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SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Reference: Exposure draft of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2005

TUESDAY, 14 MARCH 2006

SYDNEY

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SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Tuesday, 14 March 2006

Members: Senator Payne *(Chair)*, Senator Crossin *(Deputy Chair)*, Senators Bartlett, Kirk, Mason and Scullion

Substitute members: Senator Stott Despoja for Senator Bartlett

Participating members: Senators Abetz, Barnett, Bartlett, Mark Bishop, Brandis, Bob Brown, George Campbell, Carr, Chapman, Colbeck, Conroy, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Fielding, Fierravanti-Wells, Heffernan, Hogg, Humphries, Hurley, Johnston, Joyce, Lightfoot, Ludwig, Lundy, Ian Macdonald, McGauran, McLucas, Milne, Murray, Nettle, Parry, Patterson, Robert Ray, Sherry, Siewert, Stephens, Stott Despoja, Trood and Watson

Senators in attendance: Senators Kirk, Ludwig and Payne

Terms of reference for the inquiry:

Exposure draft of the Anti-Money Laundering and Counter Terrorism Financing Bill 2005

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Committee met at 9.05 am

CHAIR (Senator Payne)—Good morning, ladies and gentlemen. This is the hearing for the Senate Legal and Constitutional Legislation Committee's inquiry into the Exposure Draft of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2005. The inquiry was referred to the committee by the Senate on 9 February 2006 for report by 13 April 2006. The exposure draft of the bill proposes a number of amendments to Australia's anti-money laundering and counter-terrorism financing system, in line with international standards issued by the Financial Action Task Force on Money Laundering. The exposure bill provides a framework enabling individual businesses to manage money laundering and terrorism financing risks specific to their industry sector.

The committee has received 30 submissions to this inquiry, all of which have been authorised for publication and are available on the committee's website. Witnesses are reminded of the notes they have received relating to parliamentary privilege and the protection of official witnesses. Further copies are available from the secretariat. Witnesses are also reminded that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate.

The committee does prefer all evidence to be given in public but, under the Senate's resolutions, witnesses do have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera. I would also ask witnesses to remain behind for a few moments at the conclusion of their evidence, in the event that the Hansard staff need to clarify any terms or references.

[9.06 am]

BURKE, Mr Anthony John, Director, Australian Bankers Association

LAWLER, Mr Luke Colm, Senior Adviser, Policy and Public Affairs, Credit Union Industry Association

VENGA, Mr Raj, Executive Director, Australian Association of Permanent Building Societies

CHAIR—Welcome. I will ask each of you in turn to address your own submissions, and then we will go to questions in globo, if you like. We might start with you, Mr Burke. The ABA has lodged a submission with the committee which we have numbered 18. Do you need to make any amendments or alterations to that submission?

Mr Burke—No, thank you.

CHAIR—Then I will ask you to make a short opening statement.

Mr Burke—I thank you for the opportunity to address the committee. Our submission addresses a number of key issues as to content of the draft legislation. Our covering letter raises some overriding concerns which I would like to touch on in my opening statement. These relate to timing with respect to the consultation process and our ability to complete a submission by the nominated deadline and timing of implementation of the measures once they have passed through the parliament.

I am also going to speak in some detail about another overriding concern of ours, which has to do with what we believe to be a lack of a risk based approach in the draft so far. As to timing, the state of play as of today is that we do not have a complete package of legislation and rules. Submissions are due 13 April. We believe it is essential that we have a complete product before we can complete consultation and finalise our submissions. We believe that a time of five to six weeks will be necessary after the product is delivered to us in complete form.

We are working with the Attorney-General's Department and the minister at the moment on some alternative drafting approaches. Jointly we have a hope that that will accelerate the drafting process and perhaps address some of the other concerns we have. But again, as yet we do not have a complete product.

The other key timing issue is implementation. Once the legislation is ready, we believe that a time of two to three years will be necessary to implement this very complex piece of legislation which has very significant ramifications across our institutions. At this stage we do not have a firm position from government as to what they see the transition period as being, but it is our firm view that regardless of where the drafting ends up, a time of two to three years will be necessary.

As to the question of a risk based approach, I will read from a short prepared statement. It is our concern that the current drafting approach, as it emerges in the draft legislation and the rules such as we have them, does not reflect a risk based approach and, in that sense, is inconsistent with what we agreed with the minister and the Attorney-General's Department

last year at the roundtable meetings, inconsistent with FATF recommendations, and inconsistent with best practice internationally.

As recognised in the FATF recommendations concerning the measures to be taken by financial institutions and agreed by government and industry, the entire approach should reflect a risk based approach in order to ensure that appropriate resources are matched to high-risk activities and functions. The proposed regime is not risk based either at global or structural level, nor in relation to specific obligations. Generally a risk based approach should match the obligations imposed on an entity with the risks faced by that entity in a proportional and balanced way. More demanding obligations should be imposed to manage more serious risks.

The risk based approach requires, firstly, that legal obligations be framed so that the scope of the legal obligations should be clear and the entity subject to the obligations should be able to determine what needs to be done to comply. Secondly, compliance with the legal obligations should be feasible and practical. The entity subject to the legal obligations should be able to do what is needed to comply. Thirdly, appropriate enforcement mechanisms should be in place. The entity subject to legal obligation should be subject to reasonable and proportionate sanctions in cases of noncompliance. This is most effectively achieved by an overriding object in the interpretation part that makes clear that, both qualitatively and quantitatively, each obligation under the draft bill is to be interpreted consistently with a risk based approach relevant, for example, to the nature, scale complexity and risk profile of a reporting entity's business. As part of this overriding part, a global defence for reasonable steps and due diligence would be included.

Obviously, unless specifically stated to do so, this would not impact on the obligations already in place under the Financial Transaction Reports Act. Parts 3, 4 and 10 of the draft AMLCTF Bill potentially fall into that category and require more detailed analysis to see whether they go beyond the existing requirements in either application or obligation or are otherwise onerous or impractical. For example, reporting obligations in part 3 of the AMLCTF Bill are similar to obligations currently included in the FTRA. The industry has concerns that the suspicious matter reporting rules may be too prescriptive, as it appears that as many as 24 matters—many of which are difficult to assess—must be taken into account in determining whether there are reasonable grounds for forming a suspicion that would require a suspicious matter report, and as many as 19 details must be included in such a report.

I will touch on a couple of examples of where we think there is a significant gap—that is, where we do not believe the AMLCTF bill is risk based. Firstly, in part 2, 'Identification procedures', there is a failure to distinguish between high- and low-risk products through the definitions, which results in obligations that are not proportionate to risk. Rules relating to 'know your customer' are too complex and excessive for low-risk services. Key aspects of the operation of this part are contained in the rules. Without knowing the content of the rules, it is not possible to determine whether the scope of the obligation is sufficiently clear and whether regulated institutions will be capable of complying.

The inclusion of a defence of reasonable reliance on information provided would suggest a risk based approach in the context of core obligations that are not clearly defined in the act itself. Because of overreliance on the rules, it is not risk based. Another example is

correspondent banking. The core definition of the obligation, the meaning of correspondent banking, is not defined. Without a clear definition of what correspondent banking means, the scope of the legal obligation is unclear. There are operational difficulties with compliance. The industry is concerned that it obliges extensive due diligence from a regulator and you may have no means of conducting due diligence of a correspondent bank as a client. For example, agreements with all correspondent banks are required. Similarly to section 74, there also detailed obligations to prepare a due diligence assessment regarding section 79 and 80, the seventh of which are any matters specified in the rules. Some of the matters included in the due diligence report are difficult to determine. In a context where some of the requirements for compliance are excessive and too onerous, the severity of any penalty for noncompliance may be excessive.

CHAIR—Thank you very much, Mr Burke. As I said, we will go to questions for the three of you at the end if that is okay. We will move on to the AAPBS. Mr Venga, you have lodged a submission with the committee which we have numbered 8. Do you need to make any amendments or alterations to submission No. 8?

Mr Venga—No.

CHAIR—I then invite you to make an opening statement.

Mr Venga—Thank you very much for inviting us to provide evidence. AAPBS is the peak industry body for building societies in Australia. The building society members serve some 1.3 million members, particularly in regional Australia. They pursue progressive and service oriented strategies and provide first-rate financial services to benefit their customers and their communities. The majority of building societies, in terms of both assets and number, are mutual organisations. Profit maximisation is not their goal. Rather, they are there to optimise benefits to their members by way of lower fees and chargers or higher deposit rates et cetera. Customer service is the lifeblood of building societies, and the AML legislation as proposed obviously has implications. We see it as an intrusion into customer relations, and I would like to talk about that shortly, if I may.

We endorse the contents of the ABA submission. We have been party to a number of working groups, including the ministerial advisory group. We particularly share the concerns about the four-month consultation period being inadequate, particularly as the majority of the rules have not been released. It is difficult for us to do an impact analysis of the proposed legislation at present.

Like everyone else, we are keen to know the likely transition period that will be afforded. Our initial view is that we will need two to three years to properly implement the proposed legislation, given the systems modifications, staff training and processes that need to be undertaken. We note that the FSR provided a transition period of two years, which I thought was a reasonable indication of the time required, because the AML is no less difficult to implement than the FSR.

The cost of implementing the AML regime will fall disproportionately on smaller financial institutions, such as building societies, as they are not able to achieve the economies of scale enjoyed by larger players. We have a limited resource capacity to commit dedicated resources to a project of this nature. For example, the exposure of building societies to foreign PEPs—

politically exposed persons—is very limited, if not non-existent, yet we will need to invest heavily in identifying PEPs. The use of commercial lists, we understand, will cost up to $US500,000 per annum. That amount is beyond the capacity of any building society. There is an indication that some sort of self-declaration will be permitted. This has the potential to reduce our costs, and we would welcome such an initiative.

I will give another example, if I may. Customer transactions will need to be monitored. We know that. While the requirement is technologically neutral, the reality is that almost all building societies will need to purchase systems or effect modifications to achieve this. The expense is considered excessive. We also hope to see a regulatory impact statement that contains a genuine analysis of the cost to business. We hope it will be nothing like that prepared for the FSR. The regulatory impact statement for the FSR contained a woeful analysis of the cost to business. It boldly stated that the FSR 'will reduce compliance costs for industry', noting that 'industry is likely to incur some costs in the initial stages', although these costs 'will be limited by the fact that the new disclosure regime is broadly in line with existing requirements'. What a joke that turned out to be!

We do not believe that the government and its agencies have properly considered how intrusive the customer identification and monitoring requirements of the bill and rules actually are. We see such intrusion as a bad thing. The fact of the matter is that the overwhelming majority of our members—almost all of them—are neither money launderers nor terrorists. Customers will not welcome the prospect of providing ID information—although they do it now on a limited basis—or responding to queries in relation to the source of funds, income and financial assets or their financial situation. These are personal and confidential matters that customers would understandably not wish to share, unless absolutely necessary in relation to the designated service—for example, applying for a loan. If a customer chooses not to cooperate, do we terminate our business relationship with the customer? And are we required to lodge a suspect matter report on the basis that the customer has not been forthcoming in providing this information?

I appreciate that this is a reasonably sensitive issue but, as the bill presently stands, deposit-taking activities by unregulated bodies, such as church development funds, are not caught. While deposit taking is a designated service under item 5, table 1 of section 6, it applies only to ADIs, such as banks, building societies and credit unions, or a person specified in the AMLCTF rules.

If church development funds are not excluded from the bill it is, it seems to us, very likely that money launders will exploit this loophole. This is the weakest link in the chain. The exclusion of these funds from the ambit of designated services obviously also affords them an unwarranted competitive advantage to authorised deposit takers. It is noteworthy in this regard that APRA too is looking at the activities to see if they need to be licensed to conduct banking business under the Banking Act. We would like to see an undertaking from the Attorney-General and AUSTRAC that the activities of church development funds will be designated services under the AMLCTF rules, although we do not see why the bill itself could not be amended and broadened to include any deposit taking whether or not authorised by the Banking Act.

CHAIR—Thank you. We will move on to Mr Lawler. The Credit Union Industry Association has lodged a submission with the committee which we have numbered 19. Do you wish to make any amendments or alterations to that submission?

Mr Lawler—No.

CHAIR—I invite you to make an opening statement.

Mr Lawler—Thank you for the opportunity to contribute to the inquiry. We certainly welcome discussion and debate about these very significant proposals. The Credit Union Industry Association is the main industry body for Australia's 151 credit unions. We have 3.5 million members and total assets of around $32 billion. All credit unions are mutual entities—they are member owned, member focused, authorised deposit taking institutions.

Credit unions have been complying with anti money-laundering laws for many years. These proposals will see anti money-laundering laws capturing a much wider group of entities in the net, and will also see much more active surveillance of customer activity. We support the risk based approach. I support Tony's remarks earlier about how far away from a risk based approach this is. The trade-off with a risk based approach is uncertainty about exactly what the risks are and what the expectations of the regulator are. Credit unions will need a lot more information and guidance about money-laundering risks, particularly terrorism financed financing risks because both have been conflated in this legislation, and the regulator's expectations about responding to these risks for these proposals to be workable—not in a prescriptive rules based sense but in terms of information and guidance about the risks so they can respond to them.

I will run through a quick sample of some of the obligations that this proposed legislation will impose. Credit unions and other regulated entities will be required to collect baseline information on all customers. They will have to give all customers a risk classification, they will have to identify customers and services that pose a high risk, and they will have to collect quite detailed information on some customers and carry out transaction monitoring. Regulated entities will be obliged to report suspicious matters, even in cases where there is no actual transaction. Because of the impact on customers of these proposals, we have said from the outset that a significant public education campaign will be needed to explain why your financial institution will be asking you for more information about your personal affairs. We think this will come as a shock and a surprise to a lot of customers.

An issue I want to flag with the committee and which is of particular concern to credit unions and other smaller players is the future of the current acceptable referee method of identifying customers. This method in its current form does not meet the test of the FATF standard but smaller institutions without large branch networks rely on this method for competitive neutrality and we seek its retention with some modifications until genuine alternatives are available. I am very happy to answer any questions you may have.

CHAIR—Thank you. I thank all three of the organisations for their submissions. They are very helpful to the committee's considerations. Each of your submissions raises concerns about the exposure draft, both its content and in some cases its process. I wonder what capacity you currently have to raise those concerns with the relevant departments and/or the minister, and whether that is a productive process at the moment. Is that still operating?

Mr Burke—The process is effective. There is a consultation framework in place which comprises a ministerial advisory group. We three sit on that along with other industry representatives.

CHAIR—Does that mean you complain to yourselves?

Mr Burke—Yes, as well as to the Attorney-General's Department, AUSTRAC and the minister. Then reporting to the advisory group are four working groups looking after payment programs, customer verification and international issues and risk principles. There is a large body of people from the banks and other financial institutions involved in those working groups and there are AUSTRAC and Attorney-General's representatives participating as well. In fact, A-G's and AUSTRAC co-chair those groups. There is engagement with a large number of people, there is a deal of work and there is certainly an opportunity to provide advice to government on both process and content issues, but the simple fact is that we are not where we need to be in order to complete the consultation process by 13 April.

CHAIR—Would you agree with those observations, Mr Lawler?

Mr Lawler—Yes, I would agree with that. There has been a fair lengthy consultation process. But to date for some key parts of the regime, because we have a high-level piece of legislation with the key operational details in rules, we simply do not have many of the rules yet.

CHAIR—What is the feedback on where the rules are and when you might see them? What is happening with that side of the process?

Mr Burke—At a detail level, there are two rules which, as we understand it, are near completion. Others have been promised but, as has been remarked, we need to have five to six weeks from the completed product. We are already inside that five to six weeks. We think they are coming but as for when—

Senator LUDWIG—How many rules do you expect there to be in total?

Mr Burke—That is not completely clear. The most recent advice we have is a timetable issued on 30 January. There were nine rules listed in that timetable.

Senator LUDWIG—And how many do you have now?

Mr Burke—Two.

Senator LUDWIG—What about guidelines?

Mr Burke—There is one set of guidelines in development at the moment.

Senator LUDWIG—Do you expect the same number of guidelines?

Mr Burke—It is not clear at this stage.

Senator LUDWIG—I heard a figure of three out of 30. Is that what it is referring to—two rules and one set of guidelines and potentially 30 mixed rules and guidelines?

Mr Burke—Yes. That relates to in fact another document which was issued prior to Christmas and was a list of possible rules. We understood the list to be issued on 30 January would replace that.

Senator LUDWIG—So has Attorney-General's given you a commitment that they will have those rules and guidelines finalised by 13 April or prior to 13 April?

Mr Burke—By 13 April, yes.

Senator LUDWIG—So they have given that commitment that they will have them by 13 April?

Mr Burke—Yes, but the issue is that we need them soon.

Senator LUDWIG—I refer to two matters that you raised: correspondent banking and risk based assessment. It seems to me, from the literature and from the submissions of all parties to date, that there is no agreed definition of what a risk based approach is. Is there a definition?

