IMPACT OF CASH TRANSACTIONS LEGISLATION: COMMENTARY

T.E. BOSTOCK

Mallesons Stephen Jaques
Melbourne

Please allow me first on behalf of us all to thank Mr Coad for achieving the astonishing feat of producing a paper which both outlines comprehensively the **Cash Transaction Reports Act** 1988 ("the CTR Act") and is eminently readable. Whatever one may think of the CTR Act - and, as will be seen, I for one find some aspects of it disturbing - it is part of the law of the land, and non-compliance attracts severe penalties. Mr Coad's paper is essential reading for all operators at all levels in the financial sector.

It is not altogether a misstatement to say that the CTR Act places "cash dealers", which as defined in s.4(1) includes, among others, banks, bullion dealers and bookmakers, unit trust managers, stockbrokers and casino operators, under an obligation to inform on their clients and customers to the Commonwealth Government in the guise of the Cash Transaction Reports Agency ("the CTR Agency"). It is a mater of some irony that the cost of compliance with the reporting requirements of the CTR Act will be borne not by the Commonwealth, the informed party as it were, nor by the informer, but will inevitably be passed on to the informer's customers and clients.

Now I must at the outset make it clear that the views expressed in this commentary are my own, and that they do not, or do not necessarily, represent the views of any or all of my partners. It is especially necessary to say that because, as Mr Coad says in his paper, the CTR Agency has retained one of my colleagues to advise it in relation to the obligation of a cash dealer under s.16 to notify suspect transactions. Since that came to my knowledge, I have deliberately not inquired which of my colleagues has been so retained, still less discussed this commentary with him or her.

In the time allotted to me, I must confine this commentary to what I see as the three most sinister aspects of the CTR Act: the obligation under s.16 to report suspect transactions; the prohibition in s.24 against opening an account with a cash dealer under a "false" name; and the offence created by s.31 for conducting transactions so as to avoid reporting requirements.

REPORTS OF SUSPECT TRANSACTIONS

Section 16(1) of the CTR Act provides:

> "Where:
>
> (a) a cash dealer is a party to a transaction; and
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> (b) the cash dealer has reasonable grounds to suspect that information that the cash dealer 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 Crimes Act** 1987 or the regulations made under that Act;
>
> the cash dealer, whether or not required to report the transaction under Division 1, shall, as soon as practicable after forming that suspicion:
>
> (a) prepare a report of the transaction; and
>
> (b) communicate the information obtained in the report to the Director [sc. of the CTR Agency]."

A number of comments may be made about s.16(1).

First, whereas the other reporting requirements of the CTR Act relate in an objective way to significant cash transactions (ie. involving $10,000 or more) that are not "exempt transactions" or to transfers of currency in amounts exceeding $5,000 into or out of Australia, s.16(1) imposes an obligation to report something involving the inherently subjective notion of suspicion.

Secondly, the section applies irrespective of whether the "transaction" is a "cash transaction", which is defined in s.3(1) as meaning "the transaction involving the physical transfer of currency [ie. coin and paper currency of Australia or of a foreign country] from one person to another". The CTR Act does not contain a definition of the word "transaction", so that in the context of s.16 it must be given its meaning in accordance with normal usage.

For example, the section will apply to a banker who is a party to a cash transaction and has reasonable grounds to suspect that the transaction has contravened s.129 of the **Companies Act** 1981, which prohibits the giving by a company within the meaning of

that Act of financial assistance for the purposes of the acquisition of shares in the company.

It will also apply to a stockbroker who, by virtue of being a "dealer" for the purposes of the **Securities Industry Act** 1980 is "a cash dealer" as defined in s.3(1) of the CTR Act, in any transaction where the broker has reasonable grounds to suspect that a party to the transaction is dealing in securities in contravention of s.128 of the **Securities Industry Act**, that is, the prohibition against insider trading.

