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Public Legal Interpretation No. 10 – Agency and the AML/CTF Act

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You should ensure that this Public Legal Interpretation has not been superseded or withdrawn.

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Objective

1 The purpose of this Public Legal Interpretation is to set out AUSTRAC's views on the principles of agency applying under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act).

2 This Public Legal Interpretation deals with:

Section one:

- Meaning of common law principles of agency.

Section two:

- Reporting obligations and the principles of agency.

Section three:

- Principles of agency generally under the AML/CTF Act.

Section four:

- Principles of agency under section 37 of the AML/CTF Act for the purposes of customer identification.

Section five:

- Individual agents of customers under Part 4.11 of the AML/CTF Rules 2007.

Section six:

- Permanent establishment where a person carries on activities or business through an agent.

Section seven:

- Principles of agency for reports of suspicious matters.

Introduction

3 The objects of the AML/CTF Act include fulfilling Australia's international obligations and addressing matters of international concern in combating money laundering and the financing of terrorism. To fulfil these obligations and address matters of international concern, the AML/CTF Act places obligations on reporting entities under the Act when providing designated services.

4 The principles of agency apply to various matters in the AML/CTF Act. For example, section 37 of the AML/CTF Act states that the principles of agency apply in relation to the carrying out by a reporting entity of an applicable customer identification procedure.

5 This PLI seeks to clarify some of the issues relating to application of the principles of agency under the AML/CTF Act.

Interpretation

Section one – Meaning of common law principles of agency

- 6 The AML/CTF Act does not define an ‘agent’ or ‘agency’ arrangement. The common law principles of agency are therefore relied on to determine the meaning of agency arrangements which may be applicable under the AML/CTF Act.
- 7 The common law principles of agency provide that what a person may do himself or herself, he or she may do by an agent (*Christie v Permewan, Wright & Co Ltd* (1904) 1 CLR 693 at 700; *Bevan v Webb* [1901] 2 Ch 59 at 77).
- 8 An agent is a person ‘who is able, by virtue of the authority conferred upon him or her, to create or affect legal rights and duties as between another person, who is called a principal, and third parties’ (*Petersen v Moloney* (1951) 84 CLR 91 at 94). A principal is responsible for all acts of his or her agent that are within the actual or apparent authority of the agent. (*International Paper Co v Spicer* (1906) 4 CLR 739; *Bacon v Purcell* (1916) 22 CLR 307; *Hawkins v Gaden* (1925) 37 CLR 183).
- 9 Once appointed, an agent is able to make decisions and enter into agreements on behalf of the principal. A defining feature of the agency power is that contracts entered into within the scope of the agent’s authority become binding on the principal and the principal will be held liable for the acts of his or her agent where they are within the implied authority of an agent.¹ The implied authority of an agent extends to all acts which are necessary or ordinarily incidental to the exercise of his or her express authority (*Bayley v Wilkins* (1849) 7 CB 886; 137 ER 351). It does not extend, however, to acts which are outside the ordinary course of his or her business, or which are neither necessary nor incidental to his or her express authority (*Nowrani Pty Ltd v Brown* [1989] 2 Qd R 582).
- 10 Distinct from a person acting as an agent, and therefore acting under the authority of a principal, is a person acting as an independent contractor.
- 11 An independent contractor is a person who contracts to perform work for another person, but is not employed by that person. An independent contractor undertakes to produce a given result, the agreed payment becoming payable when the contractual conditions have been fulfilled; to be contrasted with a ‘servant’ or ‘employee’ (*World Book (Aust) Pty Ltd v FCT* (1992) 27 NSWLR 377).² An independent contractor is not able to affect the legal relations of the principal. Accordingly, an independent contractor who is engaged by a principal to provide a designated service would be considered to be a reporting entity and would have obligations under the AML/CTF Act.
- 12 Whether an attorney is acting as agent will depend on the authority conferred under a power of attorney, which may be limited by the terms of the grant of the power and in accordance with legislative requirements. The scope of the authority and powers of an attorney will depend upon the type of attorney and the terms of the document creating the relationship.