Mr Burke—There is no agreed definition.

Senator LUDWIG—But is there a definition or are we searching for the preferred term?

Mr Venga—As I understand it, in the UK there is certain wording that seems to be quite appropriate that we could lift off them.

Mr Burke—The formulation Raj refers to is in the steering group guidelines. That is a formulation which I believe most of those participating from the finance sector side would be comfortable with.

Senator LUDWIG—What has been the Attorney-General's Department's view on that to date?

Mr Burke—I think they see it as useful input, but the approach taken to date has been quite different from that taken in the most recent draft in the UK.

Senator LUDWIG—The submissions seem to suggest that it is still overly prescriptive and not risk based. Is that still the position? What I am trying to ascertain, as we move towards 13 April, is whether there is a coming together of minds or a meeting of minds in respect of how the legislation should work and whether some of the matters that you have raised have been finalised—and are no longer issues—or remain issues and so are outstanding issues and, from your perspective, still impact significantly on how the legislation will operate. I guess that is a tall order.

Mr Venga—I understand that the bill—I think it was part 2—was being looked at in terms of identification.

Mr Burke—There is a piece of work being undertaken at the moment by the Attorney-General's Department. As they are appearing before the committee this afternoon, no doubt they will refer to it.

CHAIR—No doubt we will ask them.

Mr Burke—As we understand it, it is an attempt following the most recent meeting of the ministerial advisory group to arrive at a risk based approach. It will at least, as we understand it, address the two points I mentioned—that is, correspondent banking and the part 2 identification measures. We have provided some advice that it should also consider other areas. We understand that the department will produce a document prior to the next meeting

of the advisory group, which is scheduled for Thursday. That will then allow us to have an opportunity to make a decision as to how close we are to the government's position. But, as to the body of issues raised in our submission—that is, the detailed content issues—we still see those as outstanding.

Senator LUDWIG—There seems to be a significant difference of opinion on sections 73 and 74 of the exposure draft, which relate to 'materially mitigate'. That is not only in your submission; it is in a range of others. Other submissions have identified a problem in terms of it being either overly prescriptive or not risk based.

Mr Burke—I think it is an interesting example. While we have spent quite a deal of time discussing 'materially mitigate' with the department and AUSTRAC, we have not yet come to an agreed position on that. Our concern is that it is too prescriptive. Our concern also is that it will not do the job. An organisation could be said to have materially mitigated risk in that no money laundering had been discovered, so the outcome was positive but the processes were very shoddy indeed. The converse may apply—an organisation may have fantastic processes but, unfortunately, has been the victim of money laundering and hence could be said not to have materially mitigated risk.

Senator LUDWIG—And the defences are not sufficient.

Mr Burke—Yes.

Senator LUDWIG—What you also say is that, under FATF recommendation 15, there is an excess of the obligation.

Mr Burke—Yes.

Senator LUDWIG—In part 2 you say:

> The current ED and subordinate instruments contain overlapping obligations which would result in interpretative inconsistency ...

I was wondering if you could either amplify that or provide an example of where you say there is interpretative inconsistency and ambiguity which would then raise difficult questions of construction. It might be one in respect of 'materially mitigate'. I am referring to page 8.

Mr Burke—'Materially mitigate' is a good example.

Senator LUDWIG—When you then talk about those, I was just curious as to whether those issues were still outstanding—the definitions that are provided.

Mr Burke—I have to say at this point that we jointly—that is, industry, Attorney-General's Department and AUSTRAC—have not really got to grips with the definitions.

Senator LUDWIG—It also seems to be that the exposure draft lifts definitions out of various other pieces of legislation. This is effectively going to be your bill and your act when implemented. In terms of general drafting practice, from industry's perspective, is that the way you would like to see the legislation—lifting definitions out of other acts so that you then have to refer back to those to find out what the definitions are? Is that helpful to industry or less helpful to industry?

Mr Burke—I guess there are two sides to that question. It could be unhelpful in that it requires reference to multiple pieces of legislation. But, for example, in relation to the

definition of 'account', upon which I addressed the committee when we looked at the antiterrorism bill, I think it would be helpful to maintain consistency in that definition.

Senator LUDWIG—And what is your ultimate view on these things?

Mr Burke—On which things?

Senator LUDWIG—There is a choice as to whether you want to maintain consistency with the other legislation. It is a fair practice. I have in mind that, once you start reproducing other acts' definitions, they change—whereas if you cite them, they at least remain uniform until they fall out of favour again. That is the choice.

Mr Burke—The latter would be preferable.

Senator LUDWIG—In terms of the designated services, in paragraph 4 on page 9 you talk about 'no limits'—that is, monetary limits—except for a $1,000 limit for stored value cards. Do you have a view about what the limits should be?

Mr Burke—Apart from the example Raj gave, I don't think we have really got to grips with the designated services and the definition. We have not yet formed a position on when it is necessary for those services.

Mr Venga—A personal loan of $500 could come within the ambit of this legislation. That is quite outrageous.

Senator LUDWIG—So where do you think the bar should be set?

Mr Venga—I have not focused on that, to be honest. You look at 60-odd designated services and you really have to go through each one of them and speak to each industry group representing them to find out what would be an appropriate threshold. I could not answer that, I am afraid.

Senator LUDWIG—So where do we go to from here if you cannot answer it? A range of issues and quite detailed matters have been provided in all submissions from you three parties. There are choices. In other words, there are choices as to whether you have definitions; there are choices as to where you set the limits. So you have a working group or a consultative group to work that out. Ultimately, A-G's have to take the lead from industry as to what their final position might be. Or are you saying that the A-G should come up with a position after criticism and then come back with a response? Or does industry have a view as to what appropriate limits should be, given the background of costs, time and money to implement this legislation?

Mr Burke—I think they can be developed within the consultative process I described. It is just that that process has not yet got to these matters.

Senator LUDWIG—So where is the process up to?

Mr Burke—The process has delivered the draft rules and the guidelines which have been issued today. We are continuing to do other work—for example, the correspondent banking role. As to when the process will make a determination on these matters—that is, the definitions of designated services—I cannot answer that question.

CHAIR—In terms of time, I am hoping it is 14 March—I certainly think it is—so the time frame remaining is until 13 April.

Mr Burke—Correct.

Mr Venga—Certainly it is not enough time—

CHAIR—for a lot of work to be done.

Mr Burke—Indeed.

Senator LUDWIG—That is what I am trying to get a sense of. A significant number of matters of fine detail seem to remain unresolved between at least the ABA and Attorney-General's. Or they may be resolved and this is a second go at trying to work out a better solution. It seems to be the former, not the latter, because you do not have an alternative proposal in some respects as to what you think should happen. For that to happen, are you waiting for A-G's to provide a view on a range of these issues? How is the feedback working?

Mr Burke—The way the feedback is working at the moment is that we are asked to consider particular draft rules. Consultation is confined to the scope of those draft rules.

Senator LUDWIG—Not on the exposure draft?

Mr Burke—At the moment most of the time has been spent on the rules.

Senator LUDWIG—Because you don't have the rules yet.

Mr Burke—There are matters regarding definitions, the designated services and the limits, that you have touched on. Defences and the question of impact on other laws we have not got to.

Senator LUDWIG—So we are a long way away from the public education campaign which might be needed to explain to the public why there are so many rules.

CHAIR—Mr Lawler, in the Credit Union Industry Association submission, you refer quite explicitly to the requirement for a major public education campaign. Before that, in the third paragraph on the second page, you talk about how consumers may find the new regime requirements 'intrusive and invasive of their privacy'. How would the credit unions plan to go about working with their members to assist them in understanding and appreciating this, and what sort of cost will that have to your business?

Mr Lawler—There will be a significant cost in setting up the AML CTF program, which is kind of the core of the compliance obligation in this proposed legislation. In the lead-up to the passage of legislation and in the transition period, we will get a better understanding of what the regulators' expectations are about the risks and the response to the risks but it is potentially quite incredibly invasive and intrusive of people's privacy—the information that you have to ask people for and also the information which will be reported to AUSTRAC, which then chooses whether or not to disseminate it to a vast number of other federal and state agencies, which may or may not be useful in counter-terrorism financing and anti-money-laundering activities.

We would anticipate that, depending on the extent to which one has to gather this sort of additional information on customers beyond what is gathered in the ordinary course of business now, many of our members would be quite affronted and quite surprised at being asked to provide this sort of information. Even some of the baseline information that is proposed to be provided includes, for example, place of birth. If you provide a birth certificate

as ID, that is all taken care of but if you provide, for example, a drivers licence as ID, you are not necessarily disclosing your place of birth. Nevertheless, the regulated entity will have to ask you for your place of birth. Some people might find that unnecessary and a little creepy.

These are the sorts of changes that will come with this regime. We are concerned that our members will think that it is the credit union, the bank, the building society or whatever which is seeking this information, possibly for its own commercial purposes. So we will be quite keen to explain that if we have to collect this sort of information—and in cases where someone fits a profile of possibly a high risk or a high-risk product, we will have to go and get some more information on them—we will want them to be aware that this is a legislative requirement and that we are not doing this simply to intrude in their personal affairs. That is why we really think it is important that the community understands what is actually being proposed here. There is a kind of deputisation of the entire financial sector to gather information on people and report information on people to a vast number of federal agencies. I am just not quite sure whether that has been particularly understood.

Senator LUDWIG—Just on that matter and in terms of the privacy concerns, would all of your members or your members' businesses be subject to the privacy principles?

Mr Lawler—Yes.

Senator LUDWIG—So they would all have turnovers greater than $3 million and the like?

Mr Lawler—Either they are at the turnover threshold or they have opted in.

Senator LUDWIG—And that would be the same for—

Mr Venga—I would think so.

Senator LUDWIG—Have you then looked at or analysed how much those cost burdens would be to ensure that you do in fact deal with all that information that you are going to collect under this legislation and satisfy the privacy principles?

Mr Venga—Are we talking about businesses or individuals?

Senator LUDWIG—The legislation will require you to collect information. You will then have to store it. You will have to store it, some suggest, even in paper record form. So you will have location storage costs. You will then have additional computer requirements, I suspect, to be able to store that type of information. You will then have to employ additional software, as you have indicated, to identify suspicious transactions and the like. All of that is part of the AML CTF process. You will then have to ensure that you have got privacy issues addressed. So you will then have to implement additional or existing safeguards and security measures to ensure that those records that you are keeping that are in excess of what you currently keep are maintained in an appropriate way to satisfy your customers' concerns, if they do raise them with you, that you are keeping these in a secure format and that you meet the national privacy principles. They will then feel secure in providing that information to you. Have you considered those costs? Can you quantify those?

Mr Lawler—The short answer is no. We are unable to quantify them. Clearly, there will be a cost. Again, it gets down to the extent to which the risk based approach works. Member trust is critically important to our sorts of businesses and because of our mutual structure.

Returning to the point about community expectations and community understanding, everyone opposes money laundering and everyone opposes terrorism financing. There is no argument there. It is a question of what is realistic and proportionate and what are reasonable expectations in the community about information—what is suspicious; what is unusual; and what people consider to be a reasonable approach to tackling these money-laundering problems and terrorism financing problems. The point I am making is: potentially, it could be quite a monster. It depends on everyone taking a reasonable approach and, to some extent, the very first audit that AUSTRAC does of an institution will determine the shape of the regime.

Senator LUDWIG—Have you had any feedback from AUSTRAC as to how they are going to be a regulator in this system and how they are going to address some of the concerns that you have raised today? That is also a critical part. There is the framework legislation, there are the rules and there are the guidelines. The rules will come with sanctions and they will come with defences. They will come with a regulator who will look at your practices, your procedures, what you have got in place. I suspect there will be audits as well to see how you have performed. It will be their process which will determine, by and large, whether or not you look at sanctions or remedial action.

Mr Venga—It is probably too early in the piece and it is probably a matter best asked of AUSTRAC, I think.

Senator LUDWIG—Have you asked AUSTRAC? This is industry's opportunity. Let me be frank: you have four months. The exposure draft is out. It has been sent by the minister. You knew as early as, I guess, 2003 that Australia was going to comply with the 40 plus 9 recommendations. The minister has taken a fair while to provide the exposure draft, but it is now available. You have got a consultative process with the minister, and here is your opportunity. Additionally, you have got the opportunity today to raise these matters, so those are your forums. I want to know: are you raising these issues?

Mr Lawler—Yes, we are raising these issues with AUSTRAC. AUSTRAC makes the point that, being a risk based approach, a very large part of the success of this regime and the core of the obligations on regulated entities is to have an anti-money-laundering counter-terrorism financing program and the institution will identify and respond to its own risk in its AML program. There are, obviously, a lot of other elements of the regime, but it is what is in the AML program that we are talking about now. There is a tension between having a risk based approach and having a whole lot of prescription.

What we are looking for is not prescription but guidance and information from the regulator about money-laundering risks and its expectations about responding to those risks. Eventually, it is going to have to, obviously, go to a regulated entity and say, 'These are your risks. You are not responding to them very well,' or 'You are responding to them well.' I refer in particular to the counter-terrorism financing task. We know about banking; we do not know very much about terrorism or terrorism financing, so we are looking for guidance. There is obviously guidance and information generally in the marketplace, but we are looking for information and guidance from the regulator. Whether we need that now is debatable but we need it in time to be able to design a response to this legislation. What sort of IT tasks—

Senator LUDWIG—I guess it relates more to the fact that you have raised the matter. The timing is obviously a matter for when you finally get the rules and guidelines, but if you do not raise it now then they will say that you had an opportunity to raise it.

Mr Lawler—We are raising it.

Mr Burke—I go back to your earlier question. It is crucial that we bring the customers along with us. At the moment there is this continent called the AML CTF regime and we have a few roads laid out and a couple of signposts, but we are finding it difficult to navigate our way around this continent. In a relatively short period of time, we will have to be able to bring our customers along with us. It is going to be a difficult journey.

Senator KIRK—This is a bit of a sidetrack but I wondered if someone could outline for me how the AML and CTF regimes operate in the UK and the United States and whether or not there are any significant differences between what is being proposed here and those regimes, and whether or not there is anything that has been learned in the US and the UK that you are aware of that we might be able to incorporate into this scheme.

Mr Burke—Perhaps I could pick up the second half of that question first. In the UK they initially went down a much more strongly prescriptive path than is currently the case and found enormous difficulty in doing so.

Senator KIRK—Was there legislation in place at that point? When you talk about the more prescriptive approach, did they actually enact legislation? I am unfamiliar with what happens in the UK.

Mr Burke—There is head legislation; then the body of the detail was in guidance notes produced by the organisation I referred to earlier—the Joint Money Laundering Steering Group. There were significant obligations, for example, in the verification of existing customers, not risk based. They found great difficulty implementing those obligations and significant customer push-back, and they have withdrawn from that approach to a more risk based approach. The UK is probably the model which we point to. There was a bad experience in doing it that way but now the new approach seems to be working far more effectively.

Senator KIRK—How long was the initial prescriptive approach in place before it was realised that it was not working very well?

Mr Burke—Late 2003, I believe.

Senator KIRK—So a couple of years?

Mr Burke—Yes.

Senator KIRK—Is the United States a different model altogether?

Mr Burke—They have a different model. I could not describe it for you in detail, but the different model is more risk based than the Australian approach.

Senator KIRK—So you are emphasising that we should learn from the UK experience—

Mr Venga——Exactly.

Senator KIRK—where their prescriptive approach did not work in practice.

Mr Venga—They have done the hard yards. I cannot see any reason why we cannot lift from them stuff that is relevant to our own operations.

Mr Lawler—One of the lessons from the experience of the United States is on the sheer number of reports being filed. There was an incredible increase in the number of suspicious activity reports that were being filed, so the financial intelligence unit over there was flooded with these reports with personal information about individuals, to the point where they were trying to advise industry to ease off a bit and be a bit more selective about the kinds of reports they were lodging. But industry was concerned because there were some high-profile cases where some regulated entities were hit with very big fines for having inadequate anti-money-laundering regimes. So in order to avoid any prospect of being prosecuted, they were pumping out these suspicious activity reports.

Mr Burke—There were a couple of clear aphorisms coming out of that experience. The first was, 'Let's not build a bigger haystack to find a small needle.' The second one has gone completely out of my mind.

CHAIR—Call us if it comes back!

Senator KIRK—That is certainly the case, isn't it? The larger the haystack, the less likely you are to find the needle. That is one of the problems there. In the ABA submission it is stated that there ought to be separate and different obligations relating to money laundering and terrorist financing. I understand that, at the moment, the obligations are much the same.

Mr Burke—They are different beasts. The typologies—that is, the shape of the crime—differ. For example, in relation to the Bali bombing, we understand the average transaction size for purchasing chemicals and so on was less than $US200. The anti-money-laundering system is not set up to catch all transactions. Anti money laundering is targeted at not necessarily just the large sums of money but the very large sums of money which move between institutions.