Thirdly, the Explanatory Memorandum which accompanied the Bill for the CTR Act into the Federal Parliament tells us that s.16 was "deliberately cast in terms of 'reasonable grounds to suspect' rather than the term 'reasonable grounds to believe' so that the lower threshold will alleviate the need for cash dealers to undertake extensive investigation before being able to pass information to the Director and also to enable maximum intelligence to be available to the Director and law enforcement agencies."

In that regard, s.16 differs significantly from s.79 of the **Proceeds of Crime Act** 1987 ("the POC Act"), under which a financial institution which has information about an account held with the institution and has reasonable grounds for believing that:

(a) the information may be relevant to an investigation of, or prosecution of, a person for, an offence against a law of the Commonwealth or of a territory; or

(b) the information would otherwise be of assistance in the enforcement of the POC Act or the Regulations made under it,

the institution may give the information to a police officer or a member, or member of staff, of the National Crime Authority.

It will be seen that s.79 is permissive, s.16 is mandatory; and the test for the application of s.79 is the objective test of "reasonable grounds to believe" instead of the subjective test of "has reasonable grounds to suspect" in s.16.

Fourthly, there will be many situations in which a cash dealer will have difficulty in deciding whether or not he has "reasonable grounds to suspect" any of the matters set out in s.16(1). For example, a cash dealer must, if he has "reasonable grounds to suspect" that information concerning a "transaction" to which he is a party "may be relevant to investigation of an evasion, or attempted evasion, of a taxation law", he must transmit the information to Mr Coad or his successor. There is no definition of "evasion" in the CTR Act, nor as far as I know in any "taxation law" within the meaning of the **Taxation Administration Act** 1953.

At one time, there was a recognised distinction between evasion on the one hand, as involving either concealing assessable income or making false claims for deductions, and on the other avoidance, which was the exercise of the right of the citizen to arrange his affairs according to law in such a way as to be liable for the least tax possible. There is no doubt that over the last twenty years that distinction has become blurred, or even obliterated, in the minds of the lay public, and even to a degree in the minds of some judges. And the distinction is blurred in any event by such measures as s.260 of the **Income Tax Assessment Act** 1936 and its successor, Part IVA of that Act.

If the notion of "evasion" is apt to be elusive, so much more so is that of "attempted evasion". Moreover, at a time when Australia is afflicted by what one might call the disease of legislative incontinence, lawyers struggle to keep pace with a seemingly incessant flood of Commonwealth legislation, much of which is devoted to creating new offences; the public at large, which includes cash dealers and their employees, has no hope of doing so.

In the application of s.16(1), there are at least five possible situations:

(i) the cash dealer knows certain facts and suspects that they may be relevant to investigation of an offence (known to the cash dealer) against a law of the Commonwealth;

(ii) a cash dealer suspects certain facts and knows that they may be relevant to investigation of an offence (known to the cash dealer) against a law of the Commonwealth;

(iii) a cash dealer suspects certain facts and suspects that they may be relevant to investigation of an offence (known to the cash dealer) against a law of the Commonwealth;

(iv) a cash dealer knows certain facts and suspects that they may be relevant to an investigation of an offence (suspected by the cash dealer) against a law of the Commonwealth;

(v) a cash dealer knows certain facts which may be relevant to investigation of an offence against a law of the Commonwealth, but is not aware of the particular offence.

I venture the suggestion that in situations (i), (ii) or (iii), the cash dealer is required by s.16(1) to report; that the cash dealer in situation (v) is not required to report; and that situation (iv) is doubtful.

Section 16(5) provides that "an action, suit or proceeding does not lie against a cash dealer or an officer, employee or agent of a cash dealer acting in the course of employment in relation to any action taken by the cash dealer or person pursuant to s.16."

The purpose of s.16(5) according to the Explanatory Memorandum "is to protect cash dealers from any actions for breach of confidence or defamation that might otherwise be brought against the cash dealer by a customer."

Although it is perhaps not beyond argument, it would seem that, to have the benefit of s.16(5), a cash dealer who is sued by a customer for making a report under s.16(1) would have to establish that he or she had reasonable grounds to suspect that the transaction fell within one of the three categories described in s.16(1)(b): the report would not otherwise have been made "pursuant to" s.16(1).