Whether a principal/agent relationship may be implied

- 13 A principal/agent relationship is usually created by an agreement, the terms of which can be either express or implied and the subsequent ratification by the principal of the agent’s acts done on behalf of the principal, by operation of law, pursuant to statute, or by estoppel under the doctrine of apparent (or ostensible) authority. Once appointed, an agent is able to make decisions and enter into agreements on behalf of a principal. A principal, having acted through their agent, is deemed to have acted in person in that transaction and is bound by that transaction.

¹ *Collen v Wright* (1857) E&B 301.

² Definition of independent contractor, Encyclopaedic Australian Legal Dictionary Online (2009 Lexis Nexis).

- 14 Whether the principles of agency are capable of applying in any given circumstance under the AML/CTF Act will depend upon the relevant provision in the AML/CTF Act imposing the obligation in that circumstance.
- 15 Section 5 of the AML/CTF Act states that a 'reporting entity' is a person who provides a designated service. Section 6 of the AML/CTF Act defines 'designated service' and the customers who receive designated services in tables 1, 2 and 3.
- 16 The person who provides the designated service is a reporting entity and is responsible for meeting reporting entity obligations.
- 17 For example, where a reporting entity provides a designated service through an agent, the reporting entity retains its status as reporting entity and is deemed to have provided the service. The agent does not (and cannot) become a reporting entity by virtue of the agency agreement.

Section two – Reporting obligations and the principles of agency

- 18 AUSTRAC considers that the common law principles of agency apply generally to the AML/CTF Act reporting obligations so that an agent of a reporting entity can report on behalf of a principal reporting entity.
- 19 AUSTRAC accepts that agents of reporting entities may assist reporting entities to report under sections 41, 43, 45, or 47 of the AML/CTF Act.
- 20 For reports under section 41 of the AML/CTF Act (suspicious matter reports) AUSTRAC has set out its position in *Public Legal Interpretation No. 6 – Suspicious matter and suspect transaction reports* (PLI 6) as reissued on 16 March 2010. These views are summarised below at paragraphs 54 ff.
- 21 AUSTRAC's view is that an agent may report a suspicious matter on behalf of its principal if it is appropriate to do so, having regard to the circumstances in which the designated service is provided and the terms and application of the relevant principal/agency relationship to the provision of that designated service.

Section three – Principles of agency generally under the AML/CTF Act

- 22 AUSTRAC considers that the principles of agency apply across the AML/CTF Act generally, unless shown to be excluded by a contrary intention.
- 23 There is a general principle of statutory construction that legislation does not override common law rules unless there is a clear expression of that intention in the legislation itself. As stated above at paragraph 6, the AML/CTF Act does not contain definitions of 'agent' or the 'principles of agency'. Section 37 of the Act makes a direct reference to the principles of agency and provides in subsection 37(3) that they apply in relation to the situation of an agent 'carrying out [an] applicable customer identification procedure... on the reporting entity's behalf'. In AUSTRAC's view this does not have the effect of clearly displacing or modifying the principles of agency insofar as they apply to the remainder of the Act.
- 24 In this context, AUSTRAC notes that in his second reading speech in relation to the Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2007, reported in Hansard on 15 February 2007, the then Attorney-General comments on the reasons why some amendments raised in Committee were not included in the bill:

In relation to recommendation 7 of the Senate Standing Committee on Legal and Constitutional Affairs the minister undertook to continue to work with industry groups and other stakeholders to resolve certain technical issues and, if necessary, to address these technicalities in the foreshadowed bill. Further consultation was undertaken and no amendments were considered necessary to resolve issues raised by the committee. *Affected industry sectors were advised of the government's view that the common law principles of agency apply*

throughout the Anti-Money Laundering and Counter-Terrorism Financing Act 2006. [emphasis added]

- 25 AUSTRAC has provided its views on the application of the principles of agency in the context of designated remittance arrangements in *Public Legal Interpretation No. 3 – Registration as a provider of registrable designated remittance services* (PLI 3).
- 26 AUSTRAC intends to reissue PLI 3 to reflect amendments recently made by the *Crimes Legislation Amendment (Serious and Organised Crime) Act (No. 2) 2010*.