Senator KIRK—Would you be proposing that the two different types of activity be regulated separately under the bill?

Mr Burke—I think it is possible to have the one piece of legislation, but I think the obligations need to be specified differently.

Senator KIRK—Because of the difference in the activities. I also want to ask whether or not there are particular issues—we have been talking generally—that affect building societies and/or credit unions, as opposed to banks.

Mr Venga—It probably relates to the fact that we are smaller entities. The cost to smaller entities has been disproportionate. I suspect we simply do not have the staff or the resources to do this as well as we would like to. Over the last 10 years there has been layer upon layer of regulation. At some point you have to ask yourself: how do you cope? There are some building societies which may have only one compliance person, who may or may not be a lawyer, so they have to pay for legal advice on, for example, how to implement the Consumer Credit Code or the Privacy Act or the FSR Act—wonderful stuff—and now the AML. It is a lot for a small institution to bear, particularly where their focus is not on shareholder return but on benefits to the community. It is a double whammy.

Senator KIRK—You mentioned that that would apply—

Mr Lawler—I agree with Raj that regulatory compliance has fixed costs which are harder for smaller institutions to bear. The other specific issue is the one I mentioned earlier, which goes to a method of identifying customers—that is, the acceptable referee method—that we have available to us now which, under the FATF recommendations, will be removed. That is important to institutions, and not just to small credit unions and building societies; it is also important to banks without large branch networks. That is a specific issue that our members remind us about fairly often. They need to have access to something like that going into the future, otherwise this will have a negative competitive effect on them.

Mr Venga—The members of staff, particularly front-line staff et cetera, of some of the very small building societies would know just about all their customers. It is not particularly good for members of a small community to know each other's business to that extent, especially in regional and rural Australia, and this legislation expects that of them.

Senator KIRK—That was partly my next question. How might this legislation impact on the ability of all institutions to provide services to rural and regional areas more generally? Have you considered that?

Mr Lawler—That point I made about the acceptable referee method becomes relevant there. If there is no actual branch for someone to walk into to go through an identification process, there has to be an alternative identification process. We have that now with the acceptable referee method.

Mr Venga—Most of our societies, for some reason, do not use the acceptable referee method. So it is not that much of an issue to us. But if the costs to small building societies are such as to stop them opening a branch in a rural or regional area, which would be best served by a small institution, it is not good for—

Mr Burke—On the compliance point, we have to be really careful not to create this enormous compliance edifice—the 'tick box overkill' is an expression out of the UK—rather than building a regime and designing AML programs which will actually stop money laundering, as opposed to putting a huge compliance program in place.

Senator LUDWIG—What is the cost of getting it wrong? You have until 13 April. Have you asked for an extension?

Mr Burke—Yes.

Senator LUDWIG—What has been the response to date?

Mr Venga—We hope to find out this week if it will be extended.

Mr Burke—The position we put is the one I expressed, which was: 'Let's not set a deadline. Rather, we need five to six weeks after the packages are complete.'

Senator LUDWIG—In other words, you do not want a deadline imposed by the minister which will create no solution or at least a position which is not clear. What is the cost of getting it wrong? Have you been able to quantify that at all? You have indicated that in the UK they implemented what I think you described as a prescriptive based regime. They pulled that out in part and then implemented a risk based approach, as I understand, and they are

now in finalisation. Do you say that we are going to go down the same path and create the same error and that we are likely to have to do the same? If you are right, if a significant number of entities report suspicious transactions, that will become unworkable. If the regulator says, for instance, that in the current regime that is being sought to be implemented the defences are inadequate and the regulatory framework is inadequate because it catches too many unsuspicious activities and so on, do you say we will have to go through the UK experience?

Mr Venga—We have seen it with the FSR.

CHAIR—You are a big fan, aren't you?

Mr Venga—I am a huge fan of the FSR.

CHAIR—I am not very perceptive, but I have managed to pick that up!

Mr Venga—We warned them about this before it came out but no-one listened to us.

Senator LUDWIG—Is this CLERP 9?

Mr Venga—Yes, the wonderful CLERP 9!

Mr Lawler—CLERP 6.

CHAIR—It is not encouraging me.

Senator LUDWIG—It is based on CLERP 9. That was interesting.

Mr Venga—That was a case where it was very prescriptive. It was meant to be principles based. I love that term because it never translates that way; it is always prescriptive, whether it is in the regulations, ASIC guidance or whatever. In that case there was a backflip. They realised that the so-called wonderful product disclosure statements were—

Senator LUDWIG—I am not sure that Senator Campbell, I think it was, would have regarded it as a backflip.

Mr Venga—Call it what you want. At the end of the day they realised the error of their ways.

Senator LUDWIG—I am not defending him, mind.

CHAIR—I was going to say I will draw that piece of the *Hansard* to Senator Campbell's attention.

Senator LUDWIG—I will not defend him, but—

Mr Venga—It was modified substantially, and we were happy with that. The irony is that, every time they change a piece of legislation because they find it too draconian or whatever, it is going to cost industry a lot to implement those changes because it means new staff training, it might mean modifying computer systems and it might mean changing your processes. So there is a cost even in changeover. We might ask for that change once we realise how horrendous the legislation is. There is a cost of implementing it.

Senator LUDWIG—I ask that in particular because you have an opportunity to convince the minister, so you need colour and movement. You say that that is what you are facing and you represent the industry that is going to pay.

Mr Burke—We have done some sensitivity analysis previously that looked at various elements. There are a series of bars and, if you move prescription from low to high, there is the impact across the industry. Looking at the banks, it was in the order of hundreds of millions of dollars. If you had to do it and then do something else then I imagine that would be the size of the impact.

CHAIR—I think that concludes our questions. We would be fascinated to explore FSR a little further but we might hold off on that today and come back again at another time, Mr Venga, if you are keen. Thank you all very much for your submissions. If there are issues which arise out of the rest of the committee's consultation today we may come back to you with questions on notice and seek your assistance with those. If not, we look forward to perhaps meeting you in the formal process as well as the exposure draft process.

Mr Burke—I will make one more point on a matter the committee is considering tomorrow—that is, the Telecommunications (Interception) Amendment Bill. We have a concern, which we have shared with the department and I think the department has accepted, that the effect of that legislation would be to remove a protection which we thought we had for conducting the activities necessary for filtering any money-laundering and terrorist financing transactions. The department has undertaken to come back to us with a possible solution, in terms of either a letter or an amendment to the EM.

CHAIR—Could the ABA write this committee a very brief one- or two- paragraph letter on that matter? That would help me to not conflate my inquiries, let alone conflate AML and CTF.

Mr Burke—Sure.

CHAIR—That would be very helpful. Thank you very much.

[10.06 am]

ANNING, Mr John Melville, Manager, Policy and Government Relations, Financial Planning Association of Australia

ROBERTS, Mr Tim, BT Financial Group Member, Financial Planning Association of Australia, AML/CTF Taskforce

CALLOW, Mr Michael, Member, AML Working Group, Investment and Financial Services Association

GILBERT, Mr Richard, Chief Executive Officer, Investment and Financial Services Association

WELLS, Ms Jenifer, Chair, AML Working Group, Investment and Financial Services Association

CHAIR—Welcome. I invite you to separately address your submissions briefly and then we will go to questions to both organisations. I will start with IFSA. IFSA has lodged a submission with us, which we have numbered 2. Do you need to make any amendments or alterations to that submission?

Mr Gilbert—No.

CHAIR—Would you like to make an opening statement?

Mr Gilbert—Thank you, Chair, Senator Ludwig and the committee members for inviting us here today. For IFSA, this legislation is a major piece of regulation for our industry. It is the biggest and most major piece of legislation since the FSR legislation. If we get this right, it could be quite a reasonable cost outcome. If we do not get it right, it could add, as the Bankers Association have just said, hundreds of millions of dollars of costs. Ultimately, the only bearers of those costs are the consumers, so we believe we must take a balanced approach to this legislation.

For the information of the committee, IFSA represents about nine million underlying accounts and customers with assets under management now approaching about $1 trillion. So if this legislation were to apply right through the whole industry, in terms of every customer being surveilled or checked under AML procedures it could be quite an expensive exercise. Our customers include life insurance policy holders, superannuation fund members and major investment houses with managed investment products on offer, both retail and wholesale. As I said, we would like a balanced outcome, an outcome which properly respects the risk based approach which has been adopted around the world and in particular in the UK and the US. It is an approach which we believe should be fully enshrined in this legislation. As we say in our submission, the sooner we can get a fully risk based approach in this legislation the better.

It would be fair to say that the minister has worked tirelessly to meet with us and to consult, as have the departmental officials. We have had, I think, very constructive engagement. In the last few weeks there has been a greater meeting of the minds on some of these issues. It would be fair to say that our industry fully respects the need for an appropriate anti-money-laundering and anti-terrorist financing regime in this country.

The principles based approach, if delivered by the government and the parliament, could be implemented relatively easily by our industry. We have had long-standing experience in such things. For example, the Managed Investment Act, which was passed in 1998, has worked without failure across three or four million customers. Essentially, the template for that could be easily transplanted into the anti-money-laundering regime, and it would be workable. That has been principles based, with companies developing compliance plans and internal audits, but still being reportable to the regulator—in that case, ASIC. We believe that that approach is the way we should be headed here, and we are happy to elaborate on that later in this particular set of questions. That is all I want to say, Chair.

CHAIR—Thank you very much, Mr Gilbert. We will move on to financial planning. Mr Anning, are you speaking on behalf of the Financial Planning Association?

Mr Anning—Yes. The Financial Planning Association of Australia appreciates this opportunity to provide evidence to the committee's inquiry. The FPA is the peak professional association for the financial planning sector in Australia, with more than 12,000 members organised through a network of 31 chapters across Australia and a state office located in every capital city. The FPA represents qualified financial planning practitioners who manage the financial affairs of over five million Australians, with a collective investment value of more than $560 billion.

It is widely expected the financial planners will often provide the first interface with the AML CTF requirements for many ordinary members of the public when they want to acquire commonly used financial products. Building on the views of its members, FPA, therefore, is well placed to comment on the practical impact of the government's proposed regime. As the financial planning sector is substantially composed of small business operators, FPA members help bring a different perspective when considering the draft legislation. Of FPA's 12,000 members, approximately 600 have an Australian financial services licence and, of those 600, only about 15 would be regarded as large corporates. The remainder of the members are principally practitioner financial planners employed by a licence holder.

Keeping our introductory remarks brief will leave more time for questions and discussion. There are several key issues that we would like to raise in particular. The proposed regulatory regime is intended to be principles based. FPA strongly supports a truly principles based approach to legislation, and recently argued for this in its submission to the inquiry into business regulation. In order for principles based legislation to work effectively, the legislation should be restricted to the main concepts. The detail of implementation would then be fleshed out in the subordinate regulations, with most of the procedural provisions contained in guidelines developed by industry in cooperation with the regulator.

One of the key benefits of principles based legislation is that it should be able to be confidently applied in a flexible manner to suit the needs of different businesses and their clients. Excessive prescription prevents businesses from determining appropriate ways of incorporating the requirements into their business practices. It should be possible to innovate within the broad bounds of government policy without having to seek explicit approval from the regulator. FPA is therefore concerned that the exposure draft does not set out all of the principles that should form the basis for the AML CTF regime. In particular, it has often been said that the regime will be risk based—that is, the reporting entities will be able to determine

the extent of their obligations and how they are satisfied consistent with the assessed risk of money laundering and counterterrorism activity.

However, the exposure draft is written in prescriptive, mandatory terms with provision made for exemptions to be obtained from the regulator on grounds not specified in the draft legislation. If the regime is to be truly principles based, then it should explicitly recognise the role of risk in determining the extent of obligations. Due to the shortcomings of the exposure draft in recognising the role of risk, it is only natural that industry have sought to see the whole of the regime—the exposure draft and subsidiary draft rules and guidelines—before committing themselves to the definitive comments on the proposed package.

Currently, section 6 of the draft defines a designated service as including personal advice given by a licensed financial planner in relation to securities and derivatives, a life policy or sinking fund policy, a superannuation fund and retirement savings accounts. This appears to be contrary to the assurance given several times to the industry by the minister and officials that the Australian regime would not go beyond the requirements needed to implement the recommendations of the financial action task force. It is clear from the activities listed in the FATF recommendations that it is only with a very wide reading that a connection can be joined to the provision of advice. It is also noticeable that the FATF report released last year into Australia's compliance with the FATF recommendations did not identify any shortcomings in terms of the obligations pertaining to the provision of financial advice.

After listening to the views of its members, FPA is not considering that it should argue that financial planners be exempted from having AML CTF obligations. Our members recognise that they will often be in the best practical position to identify their clients before implementation of a financial strategy. Members generally want to save clients the vexation of having to verify their identity a number of times in relation to separate financial products. However, there does not seem to be any convincing reason why the provision of financial advice in itself should trigger the AML CTF obligations. The obligations for financial planners should instead rest on actions taken to implement their clients' strategy. FPA therefore favours the position that the provision of advice should not be a designated service. It may be that financial planners undertake identification at the commencement of the client relationship, but it should be left for them to determine in accordance with their own practice management requirements.

As the exposure draft is worded currently, the reporting entity which bears the obligations would be the licensed financial planner, referred to in section 6. It could be taken that the obligations would rest solely on the individual financial planner—that is, the authorised representative of the licence holder rather than the licensee themselves. Given the extensive obligations required in connection with, for example, the AML CTF programs, it would be clearly impractical for financial planners to bear all of these obligations individually. FPA considers that effective fulfilment of the obligations will require recognition in the legislation of the pivotal role played by the licensed holder in provision of financial services.

Apart from the key issues just mentioned, FPA would appreciate the committee noting that there remain many practical issues about how the obligations will apply to financial planners. In view of the practical implementation issues which need to be resolved and the time needed for financial planners to implement the necessary changes, FPA urges the committee to

recommend an implementation timetable for the legislation which allows for the longest feasible transition period—or transitional periods, if a staged approach to implementation is adopted.

Given the scale of the task to create an effective AML CTF regime, it is not an indictment of the effort put in by all parties that much remains to be done before industry can comment definitively on the proposed regime. FPA strongly believes therefore that the government should extend the consultation period beyond the current deadline of 13 April in order for comprehensive analysis to be undertaken as to how the components of the regime will work together. The effective implementation of this legislation is too critical to Australia's welfare to be jeopardised by strict adherence to initial time lines.

CHAIR—Mr Roberts, do you wish to anything at this point?

Mr Roberts—No.

CHAIR—Mr Gilbert, you mentioned in your opening remarks that you regarded the consultation in the past few weeks as having come to a greater meeting of the minds. What characterises that that makes you describe it in those terms?

Mr Gilbert—With respect to identification procedures, there is an increasing awareness on the part of government, from our point of view, that perhaps the risk based approach is better than having people apply for exemptions.

CHAIR—And that is agreeable to your organisations? That is the sort of thing that the Financial Planning Association is looking for as well?

Mr Roberts—Yes.

Mr Anning—Absolutely. By going down the exemption route you are forcing people to look at the full guidelines and rules before making comments, whereas if a risk based approach was actually enshrined in the legislation it would be clearer.

CHAIR—I think both your submissions are helpful on that and really accord with the observations made by our previous witnesses.

Senator KIRK—Thank you for your submission. I have some questions about superannuation. You say that certain life insurance products should be categorised as low-risk designated services. Mr Gilbert, could you elaborate on that?

Mr Gilbert—We agree with the tenet of your question: superannuation is a low-risk product. It seems to me that you would have to do gymnastics to use a superannuation fund as a laundering product. Perhaps in the self-managed superannuation fund area that might be the case, but APRA supervises the official part of the industry very sternly and strictly, and trustees have an obligation to know their members. There are very strict preservation rules which, as time goes on, will see people having to keep their money until age 60. It seems to me that superannuation is a no-brainer in terms of it being a low-risk product. Would you like to add anything to that, Jenny?

Ms Wells—In terms of life insurance, with our modern-day products it is very difficult to launder, because you usually have to die or be seriously injured. Often you hear it said that

maybe you could, but they are talking about old-style products or perhaps the UK products. We contend that our products are very low risk.

Mr Gilbert—Just to add to that, I think it is worth saying that a lot of people enter the superannuation industry by virtue of a nomination of employer to exercise or complete their obligation under SG arrangements. Some of those people are not identified when they go in, but let me say that, when a trustee releases money to a person, that trustee has to be absolutely sure that person duly owns that money. We already have, in a way, a 'know your client' regime very strongly operating in super.

Mr Callow—I could add to that. IFSA is currently finalising a detailed submission on the low-risk nature of those products, which we will be providing to the department and to AUSTRAC. Perhaps in the next week or so we can provide it to the committee.

Senator KIRK—That would be helpful. From what you are saying to me, should it be the case that superannuation be excluded entirely from this regime—that it is adequately monitored already?

