GETTING DOWN TO BUSINESS

In this issue

WELCOME TO THE MARCH EDITION

Welcome to the first edition of "Getting Down to Business'' for 2018!

In this edition, we have a wonderful compilation of articles, covering the Global Legal Hackathon, third party comparative contractual rights, and financial services regulation.

Our Health and Wellbeing officer also covers how to maintain your wellbeing and strive for positivity!

We hope you enjoy this edition.

Do you have any articles or suggestions for our next edition? Contact us by emailing buslaw.chair@younglawyers.com.au and entering "GDTB" as the subject title.

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A QUICK WORD FROM THE CHAIR

Welcome to the first edition of Getting Down to Business for 2018! This edition is personally very exciting for me - not only is it my first newsletter as Chair of the NSW Young Lawyers Business Law Committee but the Editor (Jason) and I have been overwhelmed with quality articles from a variety of practitioners across different industries. It's certainly a great way to kick off the year so thank you for your contributions. Our latest news section showcases some of the outstanding achievements of the members of our committee on a national platform, while recent legal updates range from banking regulatory reform measures to updates in the tax profession and comparative international contract law. Our regular well-being contributor, Sarah Jones, also suggests a few tips on maintaining your physical health while working in an office environment. I do hope you enjoy reading this edition as much as I did.

Leah.

LATEST NEWS

Joint Buslaw-CET Team Triumphs at Inaugural Global Legal Hackathon's Sydney Round

By Olga Kubyk, Jeanette Zhang, Jacob Lancaster and Ravi Nayyar

On Friday 23 February, members of Buslaw and CET (Olga Kubyk, Jeanette Zhang, Jacob Lan-caster and Ravi Nayyar) came together to hack for good at the inaugural Global Legal Hackathon. We soon found ourselves in a strange alleyway: the beginning of quite a ride, to borrow a phrase from legendary Channel 7 sports commentator, Bruce McAvaney.

One sunrise, four coffees and a muffin later, our team eagerly awaited the countdown before launch. At 9 am, we descended on the Matthews Building at the University of New South Wales, devices at the ready, and, above all, eager to solve legal problems with technological solutions. When we arrived in our hacking space, there were empty whiteboards. That scene quickly changed for the Sydney-round contenders.

We were given a choice of two problem types to attack: private benefit (the business and practice of law) or public benefit (increasing access to justice). But in the spirit of innovation, we thought: 'Por qué no los dos? [Why not both?]'. We knew we wanted to venture into the regtech and data governance spaces. We also wanted to focus on an industry, in which data is especially sensitive: the clinical trial sector. This is how HealthMatch was born.

HealthMatch is a matchmaking platform. It helps patients find clinical trials relevant to their medical circumstances (and those that the patients are eligible to join), and yet remain in control of their medical data ('sensitive information' as per *Privacy Act 1988* (Cth) s 6). This platform is under-pinned by a private blockchain that our team governs. It would both store the patients' medical data and immutably log the patients' consent to disclose their health data to clinical trials. The key benefit of our platform is that patients can choose to only authorize disclosure of data actually relevant to the particular clinical trial. To register a clinical trial on our platform, medical researchers must specify exactly what types of data they require. By narrowing the amount of information that is disclosed, we minimise the risk that it will be mishandled.

A few Granny Smith apples and a whiteboard marker later, we were ready to remove the satin covers off HealthMatch for an esteemed panel of judges. And our efforts bore fruit: HealthMatch was a success! As a team, we were awarded the Herbert Smith Freehills Potential for Global Impact Award, since HealthMatch was judged as having the largest potential for global impact at the Sydney Round. Also, Jacob Lancaster was one of the two winners of the Shaun Chung Legal Innovator Award, awarded to the individual with the most innovative ideas at the Round. And Ravi Nayyar won the Thomson Reuters Practical Law Best Collaborator Award for being the most collaborative individual at the Round.

As a team, we found the most memorable aspect of the Hackathon to be getting to work with each other. We formed a highly cohesive unit, with each of us bringing something unique to the operation: Olga, a sound understanding of practical legal issues to inform the problems we were solving; Jacob, an enthusiasm for the technical side of things and knowledge from his physiology studies; Jeanette, a command of system design, and relentless questioning, which kept us all honest (thank you, Jeanette!); and Ravi, a grasp of blockchain systems and how they can be used to solve legal problems. As a unit, we learned off each other, be it about designing processes, how to attack the problems that we identified, or the intricacies of supercars and motorsport. Jacob, Olga, and Jeanette especially provided intelligent insights guiding the development of HealthMatch, while Ravi ensured that none of this was lost in translation, with the help of three whiteboards, and a whole whiteboard marker. Indeed, it was a proud moment when we submitted our pitch deck for HealthMatch and showcased our idea.

