

HORIZONS



Carbon neutral?

With the increasing drive towards more environmentally friendly practices, businesses are considering the benefits of offering their customers “carbon neutral” products and services.

Being “carbon neutral” is a reference to achieving a zero carbon release, brought about by balancing the amount of carbon released by a business (or product in its manufacture) with the amount sequestered or offset.

While this is presently a fairly unregulated area, businesses need to ensure that they are meeting minimum standards to support their claims of carbon neutrality. There have been a number of products on the market in recent times which were accompanied with misleading claims that they are “green”, “eco-friendly”

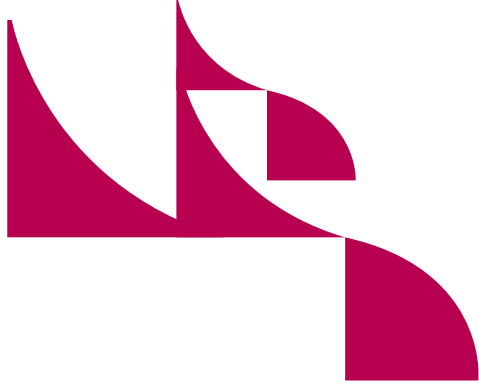
or “carbon neutral”. These types of misleading claims have been dubbed “green-washing” and have attracted the attention of the Australian Competition and Consumer Commission. It is imperative that claims regarding the environmental friendliness of a product, service or business as a whole can be supported. Otherwise businesses run the risk of attracting the misleading and deceptive conduct provisions in the Trade Practices Act 1974.

One safe and reputable mechanism to ensure the requisite standards are met, is to obtain Greenhouse Friendly™ certification, which is a Commonwealth Government established brand. In addition to ensuring that claims of being carbon neutral are well founded, gaining this certification provides businesses with

the advantage of gaining market exposure through the Greenhouse Friendly™ website and the ability to display the logo.

This type of accreditation is not compulsory though, and there are a range of carbon credits that may be purchased which will meet the necessary requirements to offset carbon emissions. For example, arrangements can be made to purchase a product such as Treecreds™ which offers both carbon credits, and a recognisable logo to display. Treecreds™ is a client of Logie-Smith Lanyon, providing carbon credits through avoided deforestation.

Ultimately, it is important that businesses carefully consider the process required to safely claim carbon neutrality, in order that the accompanying benefits may be reaped.



Proving a debt and retaining a security in a winding up



With the increasing prevalence of creditors meetings in the current economic climate, it is timely to be reminded of the importance of the completion of the Proof of Debt, which is generally required to be lodged with the trustee, liquidator or administrator in respect of any insolvency administration.

In the case of *Provident Capital Limited –v- Kelso Builders Suppliers Pty Ltd* (in liquidation), [2008] FCA 868, a single judge of the Federal Court of Australia was called upon to consider whether or not a secured creditor had abandoned their security merely as a consequence of filling in a Proof of Debt for the full sum, without reference to the security, and by then attending and voting at a creditors' meeting.

In the circumstance of that case, where there was a vote on the voices, the court held that the creditor could not have been deemed to unequivocally have abandoned their claim, or voted for the full value of the debt. In that case the security was preserved, however, it serves as a reminder that care needs to be taken in completing all documents relevant and prepared for the purposes of a creditors' meeting.

If you have any questions concerning insolvency and creditors' meeting please contact David Grant on 9628 4164.

Senior appointments



Bryce Anderson
Partner

Logie-Smith Lanyon is delighted to announce that Bryce Anderson an experienced lawyer in the field of construction and commercial litigation, and tax law expert George Kolliou (see page 4) have joined the firm. Their broad experience and expertise in their respective areas adds significantly to the breadth of specialised legal services offered by Logie-Smith Lanyon.

Bryce Anderson - Partner
Construction law expert Bryce Anderson completed his Bachelor of Commerce/LLB degrees at the University of Melbourne in 1983 and, after completing his articles, joined a city law firm in the area of construction and commercial litigation.

He became a partner in the firm which later merged and ultimately became Middleton's, where Bryce worked until July this year when he became a partner at Logie-Smith Lanyon.

For more than 18 years Bryce has been involved with the various aspects of construction law including front and back-end work relating to the preparation of contracts and construction documentation, prosecuting and defending claims, preparing litigation and advising on disputation, mediation and arbitration.

"Over the years I have acted for clients on construction matters involving projects ranging from less than \$10 million to \$100 million plus." Bryce said.

Bryce considers risk protection and risk allocation to be vital considerations for people or companies undertaking construction projects of any size and advises anyone in this position to ensure they obtain appropriate advice.

"Ideally advice should be sought from a legal practitioner who is experienced in all facets of construction law at the earliest stage rather than later so that the most appropriate risk allocation and price can be negotiated."

Significant changes to the legislative framework governing construction projects in areas such as Occupational Health and Safety, Workplace Relations, environment regimes, taxation and planning, in particular, need to be closely monitored to ensure total compliance.