Mr Gilbert—That is a very helpful question, but I could probably give you a somewhat unhelpful answer and say that markets move and markets change. Let us look at it this way: the current money laundering law was put in place in 1988, I think. It was a long time ago and it has not been changed. It has basically stood the test of time. The way it stands the test of time is to keep it at principles base and allow the regulator and the industry to work together to combat any threats that there might be to the system. So our position would be that super and life insurance should be treated as low-risk, on a principles based risk management approach, rather than having them either in or out, because they might change. We would much prefer the risk based approach, although I suppose that some of our members would say that we would like a total exemption.

Ms Wells—Yes, some of them would.

Mr Gilbert—The moral high ground is achieved by saying: 'No, perhaps that might change. We want legislation which doesn't have to go back into the parliament every year or two years for amendment because it's not meeting the needs and changing social circumstances.'

Ms Wells—The practical effect, I think, would see super and life insurance being exempt from the identification requirements but subject to the ongoing monitoring for risk and any unusual activity.

Mr Callow—The FATF recommendations also advise that employer type superannuation products and life insurance products can be contemplated as low-risk. There is some guidance from FATF on those products.

Senator KIRK—In relation to self-managed superannuation funds, in your submission you say that there are potentially quite significant implementation issues. Could you elaborate on that for us?

Mr Gilbert—We do not represent the self-managed super funds, so we will be gratuitous in our remarks and say that the dilemma that they have is that the person who owns the funds is the same person who is complying with the law. I do not know how you get around that in

the sense of money-laundering, so we really do not have much more to add than that. It is a dilemma. It is a low-intervention regulatory regime. The self-managed super funds pay $50 a year or thereabouts for regulation. There are thousands of them—300,000 or whatever—and the ATO probably has in the order of only 100 or 200 people doing the regulation. We really cannot provide the answers on anti money laundering for self-managed super funds.

Senator KIRK—On the provision of financial advice, I heard what Mr Anning had to say. Am I correct in thinking that, in your view, the obligation on financial planners should really only come into effect when they implement a client's instructions or the strategy that has been put in place? Is that the point at which—

Mr Anning—That is right. To us that seems to be the most effective point at which to trigger the anti-money-laundering obligations. When you think it through, if you trigger some of the obligations when advice is given, it is very hard to define advice as a transaction. If you look at the draft obligations around suspicious transaction reporting, you find it can be triggered by someone coming to see whether you would be prepared to give them advice on a superannuation product. It seems to us that the compliance burden involved with having the obligations triggered at the advice point would probably not be warranted by the minimum levels of intelligence that AUSTRAC will gain on money-laundering activities.

Senator KIRK—Currently, is it the case that, almost as soon as you have first contact with the client, you would need to comply with the obligations under the legislation? Is that fair to say?

Mr Anning—That is right. It may be that the practices of financial planners would be better served if they did the identification upfront, at the initial contact with the client. But we believe that is a flexible point, and that they should be able to decide for themselves—that the obligation is confined to the implementation of the strategy, but they are allowed to conduct the identification earlier if that fits better with how they run their practice.

Senator KIRK—You also mention in your submission, on page 5, that there are many unresolved practical issues—I think that is how you described them—in relation to how the regime will apply to financial planners. You have probably already referred to some of those, but are there any additional matters that you would like to raise?

Mr Anning—Third party identification is a key issue, because often financial planners are seen as the first link in a chain of financial services transactions. So it is vital for us to understand how financial planners will be impacted by the regime, and to do that we need the draft rules and guidelines for third party identification. It raises practical issues. A financial planner may be undertaking identification on behalf of a number of financial institutions, and if they each have their individual risk assessment processes they may rate products and customers at different risk levels—therefore requiring identification to be done at various levels. So this has the outcome that the financial planner conducts an initial identification of the client, covering the maximum information required, just to cover all possibilities.

Mr Gilbert—One should never assume that we do not have know-your-client rules or some process for checking on suspicious transactions and for the reporting of them. It is worth the committee knowing that post 9-11 our companies had carried out—particularly international companies in our membership—checks on terrorists and transactions before the

regulator got to them. That is interesting. It is part of their fiduciary obligations to ensure that the funds are protected. So we and many of our members took strong steps to make sure that they did not have terrorist-type financing in their managed funds, for example. I am pleased to say that I do not think we found any specific transactions. Certainly AUSTRAC has not reported that to the parliament in its reports.

Senator KIRK—So there is some self-regulation in place already, you are saying?

Mr Gilbert—That is right, yes.

Ms Wells—We do not want money laundering or terrorists raising money through our funds. The damage to our reputation and other issues mean it is just not something that anyone wants.

Senator LUDWIG—I guess we all agree that anti-money-laundering legislation is required. I suspect no one here disagrees with that, and that we then need to meet the 40 plus 9 FATF recommendations. Everyone is nodding, so I take it we start off from at least that base. The research tells me there is $2 billion to $3 billion laundered through Australia. That is my research. Is there any better research that is available, from any of the participants?

Ms Wells—Not that we are aware of. We hear reports as well, but they have never been substantiated as far as I am aware.

Senator LUDWIG—So it has got to come from somewhere, and has got to go through somewhere. You do not say that it is not IFSA, or financial planners or other entities that you represent that are potential risks or that are groups through which money is currently being laundered. You say you are not squeaky clean.

Mr Gilbert—What I would say is this. It has been very hard to find evidence—from the regulator at least—of such activities in the particular products that we offer. Furthermore, when you look at the way the people come into the industry and the way the industry is taxed—for example in the managed investment tax regime—you will see that if you do not have a valid tax file number the tax on that is 48c in the dollar. It is not a very effective way of money laundering if you are going to lose half of it via by withholding tax. So the way our industry operates, I think, militates against high risk activities. We believe that if there has been any money laundering it has been very minimal and difficult to identify.

Ms Wells—We are a very highly regulated industry. It is very difficult to launder in that environment.

Senator LUDWIG—And that is why you argue that a low-risk category for some of your products is warranted.

Mr Gilbert—Absolutely.

Senator LUDWIG—Have you raised that with the Attorney-General's Department during your meetings?

Mr Gilbert—Yes, and with the minister.

Senator LUDWIG—What has been their response to date?

Mr Gilbert—We believe that their principal response has been that these probably are low risk. But we are still working on articulating that into a bill.

Senator LUDWIG—You have also mentioned CLERP 6 consultation, as earlier witnesses have. Is the consultative period—that is, the exposure draft—sufficient? Are you working through all the issues that you have raised with the minister? Do you see that there will be a resolution by mid-April?

Ms Wells—I think the minister, the department and AUSTRAC are trying very hard to achieve that. We share the FPA's concern about the 14 April time line. This is a large piece of legislation and it is important to get it right for consumers as well as business. So we do have some concerns but we understand that they are working very hard to try to achieve that outcome.

Senator LUDWIG—I guess my question is more pointed than that: will you meet the deadline?

Mr Callow—One of the issues is that we still have not seen the full package and in fact substantial parts of the package have not been finalised. So, whilst the formal consultation period started in December and is to finish in mid-April, we are now in March and we have not seen the full package.

CHAIR—I assume you are referring to the rules and guidelines.

Mr Callow—Yes, that is correct.

Senator LUDWIG—I was going to come to that.

CHAIR—Sorry.

Senator LUDWIG—It is slow. How many of the guidelines and rules have you seen?

Mr Callow—I think six is the correct number.

Senator LUDWIG—Can you tell me what they are?

Mr Callow—They were released in December. There is one on the AML programs and one on the identification requirements. You are testing me now. I will have to refer to the package. We have also been advised that a number are still on the way.

Senator LUDWIG—Are they rules or guidelines or a mixture of both?

Mr Callow—A mixture of both.

Senator LUDWIG—So they were the ones that were released publicly back at the time of the exposure draft.

Mr Callow—That is correct, and a further one has been released.

Senator LUDWIG—We will find out which one in due course, from AGD. How many more do you expect?

Mr Callow—There was a list produced earlier this year suggesting around 36 in all, approximately.

Senator LUDWIG—When do you expect to see the next 30-odd?

Mr Callow—During the consultation process it was suggested that, depending on the workload, we would see them a month prior to the end of the consultation period.

CHAIR—That is yesterday, literally.

Mr Callow—That is correct.

Senator LUDWIG—You say that you are capable of working through to the timetable that is provided, but can you demonstrate to me that you will have a final position when you do not have the other 30-odd guidelines? Are they not critical?

Ms Wells—They are critical, and that is why I am saying that we do have concerns.

Senator LUDWIG—If the exposure draft and the framework legislation are sufficient then the guidelines and rules can be developed later and we can move on. Is that the position of AGD or the position that you can adopt—that we can deal with the exposure draft, look at how that principle based framework is put in place and move on to developing guidelines and rules further down the track?

Mr Gilbert—If the legislation is very high level in concept and span, if it is principle based and if industry is given—

Senator LUDWIG—Can I stop you there. We have the exposure draft.

Mr Gilbert—Yes.

Senator LUDWIG—You are saying ‘if’. Is it?

Mr Gilbert—We submitted earlier that the identification issues need to be put into a risk based approach, as opposed to asking for exemptions. Let us get through those ‘ifs’. What if industry is given the same sort of mandate that industry in the UK was given? Perhaps it is worth my tabling for the committee the Joint Money Laundering Steering Group press release of 13 February, which provides a good template for moving down the industry consultation path. If we can get that legislation at the right level and get the industry development of guidelines at the right level, we probably can move into supporting the legislation in a shorter rather than a longer time frame.

CHAIR—Mr Gilbert, just clarify for me the ‘Joint Money Laundering Steering Group’.

Senator LUDWIG—That is the English group.

Mr Gilbert—Yes. It is basically a joint venture between the regulator and a whole body of industry people. The minister has an advisory committee. If that were to be formalised and done more on a mutual venture basis and our being decision makers rather than submitters, we could probably truncate the passage of this legislation. Until we have those things clarified, as the ABA witnesses said, we would have some real cost and time question marks. Is it worth tabling that, Michael?

Mr Callow—Yes. We do have a copy of the most recently released guidance notes and a press release which accompanied them.

CHAIR—Thank you very much.

Senator LUDWIG—A lot of that is available on the web as well.

Mr Callow—That is true.

Senator LUDWIG—You favour a joint model that is being utilised in the UK as a method of preparing the rules and guidelines for industry.

CHAIR—Can I ask whether the Financial Planning Association agrees with that?

Mr Anning—Yes. As we mentioned in our opening statement, we are very supportive of a principle based approach to the legislation. At the moment it is impossible to take a definitive position on the draft package, given that so much of it is unknown. Currently, you cannot make sense of the draft bill until you see the subsidiary pieces. If the draft bill contained all the relevant principles—the key one which is missing for us at the moment is appropriate recognition of the risk based approach to implementation—it would be possible to comment properly on the bill itself rather than wait for the rules and guidelines.

Senator LUDWIG—Just remind me: is the operation of the joint committee in the UK funded out of industry or the UK Home Office?

Mr Gilbert—We would have to check that for you. Let me say that all of our involvement to date in this process has been with funding from our end, and going forward we would see that as a contribution that we make to ensuring that we have good ANL procedures.

Senator LUDWIG—The UK committee is a joint decision making body as opposed to a consultative process, or does it do both and make a firm recommendation?

Ms Wells—It is ultimately approved by the Chancellor. Is that right?

Mr Gilbert—Yes.

Mr Callow—My understanding is that it is a joint decision making body. The guidelines are not mandatory but they are referred to by the regulator as being a safe haven.

Senator LUDWIG—That is the defence that is created. If you comply with the guidelines, you are regarded as meeting the spirit of the legislation if one slips by.

Ms Wells—The UK sees them as satisfying the FATF requirements. FATF is quite flexible. Sometimes we have a tendency to think that they are very proscriptive, but they are not.

Mr Callow—The UK regulations refer to the ability of the FSA or industry to prepare guidelines. The FSA has decided not to prepare guidelines and has let the industry prepare the guidelines. That is their preferred model.

Senator LUDWIG—Who prepares the rules?

Mr Callow—They are guidelines rather than rules.

Senator LUDWIG—Because they use a principle based approach with risk based application you then have guidelines, which provide you with the defence. Have I got that right?

Mr Callow—Correct.

Mr Gilbert—There are so many different industries in this financial services segment that it is impossible to do it for everybody in black letter. You have to rely on industry to lead the way here. We at IFSA have about 20 standards and guidelines by which we operate and in which there has been no parliamentary intervention—and they work. We do unit pricing, fund valuation, conflicts of interest and soft dollars all through our own code, and those things work. They are time proven. I am sure the FPAA does the same.

Mr Anning—We have the same self-regulatory application.

Senator LUDWIG—In terms of how the financial planners are going to deal with the privacy issues, would all your members—or some of them—be subject to the privacy principles? The threshold is $3 million and over. If you are a health service provider you would then be subject to the privacy principles. If you are under that threshold then you would not be subject to them, unless you 'opted in'—I think that is the expression being used. Would all your financial planners be subject to those?

Mr Anning—Most of them would be.

Senator LUDWIG—So not all of them would fall under that because some of them would be small entities?

Mr Anning—Yes.

Senator LUDWIG—Have you examined, from the interested perspective, how they will deal with the privacy concerns of their customers or their clients? I am not sure how you refer to the person who comes in the door and asks for financial services.

Mr Anning—We usually refer to them as clients. We have given consideration to the privacy aspects in two ways. One is that we presume that the agreed obligations for identification will be given specific exemption from the privacy regime. Also, by the effective implementation of a risk based approach, we expect that the identification requirements that financial planners will need to perform will be at a reasonable level.

Financial planners already have an obligation to know their clients under the Corporations Act. Money-laundering certainly adds a rigour to that and may broaden those obligations if they come across high-risk products or individuals, but we expect that, for the ordinary business of most financial planners, they would not have to be asking very intrusive questions of their clients based on risk.

CHAIR—They would not have to be, did you say?

Mr Anning—No. There would, of course, be individual cases where they would need to go beyond the minimum.

Senator LUDWIG—I turn to the electronic verification that you have referred to in your submission at page 6, item 9. I understand the government is trialling an electronic verification process at the moment. Would you see it as helpful to industry if that were to be broadened out to allow industry to access it?

Ms Wells—Yes, we would, but we understand that that is not the intention at this stage.

Senator LUDWIG—Have you asked government about its intention in relation to electronic verification and its use for private industry?

Ms Wells—There is support for it. However, we are concerned that we are still talking about it rather than having any action on making it happen for the industry. That is a strong issue for us. We would like to be working on how an EV solution would be proposed and delivered.

Senator LUDWIG—I think in your submission you note that the bill as currently drafted will possibly require multiple verifications of the same customer due to, I guess, a number of interactions and the number of reporting entities in relation to the same transaction chain. If I

understand that correctly, you will then be required to verify the same person a number of times.

Ms Wells—Potentially.

Senator LUDWIG—If it is the same front-of-office person it is going to get tedious after a while, isn't it?

Ms Wells—It will.

Mr Gilbert—Precisely. A risk based approach might imply that there are different levels of identification in terms of sophistication and intensity.

Senator LUDWIG—In terms of that electronic verification, industry would not mind contributing to the cost of the service that was provided as a user pays system, would it?

Ms Wells—No.

Senator LUDWIG—I do not want to commit you to that now. Maybe I should qualify that. But in terms of exploring the options that are available—

CHAIR—I do not think we could really regard it as a binding document.

Ms Wells—We do believe that with goodwill on both sides we can deliver a simple solution. We just need to talk more about that.

Mr Gilbert—For example, we recently made a submission to the Senate Finance and Public Administration Legislation Committee on changes to the electoral law, about use of electoral rolls, and that is one bell or whistle that could be used to try and add to our tax file numbering procedures. There is more than one way to skin a cat here.

Senator LUDWIG—More broadly, what happens if intransigence sets in? Say if we get to mid-April and the guidelines have not been done but we have got the exposure draft—what happens next for you, in representing your clients and your various industry participants?

Ms Wells—The worst-case scenario would be that we have to 100-point ID our new customers. I believe we have a meeting of minds on existing customers as long as they do not set up risk triggers, which we still need to work on. But that would be very difficult for the industry to implement. It would be a huge cost and it would be an inconvenience to our customers to do the 100 points. A lot of our members do not have branches. They would have to queue outside post offices.

Mr Gilbert—It probably means that, depending on how you estimate it, between one and two million people would somehow have to be identified through a system which does not have a structure to do it.

Senator LUDWIG—And from your perspective the advice issue is the critical issue in terms of your clients coming forward?

Mr Anning—Absolutely. If the 13 April deadline comes and goes and the draft bill is implemented as currently written then I think we are going to have major problems on our hands similar to the situation of the infamous Financial Services Reform Act where the level of prescription has resulted in practical difficulties and the legislation having to be revisited.