We would like to thank the wonderful mentors from organisations like Thomson Reuters, who were incredibly helpful. They made tangible contributions to our refinement of HealthMatch. We were indeed fortunate to have their support.

Last but not least, we would like to pay tribute to our beloved Buslaw and CET Committees! This victory is as much yours as ours! You have provided, and continue to provide, us with supportive environments in which we can follow our passions for law and technology. This has to a great extent borne fruit in the form of HealthMatch.

A job well done, people, to say the least!

Once more unto the breach for 2019? Watch this space!

Note from the Chair and the Editor: We are very proud of the efforts from the joint BusLaw / CET team - what a momentous achievement to have scooped so many awards at the inaugural Global Legal Hackathon!

Recent Development of Third Parties' Contractual Rights in Common Law Jurisdictions in Comparison to Australia

By Alice Liu

The common law doctrine of privity **(''doctrine'')** eliminates third parties' enforceable rights to a contract. The doctrine encountered different developments in common law jurisdictions.

In Australia:
The doctrine was approved by Australian High Court in *Coulls v Bagot's Executor & Trustee Co Ltd* (1967) 119 CLR. However, in *Trident General Insurance Co Ltd V McNiece Bros Pty Ltd* (1988) 165 CLR 107, the High Court interpreted that the doctrine is unlikely to apply when one contractual party has explicitly promised to confer a benefit on a third party in return for consideration by the other contractual party, and the third party would suffer detriment. *Trident*, therefore, provides third party enforceable contractual rights in unfair circumstances.

In the UK:
Although the doctrine was initially developed in the UK, it was removed in 1999 by the enactment of *Contracts (Rights of Third Parties) Act 1999* **(''the Act'')**.

The Act gives third parties enforceable rights when the contract "expressly identified'' that the third parties may do so and when the contract "conferred an enforceable benefit on a third party''. Further, the Act requires that third parties must be "expressly identified by name or a class of member".

Recently, in *Chudley v Clydesdale Bank plc (t/a Yorkshire Bank)* 2017 EWHC 2177 (Comm), the English High Court was asked to interpret the Act. In *Chudley*, third party investors tried to rely on the Act to claim damages upon the bank (defendant) that failed to comply with the letter of instruction between the bank and the investment company. The Claimants argued that "client account'' mentioned in the letter of instruction expressly identified the Claimants.

Although, the High Court held that the rights were not enforceable as the letter of instruction was not a binding contract, it further discussed that if the letter of instruction was a binding contract, the third party rights would have been enforceable.

The discussion in *Chudley* is likely to broaden the "expressly identified" approach of the Act and contribute to wider third parties enforceable contractual rights.

In Hong Kong:
In January 2016, Hong Kong passed the Contracts (Rights of Third Parties) Ordinance Cap.623 **("Ordinance")**, which removed the doctrine substantially to the same as the English Act. Given the similarities of the Ordinance and the English Act, it is likely that the Hong Kong courts would take a similar approach as *Chudley*.

Comments:
The recent development of third parties' contractual rights in the UK and Hong Kong shows that there is a stronger recognition of the enforceability of third parties' contractual rights. The development may provide useful guidance for Australia's future approach.

The BEAR Awakens!

By Ivan Yau
Associate in the Financial Services and Risk Advisory team at Norton Rose Fulbright Australia

After a much long and at times unbearable wait, on 7 February 2018, the Federal Parliament passed legislation[1] to enliven the Banking Executive Accountability Regime (**BEAR**).

This is a huge game-changer for the Australian banking sector because the BEAR legislation amends the *Banking Act 1959* to make directors and senior leadership of banks and authorised deposit-taking institutions (**ADIs**) that are regulated by the Australian Prudential Regulation Authority (**APRA**) personally accountable for the misconduct and poor culture under their watch.

Essentially, BEAR:

- Introduces the concept of Accountable Persons that captures directors, senior executives, managers and heads of specific departments within banks and ADIs;
- Imposes specific obligations on Accountable Persons;
- Requires banks and ADIs to submit Accountability Statements and Maps to APRA;
- Requires breaches of BEAR obligations to be reported to APRA; and
- Provides that bonuses of Accountable Persons (60% for chief executive officers and 40% for others) be deferred for 4 years in order to discourage short-term risk taking.

By way of background, BEAR was first announced by the Treasurer at the 2017 Federal Budget, following numerous instances of scandals over recent years and misconduct by banking institutions that fell below community standards and expectations. In many of these instances, the bank or ADI would typically run an internal investigation and get rid of any "bad apples", whilst their senior leadership still kept receiving rather generous bonuses each year.