Section four – Principles of agency under section 37 of the AML/CTF Act for the purposes of customer identification

- 27 Subsection 37(1) of the AML/CTF Act states that the principles of agency apply in relation to the carrying out by a reporting entity of an applicable customer identification procedure. *Public Legal Interpretation No. 9 - customer identification requirements under the AML/CTF Act* deals with applicable customer identification procedures.
- 28 Subsection 37(2) provides that, for example, a reporting entity may authorise another person to be its agent for the purposes of carrying out applicable customer identification procedures on the reporting entity's behalf. An agent for the purposes of the applicable customer identification procedures may have no other role in the provision of, or procedures for, the relevant designated service. Under the principle that a reporting entity cannot contract out of its statutory obligations, such an agent would therefore have no direct responsibilities under the AML/CTF Act.
- 29 Subsection 37(3) provides that, for the avoidance of doubt, a reporting entity may authorise an agent, through whom the reporting entity provides a designated service, to be its agent for the purposes of carrying out the applicable customer identification procedure in respect of a customer on the reporting entity's behalf.
- 30 Subsection 37(3) also states that a reporting entity that provides a designated service to a customer through an agent of the reporting entity, may authorise the agent or 'any other person' to carry out the applicable customer identification procedure on the reporting entity's behalf.
- 31 Accordingly, where a reporting entity provides a designated service to a customer through an agent, it may also authorise that agent or another person to carry out applicable customer identification procedures on its behalf.

Section five – Individual agents of customers under Part 4.11 of the AML/CTF Rules 2007

- 32 The AML/CTF Rules may require that Part B of a standard³ or joint⁴ program or a special⁵ AML/CTF program must provide that, if:
- (a) a customer of the reporting entity deals with the reporting entity in relation to the provision of a designated service through an agent of the customer; and
 - (b) the customer does so in circumstances specified in the AML/CTF Rules;
- one or more elements of the applicable customer identification procedure for the customer must involve the taking of steps specified in the AML/CTF Rules in relation to the agent.
- 33 The AML/CTF Rules 2007 include requirements for identification of agents of individual customers. Part 4.11 of the AML/CTF Rules 2007 provides that reporting entities, in addition to identifying customers, must also identify agents of customers who are individuals, 'where that agent is authorised to act for or on behalf of the customer in relation to a designated

³ Subsection 89(1) of the AML/CTF Act.

⁴ Subsection 89(2) of the AML/CTF Act.

⁵ Subsection 89(3) of the AML/CTF Act.

service'.⁶ This would not include acts done by a third party who is not an agent of the customer. For example, betters who make deposits into a betting agent's bank account; in these circumstances the betting agent is the customer of the bank and the better is not an agent of the betting agent.

- 34 'Person' is defined in section 5 of the AML/CTF Act as an individual, company, trust, partnership, corporation sole or body politic. An 'individual' is a natural person.⁷
- 35 Customers of designated services may interact with reporting entities through those customers' agents. This includes where customers interact with a reporting entity through an agent such as a broker or financial adviser.
- 36 Paragraphs 4.11.2-4.11.4 of the AML/CTF Rules 2007 apply when a customer, who is an individual, appoints an agent to act on their behalf. Where:
- the agent is an individual, the agent will need to be identified in accordance with paragraphs 4.11.2-4.11.4 of the Rules
 - the agent is not an individual (such as a company), it will act through an individual, for example, an employee or director. In these circumstances, it is that individual who will need to be identified in accordance with paragraphs 4.11.2-4.11.4 of the Rules.
- 37 Where the agent is acting on behalf of a customer who is an individual and information and documentation exists which evidences the customer's authorisation for that agent to act on their behalf, the reporting entity must collect it (see subparagraph 4.11.2(2)).
- 38 Paragraph 4.11.3 of the Rules states that Part B of a standard or joint program or a special AML/CTF program must include appropriate risk-based systems and controls for the reporting entity to identify whether, and to what extent, it should verify the identity of individuals who are agents of customers.
- 39 Paragraphs 4.11.5-4.11.8 of the Rules apply when a customer who is not an individual, for example a company, appoints an agent to act on its behalf. Where:
- the agent is an individual, the agent will need to be identified in accordance with paragraphs 4.11.5-4.11.8 of the Rules
 - the agent is not an individual (such as a company), it will act through an individual, for example an employee or director. In these circumstances, it is that individual who will need to be identified in accordance with paragraphs 4.11.5-4.11.8 of the Rules.
- 40 Where the agent is acting on behalf of a customer that is not an individual (such as a company), the reporting entity must collect information and/or documentary evidence of the customer's authorisation for that agent to act on their behalf (see subparagraph 4.11.6(2) of the Rules).
- 41 Paragraph 4.11.9 of the Rules provides for agents of non-natural customers to be identified by the customer's verifying officer. Paragraph 4.11.9 states that Part B of the reporting entity's AML/CTF program 'may' provide for a verifying officer. In other words, it is not a requirement that the program provide for a verifying officer.
- 42 Paragraph 4.11.10 of the Rules applies in circumstances where a reporting entity identifies a customer by using the customer's verifying officer, and the requirements of paragraphs 4.11.12 and 4.11.13 are met. The requirements of paragraph 4.11.12 are that an agent who is identified by a customer's verifying officer must be identified as set out in paragraph 4.11.13; including collecting the full name of the agent and the agent's position, title or role with the customer. If paragraphs 4.11.12 and 4.11.13 are met for a customer's verifying