CHAIR—We had the benefit of some views on that this morning.

Senator LUDWIG—Is that where the minister did the backflip?

Ms Wells—I actually believe it would be worse than the FSR situation. I think this would represent higher costs for our industry.

Senator LUDWIG—I want to know if he did a backflip. Is that true? Are you able to comment?

CHAIR—I do not think the witnesses are commenting on that matter right now, Senator Ludwig.

Senator LUDWIG—No, they are not. They seem very quiet. Thank you, Chair. No further questions.

CHAIR—I thank all the witnesses for appearing this morning and for your submissions. As I said to the previous witnesses, there may be some matters we wish to follow up at the conclusion of taking evidence today. If we need to do that we will do that on notice. Your assistance would be gratefully received. Thank you all very much.

[10.48 am]

DOWNY, Mr Christopher John, Executive Director, Australian Casino Association

SEYFORT, Mr Anthony Lloyd, Partner, Lander & Rogers, lawyers for Australian Casino Association

CHAIR—Welcome. We understand that the Australian Casino Association has not lodged a submission with the committee but we are very grateful for your appearance here today. We understand this to be an important piece of legislation and want to discuss any issues that may be of concern to your organisation. I invite you to make a short opening statement. Then we will go to questions.

Mr Downy—Thank you, Madam Chair. We do have an opening statement, since we have not made a formal submission. Firstly, we would like to say that we support the Australian government initiatives to reform and strengthen Australia's anti-money laundering regime and we do support the principles underpinning the draft exposure bill. The Australian Casino Association represents the Australian casino industry at a government and community level and promotes the casino industry in Australia as one that is a world leader in regulatory standards and professionalism. All 13 casinos in Australia are members of the association together with Christchurch casino and Dunedin casino from New Zealand, which are associate members.

We will be providing a major submission to the Attorney-General's Department suggesting a series of amendments to the draft exposure bill, but we are taking this opportunity to highlight some fundamental issues that we think need to be considered in any revision of the draft exposure bill. The principal concern is that the AMLCTF reforms proposed by the Australian government are workable and meaningful in meeting the government's policy objectives. We also accept and appreciate the minister's assurances that the government does not intend the new legislation to be an unnecessary burden on industry and we make it clear that we are satisfied with the consultation mechanisms that the minister has put in place at this point in time.

Australian casinos operate in total compliance environments subject to stringent regulatory controls within each state and territory. The regulatory regime includes all features aimed at integrity in ownership, management and operations which are recommended by FATF. Central to the regulatory regime is the integral position of state based casino regulators, whose focus is on the probity and operational integrity of casinos in their jurisdictions. Casinos already provide law enforcement authorities with an effective window into their patrons' activities far exceeding that afforded by other businesses which are of interest to financial intelligence units. Contrary to popular belief by uninformed persons outside the industry, Australian casinos have frameworks in place to combat money laundering. These include: restrictions on cash transactions, the use of player identification measures, and the recording and monitoring of transactions. Casinos work with AUSTRAC by reporting any suspect or significant transactions to the agency. AUSTRAC analyses information received and provides transaction reports to Commonwealth, state and territory law enforcement revenue agencies.

We do wish to make some general comments regarding the draft exposure bill and, in doing so, we are mindful of minister's direction announced at the meeting of the advisory group of 7 March 2006 that the Attorney-General's Department should review the draft exposure bill with a view to ensuring that the bill is more risk based and less prescriptive. The first issue we would like to talk about is the essential difference between gambling as a designated service, and financial institutions. In the first instance, we draw the committee's attention to what it sees as being a fundamental issue: the essential difference between the two industries that are the major focus of the draft exposure bill, the financial sector and, while it refers to gambling services, particularly casinos. From both the consumer's perspective and a business perspective, gambling is fundamentally different from the services provided by financial institutions. It is essential to identify those differences in order to properly analyse the extent to which a regime which might make good sense for banks can actually work and offer useful regulatory outcomes for casinos. It is common practice for customers of banks to provide the bank or financial institution with extensive personal and financial information to be given access to generally accepted products such as credit cards, ATMs and electronic banking. As a result, the bank is well placed to conduct due diligence on one of its customers if it has reason to be suspicious.

On the other hand, the vast majority of casino customers are small recreational gamblers, typically occasional customers, who are no different from customers of restaurants or other entertainment services. To attempt to identify their transactions, record them, data match them or otherwise track them makes no sense because it is almost inconceivable that they are associated with money laundering or terrorism financing. The draft exposure bill will require a casino to obtain detailed information about high risk customers including personal financial information. The major concern with regard to this issue is that if a casino has suspicions about the activity of such a customer then any attempt to obtain information from the customer may alert that person to the casino's interest. As already indicated, under the current legislation reports on such customers are sent to AUSTRAC, which may refer matters to relevant law enforcement agencies. Following this, a casino may work in cooperation with law enforcement agencies in an ongoing review of that customer's activities. The Australian Casino Association believes that this system works well and needs to be incorporated in the draft legislation.

The second issue concerns the need to have a safe harbour. With the increasing complexity of business affairs and the prescriptiveness of regulation, a trend has emerged for the enactment of laws, expressed in very broad terms, which require the person regulated to achieve an outcome. As opposed to black letter law, outcomes based law tries to be light-handed and efficient yet more effective by casting broader obligations on business and shifting some of the onus to business to devise practices which should attain the regulatory objective. Many aspects of the proposed regime found in the draft exposure bill are actually outcomes based law. In particular I refer to the clause 74 requirement for all reporting entities to have a program, and this raises a number of complex and deeper issues.

Devising the optimal content of a program will be a hard task for all reporting entities and particularly for casinos. Casinos have a long track record of working cooperatively with AUSTRAC and other regulators. The Australian Casino Association has already commenced

work on a draft program template for adoption by its members which will then be adapted to suit the particular needs of individual casinos. We did originally propose a draft AML code of practice, so obviously the will is there on our part to cooperate and make any new regime work.

However, our members fear the consequences, under statute and civil law and politically, of getting it wrong or falling foul of a complex and unwieldy set of requirements. For a program to have the best hope of attaining the regulatory objectives for it, reporting entities must have some safe harbour from adverse consequences where they act reasonably and in good faith. It also is very unclear how a broadly cast program required by a federal law would reconcile with the obligations of the specific state statutes such as the Casino Control Act if there were some inconsistency—obviously, specific provisions—and whether it is intended that a program will override state based legislation. In general, the draft exposure bill could be amended to ensure that nothing casinos do in lawful compliance with their respective state based obligations would constitute non-compliance with the draft exposure bill.

The other issue that I will mention briefly concerns the powers vested in AUSTRAC which could see the whole regime turned on its head by rule amendments which take effect before parliament has had a chance to take the difficult and practically unlikely step of contemplating disallowing them. The Casino Association considers that the consultative approach taken to date and the consultation process expected during the formulation of the rules should continue. However, in the interests of providing certainty for business, consideration should be given to including in the draft exposure bill a review mechanism for the making of new rules and changes to existing rules that AUSTRAC, whether of its own volition or by a direction or policy pronouncement by some minister of the day in the future, unilaterally imposes and which are not considered reasonable by the industry. Thank you.

CHAIR—What is the practical difference between the system which currently applies in which you report to AUSTRAC your identification of suspicious activity or whatever it may be—I think you said a high risk customers—and what the exposure draft would require your members to do?

Mr Downy—I will ask Anthony to answer this if I do not quite get it correct. Basically, we are not talking about the current system which, as the new legislation stands, is still in place—that is, for suspicious and significant transactions. It really is a question now of the next step, which is customer due diligence and the requirement to undertake verification of identity of high-risk customers. The remarks I made are in regard to that area. We are talking about the system that can be in place for keeping track of some of those customers as far as suspicious matters are concerned and the way they are dealt with as opposed to what is required in the draft exposure bill.

Senator LUDWIG—It would be useful to say what you actually—

CHAIR—What do you do now and what will you need to do.

Senator LUDWIG—You need to report everything over $10,000, but there is also suspicious—

Mr Seyfort—At the moment we do significant cash transaction reports, which are over $10,000. They will be known as threshold transaction reports. Unless regulations are made to

extend the concept, which is possible under the bill, those will be essentially the same as they are at the moment. Current suspicious transaction reporting will become suspicious matter reporting. The theory of it and the catalyst for it under the draft guidelines are broader and therefore it is a bit more troublesome. But, essentially, the casino industry can cope with that. As Chris said, the key difference between what is in the current FTRA and the bill is the whole 'know your customer' regime. When you have tens of thousands of people washing through a large entertainment facility, how do we know them all?

CHAIR—So your concerns go to the need to actually provide identification information about people when you are notifying suspicious and high-risk transactions—is that right?

Mr Seyfort—Not necessarily, because we do that at the moment. A lot of large-cash transaction reports arise from the casino cashier's cage, so that information is captured at the moment.

Senator LUDWIG—Can you go through that with a bit of detail? Forgive me; I am not a frequenter of general note of casinos. In terms of the suspicious transaction types of reports and then 'know your customer', I would envisage that, when someone came to change or exchange significant amounts that might be captured by the legislation, you would have a teller or a person in a cage that can ask for know your customer details at that point. Is that what you are talking about? Is it the interaction at that point that concerns you? Or is it generally those people who might deal in cash transactions on the tables for whom, because of the potentially large sums that could occur, there is a requirement for the person on the floor to start asking questions which could be troublesome?

Mr Downy—I think that is the issue. We are basically seeing and our members are telling us that, at the present point of time, because of the system that is in place, where you might have someone engaging in suspicious activity and—without going into the full detail of which particular states or the way the system works—that information is passed on to AUSTRAC, there may be times where a person is kept under—

Senator LUDWIG—I should qualify this. If any of it is sensitive then we need to—

Mr Downy—I will put it in very general terms.

CHAIR—We can go in camera.

Senator LUDWIG—Yes, we can always go in camera if you want to.

Mr Seyfort—That might be an idea, mightn't it?

Mr Downy—If I just talk in general terms, I think it should be okay. The concern our members have is this whole question of alerting a high-risk customer to the fact that they are under suspicion. Asking them to provide identification basically alerts them to the fact that they may be under investigation. Our members tell us that the way the system works at present is that some of our members may be working with other law enforcement agencies, keeping track of the activities of a particular person who is engaging in suspicious activities. That is the point I was raising.

Senator LUDWIG—The concern is about tipping off.

Mr Downy—Tipping off, yes.

Senator LUDWIG—As part of a know your customer requirement, they say, 'I'm required to start asking this particular range of questions,' but it tips over—to use the same phrase—into effectively tipping off, because it becomes such an inquiry that the person who is the object of the interest then says, 'Why are you asking all these questions?'

Mr Downy—Exactly.

Mr Seyfort—And that is because the content of what the additional know your customer information regime requires is something that casinos would not ordinarily have. You heard from previous witnesses that banks and financial institutions typically know their customers. Financial planners are required to know their customers. In casinos, we know a bit about people who do large transactions and in respect of whom we are lodging a suspicious transaction report at the moment. Chris's point there is about having to go further. The other point, though, is that at the moment we simply do not know the vast majority of people who come in once in a blue moon and spend a tiny amount of money, and there are thousands and thousands of those people. So, apart from the point Chris has raised about the depth of the problem with the additional know your customer information, we have a problem with the whole of part 2 of the bill—simply this concept in the bill at the moment that you have to know every customer, full stop, whether they are suspicious, large or whatever.

CHAIR—Its practical application to casinos is completely different from its practical application to a financial institution.

Mr Seyfort—Absolutely.

Mr Downy—That is right, yes.

CHAIR—So when you say you are satisfied with the consultation so far, which you said several times, first of all, what is the ACA's role in the consultation? Secondly, what capacity have you had to advance the case that you are dealing with fundamentally different processes than I would have thought the majority of the other participants in the consultation process were dealing with?

Mr Downy—We have had meetings with AUSTRAC and over 2½ years we have had meetings with A-G's—and we will continue to have meetings with A-G's—at which we have advanced these arguments.

CHAIR—You do not actually sit on the roundtables that have been formed?

Mr Downy—We sit on the AML-CTF advisory group but we have not been sitting on the roundtable. I think a distinction that needs to be drawn is that when the banks and the finance sector talk about 'industry' they are talking about their industry; they are certainly not talking about ours. I think the way in which the consultation mechanism has worked has been quite satisfactory in that we are meeting separately. I think that is a step in the right direction, because we do have different issues.

Senator LUDWIG—Will you be able to get to a position by mid-April? That is when the exposure draft finalises. You say you are preparing a submission, one that obviously has not been finalised and forwarded to the Attorney-General's Department at this point. Does that leave sufficient time for the Attorney-General's Department to read your submission, digest it, consider any of the matters that you have raised, get back to you for clarification and a final

answer and for you to then say, 'Yes, we are now satisfied with the direction in which the legislation is going and we can comply'?

Mr Downy—I would think it would but that would depend upon the review of the draft exposure bill as a result of that meeting last week. Obviously, it depends upon what changes are made to the draft exposure bill. But we have finalised a draft of our submission, which we will be taking to Attorney-General's in the next week to discuss with them.

CHAIR—Will that be a confidential document or will that be something that you could provide to the committee for reference? That is obviously a matter for your organisation, but I was wondering if you would consider, once you have provided it to the department, providing it to the committee, provided that it is a bona fide version.

Mr Downy—We can take that on board. I will certainly discuss that with my members. I do not think that would be a problem.

CHAIR—It would be helpful to have that perspective.

Senator LUDWIG—I refer to the issue of a state based compliance regime. You already have state based legislation that you have to comply with. Are there any current issues as to problems arising from the exposure draft whereby meeting the proposed law would conflict with a state law?

Mr Downy—I would not think there would be.

Mr Seyfort—There is no direct conflict with the draft exposure bill. One of our concerns is what is going to be required of us under the programs. The draft rules on programs are very detailed, as you would know. They cover a whole range of possible processes as well as desired outcomes. If our statutory obligation was to produce a program that was to give the greatest chance of meeting the processes described under those rules, it is possible that that may conflict with state casino law.

Senator LUDWIG—It was of course your concern that that would then effectively become a rule that you would have to comply with and only then would it be subject to disallowance. You are then in a position where you would have a conflict between complying with a federal law in relation to AML or a state based law in relation to the operation of your casino. What happens then?

Mr Seyfort—That is a good question.

Mr Downy—The main concern as to the rule is not so much to do with the program. Given the legislation as currently drafted, we would rather see an independent review mechanism of the rule-making powers of AUSTRAC.

CHAIR—When you say 'independent', what do you mean by 'independent'?

Mr Downy—It might be a third party. It is not that we do not trust AUSTRAC, by the way.

Senator LUDWIG—That was my next question.

Mr Downy—We certainly do trust AUSTRAC. We do not have a problem at this stage, but we are looking ahead and we are looking at what might happen sometime in the future. We feel, given the way in which it is drafted as to AUSTRAC's rule-making powers, that they should be some change. We cannot offer any suggestions as to what it might be but it should

be some independent mechanism whereby our industry would have some role in any changes to the rules in the future.

Mr Seyfort—Without labouring the point, to get to this point in the process has taken a number of years, including this Senate committee's inquiry and various other external processes. We could reach the position where we have a set of rules which require us to do certain things and then AUSTRAC could change the rules. You could really overturn the regime, as Chris said before, and turn it on its head. There is obviously a statutory obligation under the Legislative Instruments Act to consult, but that could happen fairly quickly and take effect immediately. Some of the changes could have major consequences and it seems to be delegating a lot more legislative power than is usual.

CHAIR—And, of course, the committee finds that consultation under the Statutory Instruments Act means different things to different people.

Senator LUDWIG—So true. Have you had a look at any other models for consultation in terms of developing rules? There was an earlier submitter who indicated that there was a UK model for a joint committee that might assist them in progressing the rules. Have you had an opportunity to look at other worthwhile models? You are not suggesting that the casino industry develop it. You are saying an independent body will. I guess AUSTRAC is, in part, an agency. It is regarded as independent of government in that sense, but it will also be the monitor and the regulator. Is it your concern that the regulator is developing the rules?

Mr Seyfort—That would be one of our concerns, yes.

Senator LUDWIG—Have you looked at any other model that might work?

Mr Downy—We have not looked at any other models, no.

Senator KIRK—You mentioned that you currently have a code of practice in relation to AML. Is that correct?

Mr Downy—No. We developed a draft code of practice in the early stages of the consultation process when we were working up our submission to the issues paper two years ago. All I am saying is that we are approaching this in good faith and with best endeavours in mind. Certainly, we will continue to work that way.

Senator KIRK—So there is currently no code of practice in place for your members; that was just a draft?

Mr Downy—No, that was just a draft.

Senator KIRK—Right. It was part of the consultation.

Mr Seyfort—Just to address that perception, whilst there may not be one document in place called a code of practice, we are obviously subject to the FTRA and a whole matrix of informal and formal dealings with state and federal law enforcement agencies at all levels. The system works very well and very comprehensively. It might not be captured in one document, but there is a very complex regime operating already.