Over time, and as a result of negative press, public and consumer confidence in the Australian banking system have deteriorated, leading to calls for a Royal Commission into banking misconduct.

Until 30 November 2017, the government reasoned that a Royal Commission was not necessary because legislation (that is, the BEAR) had been tabled in Parliament to address the need to reform the banking culture and to make senior leadership in banks and ADIs accountable for the actions of their organisations.

Nevertheless, a Royal Commission into misconduct in the banking, superannuation and financial services industry (**Royal Commission**) has now been called.

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[1] *Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Act 2018* (Cth).

However, the Royal Commission's Terms of Reference clearly provides that the inquiry will not deter, delay or limit any proposed or announced policy, legislation or regulation of the Government. So, BEAR continues and indeed the Governor-General has recently given his royal assent.

That said, APRA has yet to release its guidance or expectations on how it wants to implement this new regime. All we know so far is that BEAR will start growling at "large ADIs" on 1 July 2018 whilst "small" and "medium" ADIs will have until 1 July 2019 before BEAR will come out of hibernation for them.

That said, interestingly, the BEAR legislation closely follows similar regimes that have already been implement and in force in the United Kingdom[2] and Hong Kong[3]. So banks and ADIs in Australia can learn off the experiences from these overseas jurisdictions to anticipate how APRA will likely regulate BEAR and to implement BEAR obligations in their organisations.

Additionally, based on previous comments by the chairs of the Australian Securities and Investments Commission and APRA, coupled with the nature of the current Royal Commission, it should come as no surprise if these senior management accountability obligations will be extended beyond ADIs to include other APRA-regulated entities (such as trustees of superannuation funds and insurers) and other Australian financial services licensees in the future.

Nevertheless, we anticipate that BEAR is the start of a series of welcomed reforms to improve and reinstall public confidence back into the Australian banking and financial sectors.

[2] Senior Manager and Certification Regime.
[3] Managers in Charge Regime.

AUSTRAC to be given New Powers to Regulate Digital Currency Exchange Providers

By Jacob J Lancaster

1. Overview

New requirements relating to digital currency exchange providers will come into effect on 3 April 2018.[4]

The Anti-Money Laundering and Counter-Terrorism Financing Amendment Act 2017 (Cth) (***'Amendment Act'***) was assented to last December,[5] and seeks to complement the existing regulatory regime by addressing the risk of money laundering and terrorism financing that currently accompanies the exchange of digital currency.

2. Background to the AML/CTFA

The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (***'AML/CTFA'***) places entities providing 'designated services'[6] under a number of obligations, including:

1. Registration with AUSTRAC;
2. Implementation of an AML/CTF program;
3. Identification and verification of customers;
4. Ongoing customer due diligence and reporting of suspicious matters, threshold transactions and international fund transfer instructions; and
5. Record keeping.

In providing a designated service, entities are required to assess the risk that a customer will facilitate money laundering or terrorism financing operations.

The Act currently applies to designated services that deal with e-currencies backed either directly or indirectly by precious metal; bullion; or 'a thing prescribed by the AML/CTF rules'.[7]

3. Risks Posed by Cryptocurrencies

3.1. What is Cryptocurrency?

According to the Oxford Dictionary, 'cryptocurrency' is defined as:[8]

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[4] AUSTRAC, *Are you a digital currency exchange provider?* (23 February 2018) <http://www.austrac.gov.au/news/are-you-digital-currency-exchange-provider-0>.

[5] *Anti-Money Laundering and Counter-Terrorism Financing Amendment Act 2017* (Cth).

[6] *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) s 6.

[7] Ibid sub-s 5(b).

'A digital currency in which encryption techniques are used to regulate the generation of units of currency and verify the transfer of funds, operating independently of a central bank.'

The key feature of cryptocurrency is its decentralization. This allows anonymous peer-to-peer transactions using blockchain technology without the need of a third-party mediator.[9]

3.2. Risks and Regulation

The Australian Criminal Intelligence Commission (**ACIC**) has identified virtual currencies and encryption as 'two key enabling technologies currently used to facilitate serious and organised crime.'[10]

Cryptocurrencies are not currently covered by the existing regime because they are backed by 'cryptoalgorithm' rather than a 'physical thing'.[11]

As noted by the Joint Submission of the Department of Human Affairs, the Attorney-General's Department, and the Australian Boarder Force (Submission No 28) to the Inquiry into the Impact of New and Emerging Information and Communications Technology, cryptocurrencies carry a number of money laundering and terrorism financing risks, including:[12]

1. Greater anonymity of users;
2. Unregulated peer-to-peer transactions which are not subject to AML/CTF obligations; and
3. The cryptocurrency system may be spread across different countries which impose different regulations.