⁶ AML/CTF Rules 2007, paragraph 4.11.1.

⁷ Paragraph 22(1)(aa) of the *Acts Interpretation Act 1901*.

officer, Part B of a reporting entity's AML/CTF program need not apply the requirements in 4.11.6-4.11.8 of the AML/CTF Rules 2007.

Section six – Permanent establishment where a person carries on activities or business through an agent

- 43 A foreign company may be considered to have obligations under the AML/CTF Act where it provides a designated service at a place in Australia where the company is carrying on activities or business through an agent. This may include where a subsidiary company, acting as its agent, provides a designated service in Australia.
- 44 Subsection 6(6) of the AML/CTF Act provides that a reporting entity does not provide a service under an item of a table in section 6 unless the necessary geographical link exists. In the context of paragraph 43, the geographical link is established if the service is provided at or through a permanent establishment of the person in Australia (paragraph 6(6)(a) of the geographical link test).
- 45 Subsection 21(1) of the AML/CTF Act provides that for the purposes of the AML/CTF Act, a permanent establishment of a person:
- is a place at or through which the person carries on any activities or business; and
 - includes a place where the person is carrying on activities or business through an agent.
- 46 In looking at whether a foreign company provides designated services as described in paragraph 6(6)(a) of the AML/CTF Act, in circumstances where the foreign company does not itself have a base in Australia, one of the ways in which this may occur is if the foreign company has an Australian subsidiary. If the Australian subsidiary provides a designated service as the agent of the foreign company this may satisfy the test in paragraph 6(6)(a), if the designated service is provided at or through a permanent establishment of the agent in Australia. In this regard it is relevant to consider whether a subsidiary company and a holding company are in a principal/agency relationship.
- 47 In *State Bank of Victoria v Parry* (1990) 2 ACSR 15 it was held that a holding company and its subsidiary are discrete legal entities, and in the absence of any proof of the relation of agency between them, the subsidiary is not the agent of the holding company.
- 48 Therefore it cannot be assumed that a subsidiary or holding company will be in an agency/principal relationship unless there is clear evidence that both parties intend that their relationship is in fact that of agent and principal.
- 49 As noted above, section 21 of the AML/CTF Act provides that a permanent establishment is any place at or through which the person carries on any activities or business, including a place where the person is carrying on activities or business through an agent.
- 50 'Business' is defined in the AML/CTF Act in the following terms:
- business** includes a venture or concern in trade or commerce, whether or not conducted on a regular, repetitive or continuous basis.
- 51 From the definition of 'business' there may be circumstances where activities are not conducted on a regular or continuous basis, but which nonetheless constitute the carrying on of a business. *Public Legal Interpretation No. 4 – What constitutes a reporting entity* deals with this issue in greater depth.
- 52 Therefore, if a person, through an agent, carries on activities or business at or through a place in Australia that is related to the designated service of the person, the person will have satisfied the geographical link requirement under paragraph 6(6)(a) of the AML/CTF Act to be considered a reporting entity.