Senator LUDWIG—Is there a reasonably simple explanation of how you see the safe harbour would operate? Is that a matter that you are trying to achieve the AGD's acceptance of at this point in time? You do not see it reflected in the current legislation.

Mr Seyfort—Not clearly enough, no. Like so many of these outcomes based laws, there is a desire on the part of the parliament to put on us an obligation to achieve a regulatory outcome. We will use our best endeavours to do it. We will write a program which we will need to tie in with all of the matrix I referred to earlier, but we need to be confident that we can write a program that is reasonable and sensible and that, if we have done it in good faith and done it reasonably, we will not be prosecuted for an isolated instance of something which is perhaps an outcome that does not meet the regulatory objective. It is a bit like the whole issue with sort of defensive reporting and defensive lodgment of documents. If there are consequences for getting it wrong, civil or statutory, that might skew the way a program is written to make it focus on process rather than outcomes. We want to write and have a program that achieves the regulatory objectives that the government has in mind. We do not want to write a program that just covers our backsides.

Senator LUDWIG—The safe harbour regime would allow that to occur?

Mr Seyfort—Potentially, yes.

CHAIR—Thank you both very much. We appreciate the association’s input to this hearing process. If you and your members would consider providing even an amended version of the organisation’s submission to the department on the exposure draft, that would be helpful to the committee’s considerations.

Mr Downy—Sure.

CHAIR—Thank you both very much for appearing today.

Mr Downy—Thank you very much.

Proceedings suspended from 11.14 am to 11.24 am

PILGRIM, Mr Timothy Hugh, Deputy Privacy Commissioner, Office of the Privacy Commissioner

SOLOMON, Mr Andrew Gordon, Director, Policy, Office of the Privacy Commissioner

JOHNSTON, Ms Anna, Chair, Australian Privacy Foundation

VAILE, Mr David, Vice-Chair, Australian Privacy Foundation

CHAIR—Welcome. We have separate submissions from your organisations, so I will invite each of you to make an opening statement pertinent to your own submission and then we will go to questions. We will start with the Office of the Privacy Commissioner. The office has lodged a submission with the committee which we have numbered 23. Do you need to make any amendments or alterations to that submission?

Mr Pilgrim—No.

CHAIR—I invite you to make an opening statement.

Mr Pilgrim—Thank you for the opportunity to appear before the committee today. As we mention in our submission, the Office of the Privacy Commissioner also intends to make a submission to the review into this exposure draft being conducted by the Attorney-General's Department. It is our intention to consider the bill and accompanying material in somewhat more detail than we have been able to for this inquiry, and we may take the opportunity there to raise additional issues. However, it is our expectation that the broad themes and issues introduced in our current submission will remain constant. The office also appreciates the opportunities it has had to date to discuss this issue with the Attorney-General's Department during the development of Australia's response to organised crime and terrorist financing risks.

In making our submission and subsequent comments, our office recognises Australia's obligations as a founding member of the Financial Action Task Force on Money Laundering to implement a range of global anti-money-laundering and counter-terrorism financing standards. We also recognise that there is a strong public interest in ensuring that Australia's financial regulatory systems and procedures incorporate appropriate responses to the risks of money laundering and terrorist financing. At the same time, it is important that, in giving effect to these standards, consideration is also given to the effect they may have on the privacy of Australians' personal information. It is therefore important for reviews such as this—and the review by the Attorney-General's Department—to be held and given significant weight, as this bill has the potential to capture the personal information of a great number of Australians.

The overall effect of these various provisions would be to extend the regime under which it is mandatory for reporting entities to collect personal information about individuals, retain that personal information for extended periods and to disclose that information to AUSTRAC—which may in turn make it available to a range of other government agencies. The AML regime as set out in the exposure draft has the potential to capture very significant amounts of personal financial information which is considered particularly sensitive by the community.

From our consideration of the exposure draft to date, there are a number of issues that we believe may need further consideration. These include—but are not limited to—whether there is a sufficiently robust privacy regime to support the draft bill; the access to AUSTRAC held data by other Australian and state and territory agencies; and retention issues relating to the holding of information collected by reporting entities. As suggested in our submission, given these issues and the extent of the information handling practices that will be implemented under the AML regime, the proposal would benefit greatly from an independent privacy impact assessment being undertaken. A PIA, privacy impact assessment, is an assessment tool that describes in detail the personal information flows in a project and analyses the possible privacy impacts. It may also assist in identifying and evaluating the impact of such matters, as we have raised in our submission. I welcome any specific questions on the office's submission.

CHAIR—Thanks very much, Mr Pilgrim. Mr Solomon, do you have anything to add to that?

Mr Solomon—No.

CHAIR—We will move on to the Australian Privacy Foundation. The APF has lodged a submission with the committee which we have numbered 4. Do you need to make any amendment or alteration to that submission?

Ms Johnston—No.

CHAIR—I invite you to make an opening statement.

Ms Johnston—I wish to note at the outset that the author of our written submission is our Policy Coordinator, Nigel Waters. Unfortunately, Mr Waters was unable to be here for these hearings. David and I will do our best to answer any questions; however, we may need to take some questions on notice if we are unable to answer them today.

If the proposals represented in this exposure bill can be described in one word it is 'disproportionate'. In so many ways, these proposals are a heavy-handed approach and may be even a ham-fisted approach to managing the risks of money laundering and terrorist financing. Instead of taking a balanced and risk assessment based approach to monitoring financial transactions, an attempt has been made to sweep up all manner of perfectly innocent transactions and innocent people into a vast net of surveillance.

This bill is objectionable because it treats everybody as a suspect and imposes a draconian scheme of reporting on businesses. In short, this bill attempts to recruit businesses into spying on their customers on behalf of the state. I will shortly outline our major objections to the proposals and our suggested amendments or reforms. However, I wish to make the comment that each of these proposals, though objectionable in isolation, is even more so when taken together with other current initiatives by the federal government. Therefore, we ask the committee to consider the privacy discrimination and natural justice implications of these proposals not in isolation but with an eye to their compounding impact as other identity management initiatives converge. These other initiatives include the document verification service, development of a common proof of identity scheme across government, development of a system for e-authentication of individuals across government, more data matching between and across federal and state agencies, the likely introduction of individual Medicare

cards with photographs and microchips included and the possibility, though we hope remote, of a national identity card.

I turn to the bill's proposals in brief. The bill has three main elements which take the scheme well beyond the current act: expansion in the range of organisations subject to the law—reporting entities; expansion in the types of financial transactions to be subject to monitoring, tracking and reporting; and tightening of the customer identification requirement. Together with AUSTRAC's role as the collator of all reports, the secret nature of some reports and the absence of access and correction rights and a dissemination regime under which more than 30 Commonwealth, state and territory agencies are provided with online access to the AUSTRAC databases for an increasingly wide range of uses, we see this regime as an unacceptable intrusion into the privacy of innocent Australians.

We reserve our strongest criticism for the notion of secret reporting of suspicious matters. In our view, the concept of secret files compiled on the basis of amateur assessments and wholly subjective criteria is inconsistent with a free society. We suggest these provisions must be withdrawn. Of particular concern is the second tranche aspect of these proposals which will increasingly see small businesses brought into the compulsory regime of collecting personal information about their customers and reporting it to AUSTRAC. Small businesses of the types to be included in this regime are exempt from privacy laws and thus have no obligation to protect the privacy of their customers' information, collected for the government under government fiat. There is little to stop them using their customers' personal information for secondary purposes.

By way of example, I would like to draw the committee's attention to an article about the proposals in this month's *Law Society Journal,* which came out yesterday. The article is already promoting the benefits to lawyers of these new anti-money-laundering laws, because knowing more about your customers' finances can 'mean you can sell a raft of additional services to them'. I quote Professor John Broom, who I understand has just written a text on anti money laundering:

> Someone comes and says 'I want you to act for me in a conveyancing matter'. You then go through all of their business activities, the kinds of transactions they are likely to engage in and you are sitting there as a solicitor saying, 'Thank you, God.' This is the greatest business lever ...

The article then helpfully points out that the information collected about lawyers' clients and about their finances is not subject to legal professional privilege, so that will not stop the misuse of customers' information either. In our view, it is therefore essential that the information be afforded the same protection and individuals given the same rights as would apply if the information was being collected directly by the government.

I now turn to a summary of our recommendations to bring about a more transparent, proportionate, balanced and effective monitoring regime. We ask the committee to consider the following: a minimum dollar or value threshold below which no customer identification or reporting is required; no customer identification requirements for customers only seeking advice or quotes on services; to wind back the regime of reporting suspicious transactions and absolutely not introduce the subjective amateur and secret reporting of suspicious matters; extend the national privacy principles to all reporting entities by amending the Privacy Act to abolish the small business exemption; provide for access and correction rights both to

AUSTRAC and to reporting entities, although with a limited exception in relation to matters or people currently under investigation; and limit the disclosures AUSTRAC can make to only agencies involved in criminal law enforcement, only where those agencies are subject to the national privacy principles or equivalent and enforceable privacy principles in their own jurisdiction and only in relation to people or transactions which AUSTRAC believes to be evidence of money laundering, terrorist financing or a crime under Australian law.

CHAIR—Thank you very much, Ms Johnston. Mr Vaile, do you wish to add anything?

Mr Vaile—I would just like to reinforce the concerns about the cumulative effect of this proposal when taken in context with the others that Anna has just mentioned, and also to flag a general concern about a trend towards paying only lip-service to the core principles behind privacy protection—which is identifying the purpose of a particular activity of collection to identify the core minimum requirements that need to be carried out in order to satisfy that first purpose and to limit distribution and further use in relation to that original purpose. These are sometimes annoying for those agencies or businesses who may want to have an open slather, but they are the core of international privacy practice. Whenever you have a trend away from that to saying, 'We can think of all sorts of reasons for doing this, we can think of all sorts of justifications, we can speculate there may be more in the future,' and a general approach of relaxing the application of those principles, you end up with a situation like this where it offends a range of privacy principles and it sits amongst a number of other initiatives which also cumulatively weaken those protections. I suppose I am just waving the flag for a renewed recognition of the historical purpose of those limitations and I am seeking to see this proposal in that context.

CHAIR—Thank you very much. May I start by asking a question on the consultation process. It seems to me that there is a highly structured consultation process around this from the perspective of the finance industry. I wondered whether, for example, the Office of the Privacy Commissioner has played any role in that in an official capacity.

Mr Pilgrim—We have had ongoing discussions with the Attorney-General's Department on—for want of a better description—the issue of anti money laundering and the proposed response, for a good two years now. It has been in different formats; I would suggest it has not been in any way you term it a formal process such as the public consultations that are going on at the moment. But we certainly have appreciated the degree to which they started involving us in the early stages of the development of this proposal.

CHAIR—I am not sure whether you said in your earlier remarks, Ms Johnston, whether you were in the formal submitting process for this or not, but have you expressed any views to the Attorney-General's Department or to the minister on these matters?

Ms Johnston—Yes. I do not think we could have been much clearer. The Australian Privacy Foundation participated in the public consultation round back in 2004. We asked the department to make people's submissions publicly available. The department refused to do so, unlike in many other reviews that we have participated in where submissions are now routinely published. We sought copies of those submissions under freedom of information legislation. We were unable to proceed with that application because we lacked sufficient funds and the department would not give us a public interest exemption from the fees. By the

time that whole process resolved itself it was 18 months down the track, so we have certainly been very critical of what we see as a lack of transparency in the consultation process. Most of the consultation has been with industry groups and has left privacy advocates, consumers and so on out of the loop.

Senator LUDWIG—In respect of the privacy issues that you raise on the suspicious transactions, I just want to explore that a little bit further. There already are suspicious transactions that are reported, but you say that the regime that is going to be imposed with respect to a suspicious matter is materially different. In what sense? There is already significant information that is being passed through that first process currently; does this open the net wider or is it more onerous?

Ms Johnston—We believe it opens the net wider. The notion of reporting people for suspicious matters leaves it open to report people for what untrained people believe to be suspicious behaviour. I think we can reasonably predict that there will be disproportionate over-reporting of people of a Muslim background, of Arabic appearance, of non-English-speaking background, Indigenous people. We are concerned that cultural differences—for example, some people do not make eye contact when they go into a bank—may be misinterpreted as suspicious behaviour. We are absolutely concerned that the change from 'reporting transactions that are suspicious' to 'matters that are suspicious' will result in these extremely subjective, untrained reports coming into AUSTRAC about people who are completely innocent.

Senator LUDWIG—Do you know whether they will be untrained?

Ms Johnston—When you are talking about extending it, through the second tranche of the legislation, to real estate agents, accountants, lawyers and jewellers, I honestly cannot imagine that every employee of every one of those organisations is going to be trained in intelligence assessment.

Senator LUDWIG—And then in terms of the matter which you have gone to—the physical characteristics of a particular client—how do you say that is captured now or by the proposed legislation?

Ms Johnston—I am sorry. I do not understand the question.

Senator LUDWIG—You indicated that a person's ethnicity might be a matter. How is that captured by the proposed changes? I am trying to understand if it is a suspicious matter.

Mr Vaile—Is it in relation to the sort of discretion that—

Senator LUDWIG—I do not know; that is what I am asking you. Do you see that as part of the wider discretion of the, in your words, untrained person using that as a criterion to determine whether it is a suspicious matter that should be reported? I am unsure about why you make that statement, so I am looking at how you came to that. Could you amplify it?

Ms Johnston—Yes, that is our understanding: the person doing the reporting, whether they are working for the law firm, the jeweller, the accountant, the bank can make that assessment not only on the nature of the transaction—you might say sending $1 million to a bank account in Iraq looks suspicious—but also on the way people behave, what they say, how they act. All of these can add up to forming a view about suspicious behaviour or a suspicious matter.

Senator LUDWIG—You call it suspicious behaviour, but it is a suspicious matter.

Ms Johnston—Suspicious matter is the—

Senator LUDWIG—You say that includes behaviour.

Ms Johnston—That is my understanding of how it could be used.

Mr Vaile—Because it is broader than ‘transaction’. There must be a reason for it being broader than ‘transaction’, and it is essentially as amended. The other aspect of it that magnifies our concern is the reduction of accountability and the insistence on secrecy, which Anna has mentioned, which means that taking errors or inappropriate factors into account—anything that is inappropriately adverse in such a discretionary judgment—is essentially unreviewable and unknown. It forms part of a blacklist. We have already seen where both federal and state laws have become relatively ineffective in dealing with the operation of a de facto blacklist in the tenancy area, and we are concerned that that practice ends up being extended here.

Senator LUDWIG—Is it fair to say that one of your concerns would be that firms, clients and customers who have suspicious matters generated about them reported to AUSTRAC are then unable to know what file it is being flagged under in respect of their name, that there is an inability to correct that information. Have I got that right?

Ms Johnston—Yes. I draw your attention to paragraph 39 of our submission, which is where we make this particular point. It refers not to the legislation, but to the draft AML CTF rules and guidelines for suspicious matter reporting, which accompany the draft bill. Those rules and guidelines include appearance and behavioural factors.

Senator LUDWIG—That is helpful, thank you very much. In paragraph 57, which is about secrecy, you say the ability to FOI that information will be excluded.

Ms Johnston—Access and correction rights under the Privacy Act are also excluded.

Senator LUDWIG—Mr Pilgrim, do you have a view about that?

Mr Pilgrim—With regard to—

Senator LUDWIG—With regard to the Privacy Act being excluded in that area.

Mr Pilgrim—The view of our office with regard to privacy protection generally is that there should be a fairly robust regime built into the bill or there should be some ability for people to have a right of recourse, if they believe there is some misinformation on them, to have access to that information to be able to correct it if they believe it is wrong. We understand there will be circumstances, particularly in cases of national security and terrorism matters, where that may not generally be appropriate to occur. As a general rule of thumb for privacy, we support a mechanism by which people are able to see information that is held on them. As to whether that should be through the Privacy Act or another mechanism, we have not formed an opinion on that.

Senator LUDWIG—Have you raised the more general issue with the AGD or is that part of the submission that you are then going to provide?

Mr Pilgrim—It is an issue we are considering as we examine the bill in more detail. Generally, the coverage of the Privacy Act is an issue we have been discussing with AGD

over the course of the last couple of years as they have developed the proposal in the form it is in now.

Senator LUDWIG—In terms of the threshold transactions, I note both the submissions indicate that that figure might be a little low. Do you know what the UK or US have? Do they have similar amounts? Why do you say it? Is it because it was some time ago and inflation might have overtaken it? Is that the main reason?

Mr Pilgrim—Our view is that the Financial Transaction Reports Act has been in place for quite some years now, and the original threshold was set back in the early nineties. It may be useful to have that reviewed to see whether it is still an appropriate amount, so the basis of our comment there is generally on the length of time for which that amount has been set.