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[8] English Oxford Living Dictionaries, *Cryptocurrency* (at 11 March 2018) <https://en.oxforddictionaries.com/definition/cryptocurrency>.

[9] Antonio Madeira, *What is a Decentralized Exchange* (28 September 2017) CryptoCompare <https://www.cryptocompare.com/exchanges/guides/what-is-a-decentralized-exchange/>.

[10] HWL Ebsworth, *Anti-money Laundering and Counter Terrorism Financing Requirements Extended to Cryptocurrency Exchanges* (23 January 2018) <http://hwlebsworth.com.au/anti-money-laundering-and-counter-terrorism-financing-requirements-extended-to-cryptocurrency-exchanges/> citing The Australian Criminal Intelligence Commission, *Organised Crime in Australia Report* (2017).

[11] Australian Government, *Regulating Digital Currencies Under Australia's AML/CTF Regime – Consultation Paper* (2016) <https://www.ag.gov.au/Consultations/Documents/AML-CTF/Regulating-digital-currencies-under-Australias-aml-ctf-regime.pdf>.

[12] Department of Home Affairs, Attorney-General's Department and Australian Border Force, Submission No 28 to the Parliamentary Joint Committee on Law Enforcement, *Joint Inquiry into the Impact of New and Emerging Information and Communications Technology*, 27 February 2018, 19 < https://www.aph.gov.au/DocumentStore.ashx?id=db38776c-ac3d-469e-a4f6-1b27d42b4db0&subId=563934>.

These risks are compounded by the introduction of digital currencies which specifically facilitate anonymous transactions through the use of 'Tor' and 'tumblers'.[13] This provides fertile soil for the growth and nourishment of dark web marketplaces, such as the 'Silk Road', which allow users to trade illicit goods and engage in money laundering.

According to the Australian Bankers' Association (**ABA**), many bitcoin exchange providers have had their bank accounts closed, as banks seek to comply with their AML/CTF obligations.[14] However, AUSTRAC has publicly affirmed the place of bitcoin exchanges in our economy and has declared it does not support the 'de-banking' of entire industry sectors.[15]

Indeed, the Regulatory Intelligence Service of Thomson Reuters Accelus refers to 'compliance sources' who suggest that the AML/CTF regime has resulted in the closure of bank accounts for purely commercial reasons. These include the cost of compliance in conducting due diligence for high risk clients, and the risk of reputational damage.[16]

4. The Amendment Act

In his second reading speech, Minister Keenan suggested that the *AML/CTF Bill 2017* will allow Australia's regulatory regime to 'keep pace' with international developments vis-à-vis money laundering and terrorism financing. By regulating digital currency exchanges, AUSTRAC will be able to regulate 'the point where digital currencies intersect with the regulated financial system.'[17]

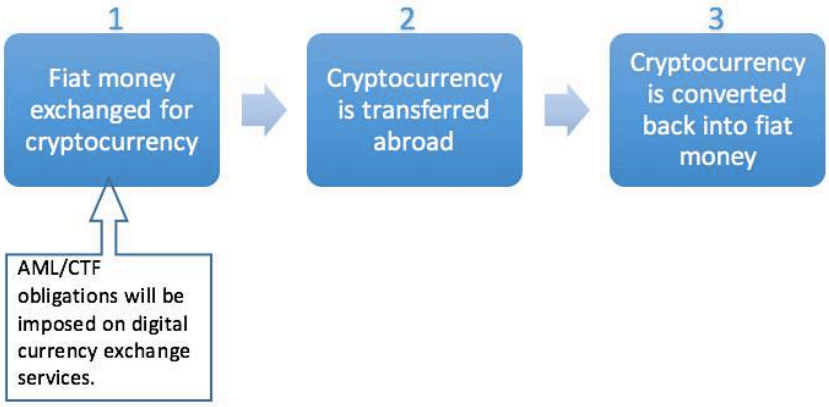

Fig 1: Transferring cryptocurrency presents a ripe opportunity for money laundering.
(Source: Jacob J Lancaster)

[13] Ibid.
[14] UNSW Centre for Law Markets and Regulation, *AUSTRAC Throws Regulatory Lifeline to "De-banked" Bitcoin Operators"* <https://clmr.unsw.edu.au/article/market-conduct-regulation/austrac-throws-regulatory-lifeline-to-%22de-banked%22-bitcoin-operators> re-publishing article originally published by the Regulatory Intelligence Service of Thomson Reuters Accelus.
[15] Ibid.
[16] Ibid.
[17] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 August 2017, 8833 (Michael Keenan).