Section 16 therefore places a cash dealer at least potentially in a dual peril: on the one hand of committing an offence for failing to report a transaction which he ought to have reported under the section, and on the other, of facing action at the hands of a party to a transaction where the dealer reports information under s.16(1) but was held not to have reasonable grounds to suspect that the information was information to which s.16(1) applied.

Just what amounts in any given circumstances to "reasonable grounds to suspect" is therefore a very critical question for banks and other cash dealers. Judicial authority on the phrase is sparse. In addition to the authorities cited in Mr Coad's paper, there is the Canadian case of Gifford v. Kelsen (1943) 51 Manitoba LR 120, in which the plaintiff sued her sister for false imprisonment on account of having the plaintiff arrested and confined to the psychopathic ward of a hospital on the basis of an information laid by the defendant alleging that the plaintiff was "suspected and believed" by the defendant to be of unsound mind and dangerous to be at large. In the course of his judgment, Dysart J. commented:

> "The phrase 'suspected and believed', although it follows the wording of s.10 of the Act, is inconsistent in itself. A suspicion or belief may be intertwined, but a suspicion and belief cannot exist together. Suspicion is much less than belief; belief includes or absorbs suspicion." (p.124).

It is significant that the one issue on which the Full Federal Court in Parker v. Churchill (1986) 65 ALR 105 split was whether the facts contained in a sworn information gave a justice of the peace "reasonable grounds for suspecting" that there were in the premises in question anything with respect to which any offence against a law of the Commonwealth had been, or was suspected on reasonable grounds to have been, committed so as to be empowered to issue a search warrant under s.10 of the **Crimes Act** 1914 (Cth). That underlines the likelihood of many situations where a bank or other cash dealer will have great difficulty in deciding whether or not information gathered in relation to a transaction does or does not give rise to reasonable grounds for suspicion.

A bank or other cash dealer must also have regard to s.17 of the CTR Act, which provides:

> "17. When a cash dealer, or a person who is an officer, employee or agent of a cash dealer, communicates or gives information under s.16, the case dealer or person shall be taken, for the purposes of ss.81 and 82 of the **Proceeds of Crime Act** 1987, not to have been in possession of the information at any time."

The point of s.17 cannot be appreciated without setting out ss.81 and 82 of the POC Act in full:

> "81.(1) In this section:
>
> 'transaction' includes the receiving or making of a gift.
>
> (2) A person who, after the commencement of this Act, engages in money laundering is guilty of an offence against this section punishable, upon conviction, by:
>
> (a) if the offender is a natural person - a fine not exceeding $200,000 or imprisonment for a period not exceeding 20 years, or both; or
>
> (b) if the offender is a body corporate - a fine not exceeding $600,000.
>
> (3) A person shall be taken to engage in money laundering if, and only if:
>
> (a) the person engages, directly or indirectly, in a transaction that involves money, or other property, that is proceeds of crime; or
>
> (b) the person receives, possesses, conceals, disposes of or brings into Australia any money, or other property, that is proceeds of crime;
>
> and the person knows, or ought reasonably to know, that the money or other property is derived or realised, directly or indirectly, from some form of unlawful activity.
>
> 82.(1) A person who, after the commencement of this Act, receives, possesses, conceals, disposes of or brings into Australia any money, or other property, that may reasonably be suspected of being proceeds of crime is guilty of an offence against this section punishable, upon conviction, by:

(a) if the offender is a natural person - a fine not exceeding $5,000 or imprisonment for a period not exceeding 2 years, or both; or

(b) if the offender is a body corporate - a fine not exceeding $15,000.

(2) Where a person is charged with an offence against this section, it is a defence to the charge if the person satisfies the court that he or she had no reasonable grounds for suspecting that the property referred to in the charge was derived or realised, directly or indirectly from some form of unlawful activity."