Senator LUDWIG—And the Privacy Foundation?

Ms Johnston—I have recently heard this thirdhand, so I have not been about to verify this but my understanding is that the Financial Action Task Force has recommended a $US15,000 threshold—I am not sure which of the three categories of transactions that applies to, if it is all three or something else—and that the New Zealand government is considering a $NZ10,000 threshold. As I said, I heard that thirdhand and I have not been able to verify it.

Senator LUDWIG—First of all, to get over the first question, do you accept the premise that there should be a threshold? If you do, what level do you think it should be set at?

Ms Johnston—We believe there should be a threshold for all three categories: international transactions, domestic transactions and suspicious transactions—if you keep the third category. As Mr Pilgrim has mentioned, we believe the $10,000 threshold that was set some time ago is now too low, through the effects of inflation. If you want to pull a figure out of a hat, I would say something like $US15,000—so whatever that is in Australian dollars; it might be $A18,000 or $A20,000—might be more appropriate.

Senator LUDWIG—In terms of the privacy impact assessment, have you asked AGD about whether or not they are prepared to entertain that?

Mr Pilgrim—I would have to take that on notice. I cannot specifically recall that we have asked them to undertake a privacy assessment with regard to this particular bill.

Senator LUDWIG—I guess we have now!

Mr Pilgrim—Rest assured, we will probably be raising that as part of our submission to them.

Senator LUDWIG—What does that actually entail in the sense of time, cost or process?

Mr Pilgrim—It is a difficult question to answer in terms of actual time frame and costs because it is going to vary depending on the complexity of any particular bill or proposal going forward. We could assume—again, I will not try to put a monetary amount or a time frame on it—given the complexity of this bill, the amount and the type of information that is going to be collected, the number of entities that are going to be reporting and, potentially, with the second tranche, the extra number of entities that are going to be reporting, coupled with the various agencies that may be able to access the information through AUSTRAC, that sitting down and mapping out the data flows would probably be a fairly lengthy process.

Having said that, we think the proposal would benefit greatly from having that done, simply because a number of questions, as I said in my opening comments, that we have around the bill itself and who is going to be able to access information would be made a lot clearer through that process being undertaken.

Senator LUDWIG—Ms Johnston, is the article that you were referring to earlier able to be provided to the committee?

CHAIR—I will lend you my copy of the *Law Society Journal*.

Ms Johnston—Or I can take a photocopy.

CHAIR—It is the Queensland one.

Senator LUDWIG—It is probably in there. I have it with me to read.

CHAIR—I am sure Professor Broome is widely published.

Ms Johnston—I am referring to the New South Wales *Law Society Journal*.

Mr Vaile—I will add something to the earlier discussion in relation to the amounts and thresholds. The figure of the threshold that has been there in the past is significant, but it is worth emphasising that not having a threshold on things like suspicious matters means that in effect all transactions in many different areas become subject to the need for someone to make a discretionary judgment as to whether the matter is suspicious. That is probably of greater significance than the actual figure for particular high-value transactions, just because it casts the net so wide and by doing so reduces, as we were discussing before, the likelihood that you will have anyone with any particular training and also the cost of monitoring and accountability in those sorts of very broad based reports.

Senator LUDWIG—Do you think there should be a public campaign to notify the general public that there is a new regime, AML CTF, which will require customer information to be passed on to financial institutions and banks?

Ms Johnston—Absolutely. Transparency about the processes and notification about any collection of personal information are key privacy principles that should be followed.

Mr Vaile—We would also like to support, if we have not already explicitly, the idea of a privacy impact assessment and flag, particularly in relation to the prospect that it may be very broad based, that that would need to be quite careful to cover all of the peripheral activities and circumstances, which may end up being the ones with the most capacity for privacy intrusion or erroneous reports.

CHAIR—I want to take up a point made in both of your submissions about access by other agencies to data held by AUSTRAC. Both your organisations make some quite forceful points on those matters. I wonder if you might expand on those and give the committee some idea how best to manage that process.

Mr Pilgrim—The nature of the AML draft exposure bill, as we have mentioned, is such that it is going to potentially open up the collection of greater amounts of information. At the moment our examination of the bill shows that information from AUSTRAC can be passed on to other Australian government agencies or to state and territory government agencies for purposes which at this stage seem fairly broad. I hope I am not misquoting the bill—it is to do

with their functions or activities. I think it refers to the other organisations that can ask for the information. We find that to be a rather broad term. One of the suggestions we would have is that some consideration be given to tightening that and, in particular, to saying that, if the information is passed on from AUSTRAC to another agency, it needs to be for the same reasons for which the information was collected—that is, to do with money laundering or the financing of terrorism. Some tighter restrictions could be put around the use or disclosure of that information. That is one of our key concerns in that area.

CHAIR—I think it is a very important area.

Ms Johnston—We would echo Mr Pilgrim's concerns. We are certainly concerned about the range of agencies over the years to which AUSTRAC has not only disclosed information but given online access to their databases, including Centrelink and the Child Support Agency, which are clearly not involved in antiterrorism or money laundering concerns. They are pursuing a wider agenda of protection of the public revenue. If the government is going to stick with that wider use of personal information, we believe they need to be a lot clearer. This bill should not be called the Anti-Money Laundering and Counter-Terrorism Funding Bill. It should be about widespread collection and monitoring of all financial transactions.

As Mr Pilgrim has noted with regard to disclosure to agencies outside AUSTRAC, obviously there is a concern about what privacy principles those other agencies are covered by and how enforceable or realistic those privacy principles are. Take the example of a disclosure to the New South Wales police. In theory the New South Wales government can reassure AUSTRAC that the New South Wales police are covered by information privacy principles which are based on the information privacy principles of the federal act. However, there is then a blanket exemption for the New South Wales police force in relation to all operational uses of personal information. So it is a completely meaningless statement to say that New South Wales police are covered by state privacy law, for example. That is just an example.

Obviously, we are also concerned about the lack of a limitation once AUSTRAC discloses information to, say, a state police force or the Federal Police. There is nothing to prevent those police forces disclosing the information to, say, an international or overseas police force. What we would be concerned about, for example, is Australian police passing on to Chinese police authorities information about the financial transactions—completely legal transactions within Australia—of Chinese dissidents or Falun Gong members, for example. That is why we believe that the uses for which AUSTRAC should be able to disclose information to law enforcement agencies be only in relation to antiterrorism financing, anti money laundering and criminal law enforcement that relates to criminal laws that exist under Australian criminal law.

CHAIR—We could always ban transactions with prescribed foreign countries. That might solve part of that problem—rather ironically.

Mr Pilgrim—I would like to add to my earlier statement. In saying what I have said I acknowledge that in section 99 of the bill there is a reference—and I think we point this out in our submission—that agencies in receipt of information from AUSTRAC must give an undertaking they will comply with the information privacy principles. The question that we

put in our submission is that we are not exactly sure how that will happen, what the mechanism will be and, to pick up on a point Ms Johnston mentioned, how legally enforceable those arrangements will be.

CHAIR—Then you get exemptions and exceptions—and the operation of the document verification service pilot is a good case in point.

Senator KIRK—Mr Pilgrim, how do you see the interaction between the Privacy Act and the exposure bill? How do they sit together? Do you see the concerns you have in relation to privacy issues being addressed by amending the Privacy Act or by making amendments to the exposure bill as it is now drafted?

Mr Pilgrim—That is an interesting question. I must apologise: one of the issues we are still grappling with is trying to work through the bill and work out how the interaction may occur. We believe that there are going to be some potentially interesting scenarios, particularly in the situation of reporting entities, the activities of whom will be covered, we believe, by the Privacy Act, but that coverage may be limited by some of the provisions within the bill. What access, for example, will our organisation have if there was to be a complaint against the activities of one of those organisations? We are trying to work through that particular issue.

One of the concerns that has been raised before is that under the provisions of the current Privacy Act we have a small business exemption for organisations whose turnover is $3 million or less. This may particularly come into play in the second tranche of the proposed exposure draft. There may be a gap of organisations or entities that may not have any coverage under the federal Privacy Act, given the size of their organisation. For that reason, we have proposed in our submission that there are possibly four options to address some of those areas. One of those options, for example, could be prescribing organisations who are reporting entities under the Privacy Act. Under the coverage of the Privacy Act there is already a mechanism within the act whereby organisations who are currently exempt can be brought into the coverage of the act. That is one example, and we put that forward in the submission.

It could be that other provisions are developed, similar to part IIIA of the Privacy Act, which covers credit reporting provisions. It sets out particular ways in which a person's personal credit information can be handled and is quite prescriptive around the handling of that information. It imposes penalties and those sorts of provisions as well. There are other provisions within the Privacy Act for the handling of tax file numbers. That is probably a useful one to consider because it also covers the handling of tax file numbers in private sector organisations, not simply as they are being issued by the tax office.

So there are a number of mechanisms which we can propose that may help address that. But, as to the nub of the question, which is how the actual act sits with the provisions, I would have to say that we are still working through that in terms of providing a bit more thoughtful comment as part of the Attorney-General's process.

Senator KIRK—So you are putting something together to provide to the A-G?

Mr Pilgrim—Yes, that is correct.

Senator KIRK—You also say on page 7, I think, of your submission that the bill would benefit from a rigorous analysis, looking particularly at whether or not the provisions are an appropriate way of meeting the underlying policy objectives. Who do you see as conducting this rigorous analysis? Would that be perhaps your office, or what would the process for this be?

Mr Pilgrim—I suspect that there are several ways in which that could be done. Part of the process would start off from committees such as this committee examining the bill as part of that process to be able to advise government on whether or not that proportionality has been struck. Another way which I touched on earlier would be through the undertaking of a privacy impact assessment—of a way of assessing what the objectives of the bill itself are and whether the responses within the exposure draft are proportional to the risk that is perceived. Through a PIA, some of that information or some of that analysis could come out as well. We would suggest in that case that, for example, a privacy impact assessment be undertaken by an independent person. We do not see that as being a role of our office.

Senator KIRK—When PIAs are done, are they normally undertaken by an independent person? Is that how it normally works, or does your office—

Mr Pilgrim—It is interesting terminology 'normally'. I think, in Australia—and Ms Johnston might have something to add to this—PIAs are a relatively new approach to assessing or considering privacy issues as part of a new proposal. Our office has actually drafted for Australian government agencies and the ACT government agencies a draft set of guidelines about undertaking privacy impact assessments—those are on our website, and we are in the process of finalising them now—to encourage organisations to treat it more as part of normal business to undertake an assessment such as that. To answer your question: for the ones that I am aware of that have been undertaken within Australia, I would say that it is probably fifty-fifty whether they are undertaken within the organisation which is putting forward the proposal or whether an independent person is brought in.

CHAIR—There may be other issues that come to the committee's attention in the course of the hearing today and in submissions we have received that we may need to raise with you on notice. I hope that will be acceptable. We will try to keep those to the bare minimum, of course, but we would appreciate your assistance with that if it occurs. Thank you to both organisations for your submissions. They are very helpful to the committee and certainly assist us in pursuing our discussions with other witnesses. Thank you for appearing here today.

[12.04 pm]

BHASIN, Mr Anish, Committee Member, New South Wales Council for Civil Liberties

BLANKS, Mr Stephen, Secretary, New South Wales Council for Civil Liberties

LUO, Miss Rhonda Rhui, Member, New South Wales Council for Civil Liberties

CHAIR—I welcome our witnesses from the New South Wales Council for Civil Liberties. The council has lodged a submission with the committee which we have numbered 10. Do you need to make any amendments or alterations to that submission?

Mr Bhasin—No, we do not.

CHAIR—I now invite you to make an opening statement and at the conclusion of that we will go to questions from members of the committee.

Mr Bhasin—I am going to make a brief opening statement and then Stephen Blanks is going to make a few more comments. The Council for Civil Liberties is deeply concerned that the exposure draft bill currently before the committee signals the end of financial privacy for Australians. The regime that the bill would introduce is a grave breach of the right of Australians to carry out their personal and business affairs without government interference. It renders otiose National Privacy Principle 8, providing the right to anonymity. It is inconsistent with a liberal democratic society and is a disproportionate response to the threat of terrorism related financing and serious money laundering.

The bill would introduce a comprehensive financial surveillance regime under which a large percentage of financial transactions undertaken in Australia would be routinely reported to the government and accessible to a wide range of government agencies. The true extent of the regime is obscured by the objects clause and title of the bill, which are highly misleading. The reference to anti money laundering and counterterrorism belies the fact that the data currently collected by AUSTRAC will be routinely accessible to a range of government agencies that have little or nothing to do with combating serious crime.

The bill purports to implement the 40-plus recommendations of the Financial Action Task Force on money laundering. However, in many respects the bill exceeds the FATF recommendations, such as by allowing welfare agencies access to highly sensitive and personal information collected in the name of fighting terrorism and countering money laundering. Further, in our opinion, the deference shown to the FATF recommendations is misplaced when considered alongside our binding treaty obligations to protect the right to privacy, such as under article 17 of the International Covenant on Civil and Political Rights. Fundamental rights should only be abrogated to the extent that it is strictly necessary to pursue a legitimate purpose. Because Australia lacks a national bill or charter of rights, it is imperative that the legislature is especially careful when introducing laws that infringe basic rights, as the courts are unable to test the proportionality of such measures. If the bill proceeds, it is, in our view, essential that partner agencies be strictly limited to those that are involved in the stated objects of the bill—that is, involved in countering terrorism or money laundering.

We are also concerned that the provisions relating to the reporting of suspicious matters raise the real risk of discrimination in the provision of financial services in Australia. We also note that a large proportion of the new regime is to be implemented by delegated legislation. It is difficult for us to comment on this as it seems to be constantly evolving. However, some aspects that we have seen give cause for concern, such as a proposal that all customers be given a risk classification. This again may lead to discrimination in the provision of financial services. Finally, if the bill is to proceed then we submit that small businesses should lose their exemption from the Privacy Act if they become reporting entities.

Mr Blanks—Firstly, I would like to thank the committee for the opportunity to make this submission and to give evidence at this inquiry. To supplement what Mr Bhasin has said, one measure that could be undertaken in connection with the introduction of this bill is for there to be prepared a human rights impact statement. Just as the Australian Privacy Foundation has submitted that a privacy impact statement or assessment should be conducted, similarly, for the various human rights impacts that we perceive this bill has, best parliamentary practice would be to have a human rights impact statement prepared before proceeding with this bill.

Secondly, I would like to say that there is a particular issue which is not addressed in our submission but which perhaps other organisations have addressed and which is a serious civil liberties issue. That is the fact that lawyers are to be reporting entities and are included within the scope of the reporting entity. That impacts directly on the operation of the legal system, which has a special role in the government of the nation, and will severely imbalance the relationship between the legal branch of government and the executive and parliament.

As a general comment, and I think this is implicit in what the Australia Privacy Foundation submission said, persons should have the right to know which of their transactions are reported under this regime. Why shouldn’t they have an opportunity to demonstrate the legitimacy of their transaction and have it removed from the record? There has been a long experience, in New South Wales at least, in the reporting of incidents related to child protection. For people involved in the teaching profession and child-care industries there is a mandatory reporting system for incidents which affect child protection. Initially, that was introduced without any regime for rectification of the record to deal with improper reports. After some years of experience, that has now been rectified. It is a major civil liberties issue that reports will be made under this legislation which are not accurate, properly based or well founded, and there will be no opportunity for persons adversely affected by those reports to rectify them.

CHAIR—Thank you very much. I like the idea of a human rights impact statement on legislation, Mr Blanks, but I also know what my chances are of persuading any government in the land that that is a good plan. We might have more luck with a privacy impact statement.

Mr Blanks—You are aware, of course, that there is a campaign for a national human rights act—

CHAIR—I am.

Mr Blanks—and one of the essential elements of that campaign is for the introduction of a human rights impact statement as a measure to bring Australia in line with every other

Western democracy in the world. Australia is unique in not having human rights protection. The suggestion is—

CHAIR—That specific form of human rights protection.

Mr Blanks—Yes, that specific form. This is not a radical suggestion. It is not saying that it is impossible to pass legislation which infringes human rights standards; it is merely saying that we ought to have an honest debate when human rights standards are being infringed—firstly, so that there can be an honest debate within Australia but, secondly, so that it is apparent to the world community when Australia is infringing its human rights obligations.

CHAIR—I was not disagreeing with you, notwithstanding your rather enthusiastic response, and I am interested in the campaign. I was, I suspect, responding in the most practical way to the suggestion made in relation to this legislation, because even if this committee was minded to take it up I am not sure how it would be received by government.

Senator LUDWIG—Mr Blanks, just to expand on that: were you referring to the UK model specifically? It might find favour with you or it might not, but they also have a human rights impact statement of sorts which requires an assessment to be made of legislation.

Mr Blanks—Yes, and I believe that for a period in Canada as well there was a similar regime.