The Amending Act will insert a new definition of 'digital currency' in s 5. It will require digital currency exchange services to register with the Digital Currency Exchange Register. Pursuant to s 76G, the AUSTRAC CEO will be empowered to impose conditions on an exchange's registration.[18]

Furthermore, a registered digital currency exchange service will be subject to the same obligations as designated services under the existing regime. Accordingly, the definition of threshold transactions will be expanded to include transactions involving digital currencies.

5. The Future of Digital Currency Regulation in Australia

Whilst the regulation of cryptocurrency will equip law enforcement with the necessary tools to combat money laundering and terrorism financing, it has also been described as a 'lifeline to "de-banked bitcoin operators"' as it does not require the wholesale closure of digital currency-linked accounts.

This both benefits digital currency exchanges, as well as AUSTRAC, as the regulator will be less likely to lose sight of 'de-banked' operators who are not subject to transaction reports, and who may have moved their operations off-shore.[19]

Nevertheless, it is clear that the regime will require international cooperation with other governments, as it is unable to address the point at which digital currencies are converted back into fiat money off-shore.

[18] Department of Home Affairs, Attorney-General's Department and Australian Border Force, Submission No 28 to the Parliamentary Joint Committee on Law Enforcement, *Joint Inquiry into the Impact of New and Emerging Information and Communications Technology*, 27 February 2018, 19 < https://www.aph.gov.au/DocumentStore.ashx?id=db38776c-ac3d-469e-a4f6-1b27d42b4db0&subId=563934>.

[19] UNSW Centre for Law Markets and Regulation, *AUSTRAC Throws Regulatory Lifeline to "De-banked" Bitcoin Operators"* <https://clmr.unsw.edu.au/article/market-conduct-regulation/austrac-throws-regulatory-lifeline-to-%22de-banked%22-bitcoin-operators> re-publishing article originally published by the Regulatory Intelligence Service of Thomson Reuters Accelus.

Regulatory Enforcement Surrounding the Big Banks

By Jason Cavallaro
Editor of the "Getting Down to Business" Newsletter

CBA

The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) **("The Act")** section 5 defines a "threshold transaction" as one "not less than $10,000". Section 43(2) obliges a "reporting entity" to report the transaction to the AUSTRAC CEO within ten business days. A "reporting entity" is defined as a person who provides a "designated service"; into which category fall both, 'ADIs' and 'Banks', pursuant to section 6(2). Additional reporting obligations for "suspicious matters" are outlined under section 41.

Ongoing customer due diligence requirements under the Act oblige a reporting entity to "monitor the reporting entity's customers in relation to the provision by the reporting entity of designated services at or through a permanent establishment of the reporting entity in Australia, with a view to identifying, mitigating, and managing, the risk the reporting entity may reasonably face that the provision by the reporting entity of a designated service at or through a permanent establishment of the reporting entity in Australia might (whether inadvertently or otherwise) involve or facilitate money laundering, or financing of terrorism; and do so in accordance with the *AML/CTF Rules*". Failure to comply with these requirements carries a civil penalty.

CBA is alleged to have committed around 53,700 various breaches of the Act, involving an approximate $77,000,000 worth of transactions, some breaches carrying a maximum penalty of $18,000,000.

<u>The allegations are as follows:</u>[20]

i. CBA was late in filing 53,506 threshold transaction reports.
ii. CBA failed to monitor 778,370 accounts.
iii. CBA failed to report on money laundering risks regarding the installation of hundreds of Intelligent Deposit Machines ("IDMs" or "smart ATMs") in 2012 – ATMs that accept both, cash and cheques. AUSTRAC reported there to have been 507 IDM's as of October 2015.
iv. CBA committed 174 breaches concerning suspicious matter reports; and
v. CBA committed 71 breaches involving customer due diligence requirements.

- Consequent to AUSTRAC's investigation, CBA's share price fell from around $83 to just above $73 – the lowest it has been since November 2016. Maurice Blackburn instituted a class action on behalf of CBA shareholders who suffered substantial losses due to CBA's "complete failure of corporate governance.[21]
- CBA's share price wiped close to $10B from its market value. AUSTRAC acting CEO stated that CBA "did not monitor its customers to mitigate and manage money laundering and terrorism financing risk".

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[20] https://www.businessinsider.com.au/austrac-cba-breaches-2017-12.
[21] http://www.abc.net.au/news/2017-10-09/commonwealth-bank-shareholder-class-action-set-to-get-underway/9029988.

Moreover, AUSTRAC further alleged CBA to have deliberately "structured" transactions so as to fall short of the criteria required for such transaction to be reported – such transactions entail a pattern of ensuring that transactions are just below the threshold transaction, in order to 'avoid the reporting requirements'. Such an offence is criminalised by section 142 of the Act and carries a maximum penalty of 5 years' imprisonment, 300 penalty units, or both. The suspicion of misconduct arose from various "Money Laundering Syndicates".

