most exceptional circumstances can an entry in a solicitor's trust account be privileged as disclosing the contents of communication between solicitor and client.**¹⁴

Cash Deposits Made With Solicitors

11.16 Legal professional privilege in its precise application may not cover matters to do with the deposit of cash by clients with their solicitors. However the policy behind the doctrine is relevant when considering whether the definition of "cash dealers" should be extended to cover them.

¹¹ *Grant v Downs* supra.

¹² *R v Cox and Railton* (1884) 14 QBD 153

¹³ *Corporate Affairs Commission of NSW v Yuill* (1991) 172 CLR 319

¹⁴ *Allen Allen & Hemsley v Deputy Commissioner of Taxation* (1989) FCR 576. See also *Nickmar Pty Ltd & Anor v Perservatrice Skandia Insurance Ltd* (1985) 3NSWLR p. 44) for further discussion about the limit of the privilege

11.17 On the other hand the doctrine reflects the need for confidentiality in the relationship between solicitors or clients. This should not as Murphy J says be available for use as a cloak for the commission of crime. But it is AUSTRAC's function to gather intelligence not to carry out active policing duties by questioning suspects or possible witnesses to an offence or by manifesting a pressure to deter the commission of crime. Before that becomes part of AUSTRAC's function the proposal should be debated in Parliament.

Trust Accounts and Audit

11.18 Both the NSW Law Society¹⁵ and the Law Institute of Victoria¹⁶ provided information on the operation of solicitors trust accounts, and the role of audit inspections of those accounts. The Law Society in its earlier submission made this point. 'Solicitors are specifically required by regulation to maintain all ledger accounts in the name of the person on whose behalf monies are received or held'.

11.19 In response to a question whether this requirement was sufficient to control any conscious involvement in money laundering by solicitors, the Attorney-General's Department said:

No. The function of an auditor is too narrow to address the full breadth of the problem. In any case, the proposal to make solicitors cash dealers is intended to do more than simply discourage solicitors from intentionally engaging in money laundering. Primarily it is intended to close a loophole in the system of reporting and maintain the integrity of the money trail.¹⁷

11.20 The Committee considered, however efficient the audit procedures undertaken by the solicitor governing bodies may be, those procedures are not geared toward law enforcement. Even if they were, such examinations usually occur well after the event when the trail is cold.

¹⁵ Submission Nos. 36 & 62, (Law Society of NSW)

¹⁶ Submission No. 49, (Law Institute of Victoria)

¹⁷ Submission No. 59, (A-G's) p. 2.

Deterrence

11.21 The NCA submitted the following in response to the specific question of solicitors as cash dealers.

The inclusion of solicitors within the definition of 'cash dealer' may deter solicitors from accepting cash from clients, and clients from paying solicitors in cash because the transaction would be reported in the same way as a deposit made directly to a bank. This in turn would reduce the volume of transactions reported to AUSTRAC and, importantly, reduce the avenues available to those wishing to launder money.¹⁸

11.22 The Committee agrees there is deterrence value in the reporting of cash transactions by solicitors. But this may be a reason for not extending the definitions of cash dealer to include solicitors. The purpose of AUSTRAC is to act as an intelligence gathering body not as a policing one. A function of policing is to deter and if AUSTRAC is to take on this character that should be made clear. Before this happens issues of civil liberties arise which would need to be addressed.

Suspect Transactions

11.23 The aspect of the FTRA which attracted fiercest opposition from the legal profession was the reporting of suspect transactions. Mr Hugh Norton, a member of the Law Society of NSW, said in evidence:

In very broad principle, I have no objection to the reporting of facts of an objective nature - by that, I mean significant transactions. But I wonder whether I am sufficiently taking into account the position of clients when I say that we would have no objection to objective reporting. On the other hand, the Law Society is totally opposed to the Act being extended to solicitors in regard to suspect transaction reporting.¹⁹

¹⁸ Submission No. 58 (NCA) p. 2.

¹⁹ Evidence (Mr Norton) p. 121.

The objection can perhaps best be summarised by the comment that 'it will make solicitors informers on their own clients'.²⁰

11.24 The Committee considered submissions made about the conduct of some members of the legal profession. Evidence was put before it of flawed practices particularly in areas such as the Gold Coast and the suburbs of Sydney and Melbourne. This issue is referred to in paragraphs 11.26 to 11.28 immediately below.

11.25 The public interest that is served through a system of compelled informers must be balanced against the public interest in preserving confidentiality and trust between clients and their legal advisers.

Recommendation 22: The Committee recommends that the definition of 'cash dealer' in the *Financial Transactions Reports Act 1988* not be widened to include solicitors.

Increase in and Extension of Law Enforcement Powers

11.26 From time to time, law enforcement agencies in the proper discharge of their responsibilities seek further powers and greater jurisdiction from Government. Government should not readily grant them.

11.27 Because law enforcement mechanisms are prone to impact heavily on the life and liberty of members of the community they must, in a free and open society, be instituted only after close analysis and with considerable caution. Other than in exceptional circumstances evidence on the basis of which they are established should be comprehensive, complete and compelling.

11.28 For example, the case to have solicitors included within the definition of cash dealers under the FTR Act has not, as yet, been made out. The evidence produced does not show widespread and endemic conduct by the legal profession which would justify the imposition of onerous obligations upon them. Nor does that evidence go into close detail about the issue.

²⁰ Submission No. 62 (NSW Law Society) p. 7.

Further Inquiry by Committee

11.29 The work of AUSTRAC is still developing. The undoubted contribution it already makes to law enforcement, and will make in the future, is still being realised and assessed. As time goes by fresh developments may justify an extension of its powers.

11.30 Given all this it would be a wise and useful move were the Committee to hold a further inquiry into the activities of AUSTRAC three years from the tabling of this report.

<p>Recommendation 23: The Committee recommends that the FTR Act be reviewed again in a further three years.</p>
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