"While I concentrate on the many aspects of construction law we have highly experienced lawyers at Logie-Smith Lanyon who can provide the necessary advice relating these matters."

Bryce is available to provide advice and act for principals, developers, contractors, sub-contractors, consultants and suppliers in the commercial, domestic, industrial and civil sectors.

"Regardless of whether someone is involved in a construction project of any size, a fit-out or refurbishment we have the expertise to assist them with all aspects of their legal work." Bryce added.



Anti-money laundering and counter-terrorism financing reforms

In the first week of December 2006, Federal Parliament passed the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth)* ("Act"). Parts of the Act were implemented in stages, with the full effect of the new obligations commencing in December 2008.

The purpose of the Act is to combat the issue of money laundering in Australia which is estimated to have a value of approximately \$11.5 billion per year.ⁱ The Act also addresses concern regarding the threat to national security posed by the financing of terrorism.ⁱⁱ Australia has international obligations including a commitment to bring the Australian legislation in line with international standards as set out by the Financial Action Taskforce on Money Laundering (FATF), and the Act is an attempt to bring Australia's laws in this area in line with these obligations. Money laundering has been defined as the process by which illicit source moneys are introduced into an economy and used for legitimate purposes. The definition of "financing of terrorism" is found in the Criminal Code and relates to the collection or provision by a person of funds to be used for a terrorist act, and alternatively making money available to another person who will utilise the funds for a terrorist act.

Coverage of the Act

The Act lists a number of "designated services" which cover a wide range of financial services including:

- accepting a contribution, rollover or transfer in respect of a new or existing member of the fund
- cashing all or part of an interest held by a member
- making a payment by way of a pension or annuity
- commuting a pension or annuity, or
- in the capacity of an Australian Financial Services Licence (AFSL) holder, arranging for a person to receive a designated service.
- Persons who provide the designated services to customers become reporting entities (REs) that incur reporting and other obligations under the Act.

The requirements under the Act

Identification and verification

REs must verify a customer's identity before providing them with a designated service. Further, an RE is required undertake ongoing customer due diligence by establishing, maintaining and implementing procedures to monitor customers with a view to identifying, mitigating and managing AML/CFT risk.

Reporting

REs must report suspicious matters, certain transactions above a threshold stipulated in the Act and international funds transfer instructions (IFTIs).

A suspicious matter arises where the RE has reasonable grounds to suspect that:

- the customer is not who he or she claims to be;
- information that the RE has concerning the service may be relevant, or of assistance, to the investigation of tax law evasion, AML/CTF laws or the investigation and prosecution of a person for an offence against the Commonwealth or a State or Territory; or the provision of the service is preparatory to the commission of an AML/CFT offence or to the investigation of, or prosecution for such an offence.

All transactions over \$10,000 (or other amounts specified in the Act) are considered threshold transactions under the Act. It is necessary for RE's to establish, maintain and implement procedures to report these transactions to the Australian Transaction Reports and Analysis Centre (AUSTRAC). This is the general position, and there are a number of exceptions under the rules that may be applicable to a particular RE's circumstances.

An IFTI is an electronic funds transfer instruction or designated remittance arrangement that is either accepted at, or through, a permanent establishment in Australia (ie "outgoing") or from a permanent establishment in a foreign country (ie "incoming"). Such IFTIs must be reported by REs to AUSTRAC under the Act unless an exemption applies.



Senior Tax Counsel



George Kolliou
Senior Tax Counsel

Further, every person who moves currency exceeding \$10,000 across the Australian border must report this movement to AUSTRAC. Any person who fails to make such a report, or any person who receives currency where a report has not been made will be guilty of an offence under the Act.

Developing and maintaining an AML/CTF Program.

Under Part 7 of the Act, REs must have, and comply with, anti-money laundering and counter-terrorism financing programs, which are designed to identify, mitigate and manage money laundering or terrorist financing risks a reporting entity may reasonably face.

Record keeping

REs must make and retain certain records (and other documents given to REs by customers) for a seven-year period. Further, a RE is required to produce, at the end of a specified period and in compliance with the AML/CTF Rules, a report regarding the RE's compliance with the reporting requirements.

Penalties

Where a breach of any of the above obligations occurs, AUSTRAC can apply to the Federal Court for a civil penalty order. If the court is satisfied that a contravention has occurred it may order that a pecuniary penalty be paid, and the amounts are not insubstantial. Where the person is a body corporate, the penalty may be up to \$11 million, and in all other cases \$2.2 million.

How we can assist you

Many legitimate business activities may fall within the requirements of the Act, and care will need to be taken to ensure compliance, either through proper reporting or seeking the relevant exemption from the Act.

Should you have any questions relating to the reforms please contact David Grant on 9628 4164.