Such conduct includes arounds $20,590,000 being deposited between late 2014 and August 2015, primarily as 'structured cash deposits' using CBA's IDMs, into 30 accounts, 29 of which were held in false names. Much of this cash was subsequently transferred internationally. Also, included in such conduct is $2,270,000 in cash being deposited into three CBA accounts without the necessary reporting. AUSTRAC also contended that nine breaches of compliance with Part A of an anti-money laundering and counter-terrorism financing program had occurred, pursuant to s 82.

In the Federal Court, AUSTRAC sought the following orders:

- Declaratory relief pursuant to the *Federal Court of Australia Act 1976* (Cth) s 21;
- Orders for civil pecuniary penalties pursuant to s 175 of the Act; and
- Costs.

Further excitement has been sparked in relation to CBA, as a class action was brought by Maurice Blackburn Lawyers and funded by IMF Bentham on 9 October. According to an AFR report on 23 August 2017, notwithstanding that CBA has 800,000 retail shareholders, "only those who purchased shares and held some of them during the period of alleged non-disclosure will be able to participate in the action". According to Maurice Blackburn, "The class action alleges that CBA knew about serious instances of non-compliance with the Act and that its failure to disclose that information to the ASX amounts to misleading and deceptive conduct and a breach of its continuous disclosure obligations under the *Corporations Act 2001* (Cth) and the ASX Listing Rules".

According to an ABC report on 14 December 2017, CBA's defence to the significant number of breaches was that the "laws were technically breached just once due to the same computer coding error that was not fixed for a couple of years". This was not bought by AUSTRAC, who suggested that 53,000 breaches were incontrovertibly committed.[22]

Bonuses

In an article published by the Financial Review published on 20 October 2017, it states that the "Commonwealth Bank chairman Catherine Livingstone has been berated by a parliamentary committee for "extraordinary incompetence" in signing off on hefty executive bonuses even though her board knew of AUSTRAC's concerns about the bank's reporting of large ATM deposits".[23]

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[22] http://www.abc.net.au/news/2017-12-14/cba-bows-to-the-inevitable-but-will-it-be-enough/9257482.
[23] http://www.afr.com/business/banking-and-finance/financial-services/commonwealth-bosses-slammed-for-extraordinary-incompetence-20171020-gz513p.

To break down the breaches into categories, the ABC news report suggests that CBA intends to admit—

- Its lateness in filing 53,506 threshold transaction reports;
- Its failure to adhere to IDM risk assessment requirements;
- Having breached 91 breaches surrounding suspicious matter reports (though disputing a further 83); and
- Having breached 52 allegations involving due diligence requirements (though disputing a further 19).[24]

AUSTRAC is vested with various enforcement powers:

- Civil Penalty Orders under the *AML/CTF Act* section 175, on application by the AUSTRAC CEO. Furthermore, if found liable under the abovementioned section, the FCA can also order a pecuniary penalty to be paid to the Commonwealth. Section 175 was enforced against Tabcorp in March 2017.

- The AUSTRAC CEO may also seek enforceable undertakings pursuant to the *AML/CTF Act* Part 15 Division 7, requiring the company to take specified action or forbear therefrom. The action has been sought numerous times since 2009. In 2009, enforceable undertakings were sought against PayPal and Barclays Bank.

- Other enforcement methods include "infringement notices" (*AML/CTF Act* Part 15 Division 3), "remedial directions" (Part 15 Division 5), and "written notices" (section 162(2)), in which case AUSTRAC can appoint an external auditor to the company being investigated. External auditors must be authorised under section 164(1) (a list of authorised auditors can be found on AUSTRAC's website).

ANZ and Westpac

Both ANZ and Westpac are the subject of "enforceable undertakings" by ASIC which seek to address their "inadequacies" with regards to their foreign exchange ("FX") business. Employees of both banks disclosed confidential client information relating to FX orders to third parties. Both banks have undertaken to implement changes to their existing systems, controls, and monitoring and supervision of their employees in order to preclude the disclosure of confidential and potentially material information. In March 2017, both banks undertook to respond to inappropriate order management and trading whilst in possession of confidential and material information. Both banks will provide to ASIC an annual statement of the efficacy of the systems and controls hereby put into place.