The implication to be drawn from s.17 is that a bank or cash dealer who fails to report information under s.16 runs the risk not only of committing an offence under s.28(1) of the CTR Act, for which the penalty is, in the case of a natural person, $5,000 or two years or both, but also of incurring a much greater penalty for money laundering in contravention of the POC Act. No doubt, the implied threat in s.17 is to encourage cash dealers to follow the line of "if in doubt, report".

OPENING AND OPERATING AN ACCOUNT UNDER A FALSE NAME

It is often overlooked that "speaking generally, the law of this country allows any person to assume and use any name, provided that its use is not calculated to deceive and to inflict pecuniary loss", as Lord Lindley said in Earl Cowley v. Countess Cowley [1901] AC 450 at 460.

On top of ss.18 to 23, which impose obligations on cash dealers in relation to the verification of identity of a person seeking to open an account or seeking to become a signatory to an existing account, and provide for the blocking of withdrawals by unverified signatories to accounts which exceed certain credit balance or deposit limits, s.24 adds to Australia's already impressive catalogue of economic crimes by making it an offence to open or to operate an account with a cash dealer in a "false name".

Under s.24(7), a person opens an account in a "false name" if the person, in opening the account, or becoming a signatory to the account, uses a name other than a name by which the person is commonly known; and by s.24(3) where a person is commonly known by two or more different names, the person shall not use one of those names in opening an account with a cash dealer unless the person has previously disclosed the other name or names to the cash dealer. A contravention of s.24(1) or (3) or of the corresponding provisions relating to the operation of an account renders the offender, if a natural person, liable to a fine not exceeding $5,000 or imprisonment for up to two years or both or, if the offender is a body corporate, to a fine not exceeding $25,000.

There are a number of situations in which a person may for legitimate reasons wish to operate an account with a bank under an assumed name. An obvious example is an author writing under a nom de plume, like, for example, the Australian writer, Brent of Bin Bin, about whose identity there is still some aura of mystery. A nom de plume or pseudonym is not normally called a "false", as opposed to an "assumed", name: in normal usage a "false name" is an assumed name used for criminal or fraudulent purposes. In that respect, the offence created by s.24 is what one might call a cacological crime: a crime created by giving an activity which is not inherently or invariably evil a nasty name. It is not unlike the offences under Soviet-bloc law of "sabotage" or "hooliganism" (for which the Czech writer, Vaclav Havel, is presently in prison), which in reality means doing anything of which the authorities disapprove, or "slandering the socialist system", which in reality means saying anything of which the authorities disapprove.

Let me make it clear that I have no quarrel with the aim of these provisions "to put an end to the practice of tax cheats and criminals hiding their ill-gotten gains behind a veil of respectability", as stated in the Explanatory Memorandum. I question, however, whether the aim makes it necessary to put an end to the right of the citizen to use an assumed name for a legitimate purpose when it comes to opening or operating a bank account.

CONDUCT OF TRANSACTIONS SO AS TO AVOID REPORTING REQUIREMENTS

Under s.31(1) of the CTR Act, "a person commits an offence against this section if:

(a) the person is a party to 2 or more non-reportable cash transactions; and

(b) having regard to:

  (i) the manner and form in which the transactions were conducted, including, without limiting the generality of this (sic), all or any of the following:

    (A) the value of the currency involved in each transaction;

    (B) the aggregated value of the transactions;

    (C) the period of time over which the transactions took place;

    (D) the interval of time between any of the transactions;

    (E) the locations at which the transactions took place; and

(ii) any explanation made by the person as to the manner or form in which the transactions were conducted;

it would be reasonable to conclude that the person conducted the transactions in that manner or form for the sole or dominant purpose of ensuring, or attempting to ensure, that the currency involved in the transaction was transferred in a manner and form that:

(iii) it would not give rise to a significant cash transaction; or

(iv) would give rise to exempt cash transactions."

The penalty for an offence against s.31(1) is, if the offender is a natural person, a fine not exceeding $10,000 or imprisonment for a period not exceeding 5 years, or both; or, if the offender is a body corporate, a fine not exceeding $50,000.