Logie-Smith Lanyon senior tax counsel George Kolliou qualified as an accountant in 1984 and worked for the Australian Taxation Office for three years then had a 12-month stint at the ANZ Bank before entering private practice to specialise in business taxation. George worked in public practice as a principal and partner for more than 15 years.

George, who also taught accounting at La Trobe University, decided on a change of direction and completed his law degree at Monash University in 2005. "I felt I had gone about as far as I wanted to go in accountancy and was attracted to tax law because of the challenges it offers."

Tax law is widely considered to have been subjected to more legislative change than any other area of the law over the last 20 years. "As a consequence, it is extremely difficult for accountants in general practice to keep themselves abreast of the all the amendments to tax laws," George said.

George provides advice to accountants and their clients on a broad range of legal issues involving taxation. "The relationship I have with accountants could be

likened to the one GPs have with medical specialists; I complement their role and give them advice on complex aspects of their clients' taxation affairs."

The advice is wide-ranging and encompasses tax matters relating to areas such as capital gains, FBT, GST, superannuation law, Workplace Agreements, estate planning, purchase of a business and contracts.

As well, George works closely with experts from the other disciplines within Logie-Smith Lanyon and advises on the tax implications associated with dispute resolution, property development, business structuring and litigation.

"Taxation is one of the most substantial costs any business faces and, as is the case with any other expenditure, the objective is to minimise the financial obligation faced by the company or proprietor within the confines of the law."

George, who was one of the instructing solicitors for the first GST case to go to the High Court of Australia, frequently presents at conferences and seminars, and writes for professional journals on tax matters.

ⁱ Department of Parliamentary Services Bill Digest 30 November 2006, no.60, 2006-07. p.2.

ⁱⁱ The Hon. Philip Ruddock MP, Attorney-General, Second Reading Speech, House of Representatives Hansard, 1 November 2006, p.1.

Legal professional privilege and the AWB v Cole decision



Legal professional privilege is a fundamental common law immunity that is intended to preserve the confidentiality of communications between a lawyer and a client. The privilege, subject to defined qualifications and exceptions, will extend to communications brought into existence for the dominant purpose of either:

1. enabling a client to obtain, or the legal advisor to give, legal advice or the provision of legal services, or
2. for use in litigation which is within the reasonable contemplation of the client.

The right to legal professional privilege is one that is held by clients, and may only be waived by the client; lawyers cannot breach their client's confidentiality and a court, investigative body or other statutory authority cannot compel the disclosure of such communications. However, the privilege is lost, if the privilege is waived.

Australian Wheat Board Ltd v Honourable Terrence Roderic Cole [2006] FCA 1234 considered what amounted to waiver of legal professional privilege. The AWB case arose from notices to produce documents under section 2(3A) of the Royal Commissions Act 1902 (Cth). His Honour Justice Young was required to determine the validity of AWB's claims for legal professional privilege in relation to approximately 900 documents spanning a period of years from 2002 to 2006.

During the time the documents in question were created, the AWB was involved in investigations regarding its sale of wheat to Iraq under the United Nations' Oil for Food Program. During this period AWB sought advice from several law firms concerning the investigations, in addition to retaining counsel to conduct internal investigations.

Prior to, and during, the Cole Inquiry, AWB made public claims that its legal advice showed there was no evidence of any

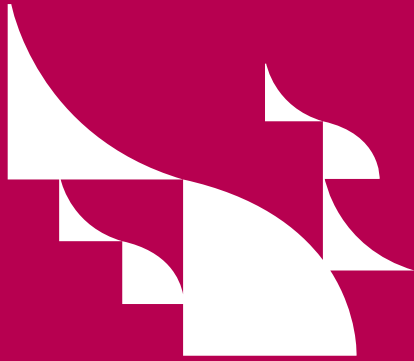
wrongdoing in connection with the Oil for Food Programme. The Commonwealth in turn argued that in the process of making such statements, the AWB had disclosed the substance of its legal advice to the government, the Volker Inquiry and the Commission.

Justice Young found that the AWB had made a deliberate decision in line with its commercial interests to make the claims, with the effect that it was acting inconsistently with the maintenance of confidentiality in relation to legal advice. It was concluded that the AWB had waived privilege over all legal advice relating to those claims, and this waiver extended to broad categories of documents including:

- documents seeking advice, or comprising or recording advice relating to the question of whether AWB or any of its employees engaged in wrongdoing in connection to wheat sales to Iraq under the Oil-For-Food Programme;
- witness statements and other notes or records of interviews of AWB personnel;
- documents defining the scope of or identifying internal reviews and investigations; and
- summaries, chronologies and other documents recording or analysing the results of those investigations.

This decision has significant implications for all users of legal services. To maintain privilege it is essential that the 'gist' of any legal advice not be disclosed, even in the course of vigorous defence of one's legal position. While it may be appropriate to advise a third party that legal advice has been received and that a decision has been made following that legal advice, actually stating that advice was given in regard to a particular course of action is likely to result in a loss of privilege.

Should you have any questions please contact David Grant on 9628 4164



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