Resulting from lack of compliance and pursuant to ASIC's enforceable undertakings, Westpac, as stated in their media release from 15 March 2017, will make a $3,000,000 'community benefit payment' to support the financial capability of vulnerable people, including women experiencing family violence, the elderly, and youth at risk. ANZ, as stated in ASIC's media release from 15 March 2017, will make an equivalent payment (also flowing from lack of compliance) to "Financial Literacy Australia", a NPF organisation with the goal of advancing financial literacy in Australia.

[24] https://www.businessinsider.com.au/austrac-cba-breaches-2017-12.

News Surrounding the Royal Commission: March 2018

By Jason Cavallaro

According to an article published by the ABC, published on 14 March, "the banking royal commission has heard sensational allegations of a cash-for-loans bribery ring at National Australia Bank branches in western Sydney as the first round of public hearings kicked off".[25]

Key points from this article:

- The commission hit out at banks for failing to disclose misconduct around consumer lending.
- The commission heard from customers who said banks and brokers falsified home loan documents.
- People also complained banks and brokers intentionally failed to verify their income for home loans.

According to another article, published by the Sydney Morning Herald on 13 March, Rowena Orr QC stated that, CBA "did not disclose the totality of the conduct that constitutes misconduct, or conduct that falls below community expectations".[26]

The Royal Commission has also reprimanded CBA for handing up first an incomplete submission, and then flooding the commission's offices with meaningless spreadsheets.[27]

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[25] http://www.abc.net.au/news/2018-03-13/banking-royal-commission-alleged-cash-for-loans-bribery-ring/9543280.
[26] https://www.smh.com.au/business/banking-and-finance/cba-slammed-for-handing-meaningless-spreadsheets-to-royal-commission-20180313-p4z44b.html.
[27] Ibid.

Company Tax Rate Cuts, Not All They're Cut Out to be

By Nicole Joannou & Lilian Leong
Tax Consultants, William Buck

Legislation was recently enacted to reduce the company tax rate from 30% to 27.5%. The rate is anticipated to progressively reduce to 25% by 2027. Whilst these changes appear transformative, a closer look highlights a lack of certainty as to when the lower tax rate applies. Additionally, where the lower rate does apply, it may have the anomalous result of increasing the effective tax rate.

For 2017, companies need to be "carrying on a business" to be eligible for the lower rate. However, what constitutes "carrying on a business" is unclear. While, the ATO has issued draft ruling "TR 2017/D7" to illustrate when companies are "carrying on a business" for the purposes of the lower rate, the examples illustrate discrete scenarios not directly applicable to even a slightly unorthodox business structure.

The 2018 rules attempt to address this uncertainty by introducing a "base rate entity test" in place of the "carrying on a business" requirement. However, these laws are currently in draft making it difficult for businesses to plan ahead.

Even where the reduced rate applies, businesses may find the net tax outcome is less favourable overall due to a difference in the rate at which tax was paid and the rate at which the company franks its dividends. For example, where a company has historically paid tax at 30% and accumulated franking credits at that rate, the application of the lower company tax rate could mean the company can only frank future dividends at 27.5%. This means shareholders would not get the benefit of 2.5% differential of the tax already paid resulting in a double taxation outcome. Where the proposed 25% rate is legislated, this differential could increase to 5%.

Given how these rules operate, the Federal Government seems to have overcomplicated the implementation of the reduced tax rate, possibly creating more problems for the small businesses that the rules are intended to assist.

While it is hoped the uncertainties are clarified in future, businesses should review their current tax planning and dividend strategies with financial/tax advisors to maximise their ability to access the reduced rate and to ensure that this tax cut does not come at a tax cost. Although eligibility for the reduced rate is self-assessed, companies cannot "opt out" of these rules and appropriate strategies should therefore be implemented sooner rather than later.

ATO Issues Guidance on New GST Rules

By Leah Serafim
Chair of the NSW Young Lawyers Business Law Committee and Taxation Lawyer at Arnold Bloch Leibler

Recent goods and services tax (**GST**) changes form part of a suite of measures aimed at increasing the effectiveness of tax collection in Australia, for instance, the GST withholding and CGT withholding regimes. The new rules both widen the existing tax net and re-orient the responsibility for GST.

Low Value Imported Goods

The Government's decision to extend the GST regime to low value imported goods was originally announced in the 2016-17 Budget. The *Treasury Laws Amendment (GST Low Value Goods) Act 2017* (Cth) (the ***LVG Act***) followed in 2017 and is due to take effect from 1 July 2018.

The LVG Act amends *A New Tax System (Goods and Services Tax) Act 1999* (Cth) to ensure imported goods with a customs value of AU$1,000 or less will have GST collected at the point of sale, using a vendor registration model. That is, overseas vendors with an Australian turnover of AU$75,000 or more will be required to register for, collect and remit GST on low value goods supplied to consumers in Australia. The *LVG Act* also amends the *Taxation Administration Act 1953* (Cth) (***TAA***) to extend the range of penalties for false and misleading statements and will subsume the penalty provisions within the existing legal framework. There is no change to existing processes for collecting GST on imports with a customs value above AU$1,000.