The first thing to be noted about the offence created by s.31(1) is that it does not require any criminal purpose or intent. The offence is constituted by carrying out two or more transactions in such a way as to make it reasonable to conclude that the transactions were carried out for the sole or dominant purpose of avoiding giving rise to a significant cash transaction or of giving rise to exempt cash transactions. Let us suppose, for example, that one is lucky enough to win $25,000 in cash over an afternoon at the races. There is nothing inherently unlawful in that. If the whole $25,000 were to be deposited in cash in a bank account, the deposit would give rise to a "significant cash transaction" which the bank would have to report to the CTR Agency under s.7 of the CTR Act.

Now if one were nervous about having such a deposit reported to the Agency - not because of fear of prosecution (as no offence has been committed in the getting of the money) but because of a natural reluctance to have one's business transactions being informed on to the government - one would be naturally tempted to cut up the $25,000 into three pieces of less than $10,000 and deposit them separately, thus avoiding a significant cash transaction. If the prosecution is able to prove that in the circumstances it is reasonable to conclude that the three deposits were made with the sole or dominant purpose of avoiding giving rise to a significant cash transaction, the offence is committed, notwithstanding that one's only motive was to preserve one's privacy.

The second remarkable feature about s.31(1) is that the prosecution does not have to prove one's actual or subjective sole or dominant purpose: one stands to be convicted if the prosecution proves that it is reasonable to conclude that avoidance of a significant cash transaction was one's sole or dominant purpose, regardless of whether it was one's actual

purpose. In that respect, the offence is framed on the basis of an objective test of the kind applied in the context of murder of the House of Lords in DPP v. Smith [1961] AC 290 - "the most criticised judgment ever to be delivered by an English court", in the words of Glanville Williams - which was decisively rejected by the High Court of Australia in Parker v. The Queen (1963) 111 CLR 610.

The Explanatory Memorandum states that "such an offence [as in s.31(1)] has recently been created in the United States because of the growing concern about the avoidance of the reporting requirements by the structuring of transactions"; yet the corresponding US offence is defined in s.1354 of the Anti-drug Abuse Act of 1986 in the following terms:

> "No person shall for the purpose of evading the reporting requirements of s.5313(a) with respect to such transaction -
>
> (1) cause or attempt to cause a domestic financial institution to fail to file a report required under s.5313(a);
>
> (2) cause or attempt to cause a domestic financial institution to file a report required under s.5313(a) that contains a material omission or misstatement of fact; or
>
> (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions."

It will be seen that s.1354 is constructed in the conventional way for a statutory criminal offence and required proof by the prosecution beyond reasonable doubt that the accused had the requisite criminal purpose or motive.

There is a similar difference between the definition of the offence of money laundering in the two jurisdictions. Under s.1352 of the **Money Laundering Control Act** of 1986, the prosecution must prove that the accused actually knew that a transaction involved the proceeds of unlawful activity. As we have seen, under s.81 of the POC Act, it is sufficient for the prosecution to prove that the accused ought reasonably to have known that the transaction involved the proceeds of unlawful activity.

CONCLUSION

At the present time, the rule of law is imperilled, not only in Australia but elsewhere in the Western world, by the emergence of three phenomena. The first is the sheer proliferation of laws, which is as subversive of the rule of law as the absence of laws. The second is the alarming increase in the rate of drug-related crime, crime being the only way by which many addicts can find

the money to finance their addiction. The third is the enactment of laws, like the CTR Act and the POC Act, which undermine the safeguards for the citizen which evolved with the common law over centuries and have more than a passing flavour of totalitarianism.

It is said that such laws are necessary to combat organised crime; yet, according to the Senate Standing Committee on Legal and Constitutional Affairs in its report on the Bill for the CTR Act, "the evidence available to the Committee was insufficient to enable it to reach a firm view on the effectiveness of the Bill, were it to become law. The United States of America is the only country to have enacted comparable measures. The evidence of the American experience is inconsistent". (Report paragraph 8.10).

We shall await with interest the results of the CTR Act and in particular whether they justify the disturbing aspects noted in this commentary. I, for one, doubt it.