- 53 Entities that have formed a designated business group may continue to report within the arrangements of that designated business group instead of relying on the principles of agency for reporting purposes.

Section seven – Principles of agency for reports of suspicious matters

- 54 AUSTRAC considers that the obligation of reporting entities to make reports about suspicious matters requires a reporting entity to form a subjective view, based on objective grounds. PLI 6 deals with this issue and was re-issued by AUSTRAC on 16 March 2010 to include further analysis of the terms and effect of relevant principle/agency arrangements and the circumstances in which designated services are provided by reporting entities.
- 55 PLI 6 covers the issue of agency and the obligation to report at paragraphs 36-44. In general terms PLI 6 states AUSTRAC's view that, depending on the particular circumstances, an agent may fulfil a principal's reporting obligation under section 41 of the AML/CTF Act.
- 56 PLI 6 also addresses the issue of agency and tipping off at paragraphs 45-56 and states in general terms AUSTRAC's view that an agent may report on behalf of a principal under section 41 without breaching the tipping off provisions in section 123 of the AML/CTF Act.

Related information

Legislative instruments

The Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1) (AML/CTF Rules 2007) can be found at:

<http://www.comlaw.gov.au/comlaw/management.nsf/lookupindexpagesbyid/IP200730563?OpenDocument>

AUSTRAC publications

Public Legal Interpretation No. 2 – Item 54 of table 1 in section 6 of the AML/CTF Act provides AUSTRAC's view on the principles of agency in relation to the provision of designated services under items 33 and 54 of the AML/CTF Act.

Public Legal Interpretation No. 3 – Registration as a provider of registrable designated remittance services provides AUSTRAC's view on the principles of agency in relation to the provision of designated services under items 31 and 32 of the AML/CTF Act.

Public Legal Interpretation No. 4 of 2008 – What constitutes a reporting entity provides AUSTRAC's views on the meaning of 'carrying on a business' and 'in the capacity of', and the designated services in tables 1, 2, and 3 of section 6 of the AML/CTF Act.

Public Legal Interpretation No. 6 – Suspicious matter and suspect transaction reports as reissued on 16 March 2010 provides AUSTRAC's view on the principles of agency and the obligation to provide a suspicious matter report.

Public Legal Interpretation No. 9 - customer identification requirements under the AML/CTF Act provides AUSTRAC's views on the provisions of the AML/CTF Act relating to the applicable customer identification procedures to be applied to the agents of customers and the use of agents by reporting entities.

AUSTRAC Public Legal Interpretations can be accessed via AUSTRAC's website at: www.austrac.gov.au/pli.html

The *AUSTRAC Regulatory Guide* contains guidance on obligations under the AML/CTF Act. Chapter 4 of the Guide contains information regarding customer identification procedures and the use of agents. Chapter 7 contains information regarding suspect transaction reporting obligations of agents. It is available on the AUSTRAC website at: http://www.austrac.gov.au/regulatory_guide.html

AUSTRAC has released a 'ready reckoner' which includes a summary of minimum identification and verification requirements for agents of low or medium risk customers under the AML/CTF Rules. It can be found (as a PDF document) at http://www.austrac.gov.au/files/ready_reckoner.pdf

AUSTRAC has provided information on its website regarding who needs to be identified when a reporting entity provides a designated service to a customer through the customer's agent. It can be found at: http://www.austrac.gov.au/id_agents_of_customers.html

Other

House of Representatives Official Hansard, No. 2, 2007, Thursday, 15 February 2007.

The second reading speech of Mr Ruddock, Attorney-General, refers to the government's view that the common law principles of agency apply throughout the AML/CTF Act. It can be found (as a PDF document) at <http://www.aph.gov.au/hansard/reps/dailys/dr150207.pdf>

Legislation attachment

The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* is available in consolidated form at:

www.comlaw.gov.au/comlaw/management.nsf/lookupindexpagesbyid/IP200627290?OpenDocument

Further information

AUSTRAC officers are able to assist reporting entities, their staff and the public in providing general information relating to the AML/CTF Act. Enquiries can be directed to the AUSTRAC Help Desk via:

- email to help_desk@austrac.gov.au
- telephone 02 9950 0827 or 1300 021 037 (a local call within Australia).

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