Key changes include that 'electronic distribution platforms' and 're-deliverers' are deemed to be 'suppliers' and that the GST net has been widened by extending the concept of a supply 'connected with' Australia to a supply of low value goods imported into Australia. Simplified registration and reporting obligations also apply to entities electing to be treated as 'limited registration entities'.

Carve-outs from a liability to GST apply where the supplier takes reasonable steps to obtain information about whether or not the goods will be a taxable importation and, after taking these steps, reasonably believes that the goods will be imported as a taxable importation.

Inbound Intangible Consumer Supplies

The *Tax and Superannuation Laws Amendment (2016 Measures No. 1) Act 2016* (Cth) (the ***IICS Act***) took effect from 1 July 2017. Dubbed the 'Netflix tax', the new rules were announced in the 2015-16 Budget and are similarly oriented at adopting a vendor registration model in line with the OECD BEPS Guidelines by ensuring inbound intangible consumer supplies will have GST collected at the point of sale. Overseas vendors who make at least one inbound intangible consumer supply will be required to register for, collect and remit GST on digital products supplied to consumers in Australia. There is also a corresponding amendment to penalties imposed pursuant to the *TAA*.

The purpose of the legislation was to ensure that GST is applied consistently to all supplies of digital products to Australian consumers, and to provide overseas suppliers with the opportunity to shift the obligation to account for GST to either the resident agent or electronic platform provider through which the supply is made. Whether GST arises, and determining the party liable to GST, will depend on the factual matrix, particularly the relationships and contract terms between the supplier(s), platform provider and consumers.

ATO Law Companion Rulings (LCRs)

For reference, in February 2018 the Australian Taxation Office (**ATO**) changed the terminology for documents issued as non-binding legal guidance from 'Law Companion Guidelines' to LCRs.

On 7 March 2018, the ATO issued the following three LCRs to provide guidance on the Commissioner's application of the new laws:

1. LCR 2018/1 *GST on low value imported goods*;
2. LCR 2018/2 *GST on supplies made through electronic distribution platforms* (**LCR 2018/2**); and
3. LCR 2018/3 *When is a redeliverer responsible for GST on a supply of low value imported goods?* (**LCR 2018/3**).

The application of the LVG Act and the IICS Act remains largely untested. However, LCR 2018/2 helpfully sets out a four-step approach for determining whether an electronic distribution platform operator is responsible for GST as the ruling applies to both the *LVG Act* and the *IICS Act*.

The LCR 2018/3 also clarifies the scope of the meaning of a 'redeliverer'.

Keeping Healthy in the Office

By Sarah Jones

Staying healthy while you work long hours in an office can be really difficult. Here are some ideas on things you can do to keep yourself well.

1. **Get out at least once a day**

As I've said before, without rest, our brains have a much more difficult time processing information. Getting out of the office (it doesn't have to be on your lunch break if that timing doesn't work for you) at least once a day gets you away from the stressors of work, and lets you get a little exercise and vitamin D at the same time!

2. **Don't ignore headaches**

There are lots of reasons for headaches, and obviously, that means there are different cures and preventions. But if you are getting headaches regularly when you're at your desk, there is a reasonable chance you need to get your eyes tested.

3. **Bring outdoors inside**

Check first with your office manager/direct report, but most offices will allow a couple of plants on your desk or in your office. Remember that while plants look nice: that's not their only asset – they also absorb carbon dioxide.

4. **Sit properly**

When you're sitting for hours at a time, the way you sit can have a big impact on your muscles and your ability to concentrate. Try to put your computer monitor at eye line and sit with your feet flat on the floor.

5. **Don't ignore stress**

When you're feeling stressed, you can tend to stay in one spot for longer, thinking that you won't be as productive if you take a break. Not so! Not only are extended periods of stress bad for your health, you'll find your productivity increases if you give yourself a chance to calm down.

6. **Eat better**

It can sometimes be difficult to eat well when you're stuck in the office, especially if you're working long hours and you race downstairs to buy food every day. Even if it's just healthy snacks (almonds, apples and yoghurt all make good afternoon snacks) – there are fast, easy and cheap ways to stay healthy. Another option is to band together with some colleagues to share healthy recipes or order healthier pre-packaged food as a group.

7. **Do what exercise you can**

Even if it's walking around while you take a call: incidental exercise can really add up. If you've got the time or can make the time to go to the gym, remember that NSW Law Society members get a 10% discount on membership at Fitness First!