Senator LUDWIG—Yes. But is the model you are advocating similar or dissimilar to the UK model, or is there a separate regime that you seek to promote?

Mr Blanks—I am not sure that I can descend to that level of specific detail. The campaign that I was referring to is the campaign in Australia for a human rights act which is being conducted by New Matilda.

Senator LUDWIG—Yes, I am familiar with that.

Mr Blanks—It is campaigning for legislation to introduce the requirement for a human rights impact statement in relation to all legislation.

CHAIR—That finds favour in surprising places, you might find, Mr Blanks.

Senator LUDWIG—That was the only part I wanted to intervene on, just to establish whether it was similar to the UK model because I am familiar with that.

CHAIR—I want to take up some of the observations you make on page 7 in relation to penalties for reporting offences, to use a turn of phrase that might cover what you are talking about there. One of the witnesses we had this morning from the finance sector talked a little about the rather enthusiastic overreporting that has been the case in other jurisdictions as a result of the introduction of similar legislation. Is that the concern that motivates you to make those suggestions—that is, over and above your general concern on civil liberties grounds, which I understand and appreciate completely? Is that the concern?

Mr Blanks—Yes. There is simply no utility in a system which generates overreporting.

CHAIR—Particularly if you do not resource the agency to whom the overreporting is being sent—resource it to deal with overreporting, I mean.

Miss Luo—Overreporting is also very likely to result in misinformation being collected against individuals. If the object of the legislation is to identify and prevent international financial crimes, there is simply no use in having a large volume of possibly useless and wrong information against our citizens. It is possible that many innocent people will be caught up in these measures. More experienced, if I may say that, money launderers and financiers will be more likely to escape the simple pitfalls in the legislation.

Senator KIRK—In relation to that point on overreporting that you have just referred to, you say in your submission that this has serious implications as people have no right to the anonymity principle. I know what you mean by anonymity principle, but I wonder where this principle comes from. Where do you source that from? Is it just a general kind of rider or is it embodied in some kind of—

Miss Luo—That is both in general law and under the National Privacy Principles—I believe it is No. 8, which requires private sector businesses to provide customers whenever possible with the option of transacting anonymously. That is expressly overridden by this legislation.

Mr Blanks—Just to supplement that answer, article 17 of the ICCPR, which is set out in our submission, I think sets out the principle that no-one should be subjected to arbitrary interference with privacy. What we see in this legislation is that the reporting regime that is set up is essentially arbitrary.

Senator KIRK—Is this principle reflected in the Privacy Act as it is currently drafted?

Mr Bhasin—The National Privacy Principles I believe are in a schedule to the Privacy Act and form part of it.

Senator KIRK—You talk about it possibly being arbitrary, but isn't it necessary to try to balance this principle against measures to try to prevent money laundering and counterterrorism financing? How do you find that right balance?

Mr Blanks—Yes, it is always necessary to balance rights and to balance competing rights against each other. But, if the object is in relation to money laundering and antiterrorism, this legislation strikes no balance because it is setting up a wide-ranging reporting system with application outside of those areas.

Senator KIRK—So it is really the lack of proportionality that you see as being the issue here?

Mr Blanks—That is a major issue, yes.

Miss Luo—That would be a constant theme in many of the submissions, I believe. At the moment, as far as I am aware, only serious criminals—say, sex offenders—are subject to continuous scrutiny from the state. There is still a large amount of debate about how much scrutiny is necessary and how much of it actually infringes on their rights and civil liberties. If we subject everyone indiscriminately to such continual monitoring and arbitrary reporting based on the objective judgments of many small businesses and employees, it is equivalent to creating some kind of financial police state that is against every democratic principle Australia has ever fought for.

Senator KIRK—You also suggest in your submission that some of the elements of the bill might be contrary to the Racial Discrimination Act. Can you outline where you see the bill being contrary to those principles?

Miss Luo—There is no single provision that contravenes the Racial Discrimination Act. Our concern is that, taken together, many provisions of the legislation encourage subjective and possibly uninformed speculation by Australian businesses and service providers. If people are asked to lodge suspicious matters based on what they know of the customers' financial background and what they believe to be the normal financial behaviour or sources of finance, it is highly likely, especially when one looks at the government's power under part 9 to prohibit transactions to and from certain countries, that businesses in their impulse to over-report will make judgments that draw on any existing racial and cultural prejudices. If the act does not contain an express provision that guarantees people will not be judged according to any racial and cultural prejudices against them then the legislation does not live up to the standard established by the Racial Discrimination Act.

Senator KIRK—Again, it is bit like the question I asked in relation to the Privacy Act about how these two pieces of legislation will sit together. As you were talking, I thought it would be difficult, just based on the activities of a small business person, for example, to prove that there had been some infringement of the Racial Discrimination Act. But it seems that you are suggesting that there needs to be some reflection of the principles of the RDA in this legislation.

Miss Luo—Yes. I believe I addressed this in my submission, that there ought to be a clause that the operations of the bill will be subject to the principles established by the Racial Discrimination Act so that, although it may not be possible to establish any steps or mechanisms to guard against it, at least people who operate under the obligations under this proposed act will be aware that they also need to take into account the racial discrimination principles.

Mr Bhasin—If I can just add to that. In the draft rules there are provisions for risk classification of all customers. The potential there is that, if one of the bases of classifying people is citizenship or even countries that they transact with, there is a real potential that the extra burden that that creates indirectly increases the cost of their obtaining financial services. So it can indirectly discriminate.

Senator LUDWIG—Just coming back to the consultative process, as I understand it, about six of the 36 rules and guidelines have been put out for consultation. Has your organisation or someone from the point of view of a consumer advocate been involved in the preparation of those six guidelines or rules?

Miss Luo—Do you mean have we been consulted in relation to it?

Senator LUDWIG—Yes.

Mr Bhasin—We had a meeting with the Attorney-General's Department and AUSTRAC. It seems to be a continually evolving process. We have seen some of the draft rules and had discussion about them, but I do not think we were involved in formulating anything prior to that.

Senator LUDWIG—So you are not on the working group or you do not participate in the roundtable discussions about how the exposure draft should finally apply—of course, some of the feedback mechanisms are in place—from a consumer advocate's perspective; in other words, the end user or the person who is going to provide the information?

Mr Bhasin—We have been involved in a roundtable process instigated by the Australian Privacy Foundation with the Attorney-General's Department and AUSTRAC.

Senator LUDWIG—Since when has that been available?

Miss Luo—The roundtable itself was in late January.

Senator LUDWIG—And then?

Miss Luo—We have not been involved in the actual formation and drafting of the legislation rules.

Senator LUDWIG—So prior to that the first time was back in 2004? So that was the first time for this legislation and you were involved in the consultative processes at that point?

Mr Blanks—We would have to take that question on notice.

Senator LUDWIG—All right. I am just trying to establish how much involvement you have had with the development. It is not a trick question. I am just trying to understand this.

Mr Blanks—The three of us may not be aware of what was—

Senator LUDWIG—Then please just say that you are not aware and that you have to get back to me on that.

Mr Blanks—Yes.

Senator LUDWIG—I will tell you what I am trying to establish. There are two elements. One is the 2004 one. You indicated that you tried to obtain the submissions of industry but, as I understand it, you would have been unable to do so as the freedom of information costs would have been quite prohibitive, so that was one area of generally trying to generate information. Have you tried any of those sorts of tactics?

Mr Blanks—Not that I am aware of.

Senator LUDWIG—So when did you first start to consult?

Mr Blanks—As far as I am aware, this issue came up earlier this year when the roundtable was proposed with AUSTRAC and the Attorney-General's Department. As far as I am aware, that is when the council started looking at this. I am not aware of any involvement by the council in the development of the legislation prior to that.

Senator LUDWIG—Is four months for the exposure draft sufficient for you to be able to comment to the AGD about your concerns? Do you have a view as to whether that timetable is sufficient, especially if I can add the additional piece of information that all the guidelines and rules have not been finalised yet?

Mr Blanks—I think a preferable process, rather than having a written submission, is actually the roundtable, where one gets to discuss the issues and can develop one's thoughts in view of the discussion. We have been through that process in relation to the Medicare smartcard proposal last year with the department of human resources and various other

consumer and privacy groups, including the Australian Privacy Foundation. I think we had three meetings over the course of a period of six months. Personally, I think it was an excellent process. It avoided the need to write formal submissions. Sometimes you do not know whether or not they are making points that are useful to the people who are reading them, whereas when you sit around a table and discuss the issues you can address immediately any issues which they raise.

Senator LUDWIG—Getting back to my original question, has the process to date been adequate from your perspective and is the April deadline sufficient for you to raise your concerns and meet with the AGD?

Mr Bhasin—In terms of the fact that you point out that a large amount of the legislation regime is intended to be implemented through delegated legislation, much of which is yet to be drafted, it is not feasible to comment meaningfully on the bulk of it until you see it.

Senator LUDWIG—So do you say it is an adequate process or an inadequate process?

Mr Bhasin—I would say that in that sense it was inadequate.

Senator LUDWIG—Are you going to raise that concern with the AGD? I take it you will be making a submission as well, or have you already done so?

Mr Bhasin—We will make a submission.

CHAIR—I refer to the point you make about possible constraints or restrictions on the use of AUSTRAC reporting information in trials. This point is at the end of your submission.

Senator LUDWIG—The question would be raised as to whether AUSTRAC could provide the evidence of the suspicious matters in a trial or subsequent proceedings .

CHAIR—That is right. Would you expand for the committee on the concern that you are raising there?

Mr Blanks—The concern would be that any record that AUSTRAC had in its possession might be accessible to court proceedings.

Senator LUDWIG—Probably by way of ordinary warrant, if the AFP were seeking the information.

Mr Blanks—In criminal proceedings, that is right.

Senator LUDWIG—In civil proceedings?

Mr Blanks—I am sorry but I am not across this point in sufficient detail; maybe Miss Luo can expand on this. Does the legislation sufficiently prevent private litigants in private litigation having access to any AUSTRAC records—

Senator LUDWIG—Say, through discovery they obtain—

Mr Blanks—through a subpoena process and so forth?

Senator LUDWIG—Yes.

Mr Blanks—Presumably, it must be the intention of this regime that any records are not available.

Senator LUDWIG—It might already be dealt with under the current FTR legislation, in which the purpose for which they can provide information is limited.

CHAIR—We can check on that with the agency this afternoon.

Miss Luo—There is an additional concern that, in particular, sections 93 and 105 of the act do impose some limits on when information and documents may be disclosed to the court. If someone would like to take legal proceedings in relation to, say, misleading or false information being provided to AUSTRAC, there is some confusion over whether they will be able to obtain the information from AUSTRAC or relevant agencies. On the one hand, there is a concern that there may be unwarranted access to such information. There is also the concern that the individuals concerned may be limited in their access to their own personal information.

Senator LUDWIG—In the UK they have introduced a framework for AML-CTF in accordance with FATF. Are you satisfied with the way they have addressed the privacy issues? Have you had an opportunity to look to see how they have dealt with it? It is an issue I will probably pursue with the department as well, because one would assume they have human rights legislation as well. They also have privacy rights.

Mr Blanks—The only thing I can say about that is that I know the Law Council of Australia is across that issue or has been looking at the UK experience. If they are giving evidence, they might be a good agency to ask. The comment that they made to me was that the UK experience is vast overreporting, so the usefulness of the material is not there.

Miss Luo—Which brings us back to the point of accountability—that is, that individual businesses are not accountable in the same way that government agencies are and that once the function of information collecting is delegated to the private sector it is very difficult to impose the same limits and equality guarantees that are possible with the public sector.

CHAIR—The Law Council are not appearing today. I am not sure whether they made a submission to the inquiry or not, but we will check on that and we might clarify some of these matters with them.

Mr Blanks—I think they are sitting on Senator Ellison's working group committee.

CHAIR—They are. We could confuse them and ask them during telecommunications interception discussions tomorrow, but that is probably not a good idea. Thank you very much. We thank CCL for their submission and for appearing today. It has been very helpful to the committee, and we appreciate your contribution.

Proceedings suspended from 12.33 pm to 1.36 pm

HARTCHER, Ms Judith Lorraine, Business Policy Adviser, CPA Australia

KENNEDY, Ms Catherine, Professional Standards Consultant, Institute of Chartered Accountants in Australia

PALMER, Mr Bill, General Manager, Standards and Public Affairs, Institute of Chartered Accountants in Australia

CHAIR—I welcome our witnesses representing CPA Australia and the Institute of Chartered Accountants in Australia. CPA Australia and the Institute of Chartered Accountants in Australia have lodged a submission with the committee which we have numbered 7. Do you need to make any amendments or alterations to that submission?

Mr Palmer—No.

CHAIR—Are you a combined organisation?

Mr Palmer—No.

CHAIR—You are two separate organisations who have made one submission.

Mr Palmer—Correct.

CHAIR—Thank you for clarifying that for me. Does that mean that you would like to make two opening statements or one?

Ms Hartcher—One, with an addition.

CHAIR—That means two—from this side of the table. Ms Kennedy, I ask you to make a brief opening statement and then I gather we will go on to some additional remarks from Ms Hartcher. We will go from there.

Ms Kennedy—Good afternoon, and thanks for the opportunity of speaking to you about this issue. The Institute of Chartered Accountants in Australia and CPA Australia appreciate the opportunity to appear before the Senate Legal and Constitutional Committee hearing into the exposure draft of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2005. The accounting bodies are supportive of the government's policy objectives in bringing the Australian legislative framework into line with the recommendations of the Financial Action Task Force. We have been engaged in the consultation process from its inception, and since the release of the draft bill have communicated areas of concern regarding the draft bill with the Attorney-General's Department and AUSTRAC.

Together, the Institute of Chartered Accountants in Australia and CPA Australia represent in excess of 140,000 members. Of our members in practice, approximately 97 per cent are in practices with fewer than five principals. Our main concern is to ensure that the impact of the new AML-CTF compliance requirements on our members and their clients is minimised, while at the same time ensuring that high-risk clients and transactions are properly identified. In this respect, we have several key issues in relation to the draft bill.

Firstly, the AML-CTF legislation must allow an efficient method for our members to rely on the customary due diligence already undertaken by other reporting entities and/or government agencies. Secondly, it is vital that the legislation reflects a risk based approach.

The AML-CTF obligations should allow sufficient flexibility for members to target those clients and transactions which pose the greatest risk of relating to money laundering or terrorist financing. Because of the range of different types and sizes of reporting entities captured in the draft bill, a one-size-fits-all framework of prescriptive obligations is undesirable. It will not deliver the most efficient and effective means of combating money laundering and terrorist financing and will impose unnecessary compliance costs on reporting entities.

Thirdly, contrary to public statements, the first tranche of the AML-CTF legislation extends beyond the FATF recommendations in relation to the financial sector. This has a significant impact on the scope of the application of the legislation and the consequent costs of compliance. The areas that we are most concerned about are in relation to the definitions, which I think we have covered in the submission. We are most concerned about the definition of 'business', or activities that are undertaken in the course of conducting a business, and the definition of 'loan'. Together, we think that those definitions extend the application of the bill to all transactions which are offered on credits, which would include trade credit or the provision of services on credit terms. Also, the FATF recommendation No. 1 states:

Countries should apply the crime of money laundering to all serious offences ...

However, the draft bill imposes an obligation to report suspicions in relation to all offences. So there is no limitation on the predicate offences. The FATF recommendations also refer to a risk based approach to customer due diligence processes in recommendation 5, and we do not feel that the draft bill reflects that FATF recommendation.

We are concerned that the consultation period is not sufficient to allow for an adequate response to the AML-CTF package. This package is to include the AML-CTF rules which are to have legislative backing, and the bulk of those have not been released. The draft bill and the mandatory rules must be viewed as a whole to properly assess the impact of the AML-CTF compliance requirements on our members. Thank you.

CHAIR—Do you have a statement, Ms Hartcher?

Ms Hartcher—We are pleased that the legislation is being considered in two tranches—the first for the financial services sector—and that there is an intention later to extend the bill to non-financial services professional organisations. We think that is a good approach because the non-financial services professional sector has never been exposed to any of these sorts of compliance obligations before. However, that in itself raises some concerns with this particular piece of legislation. I think that it is essential to consider this tranche of legislation in the context of the second tranche. I guess the main reason is that the easiest way to extend this bill to those other requirements under FATF is to extend section 6 to add more designated services. The way the bill currently stands, not being a risk based approach, means that it would be impossible for those non-financial businesses to comply with the regulations that are being developed in this particular tranche, and that poses a future risk for legislation. If the bill is redrafted as a more risk based approach, then it would be easier to apply the same guidelines and the same rules to the second tranche of legislation when it comes in.

We have had some discussions with AUSTRAC and A-G's regarding these issues and also some issues that we raised in our submission, particularly in relation to the definition of a loan

transaction through trust accounts, self-managed super funds and related companies. We are hopeful that those discussions will result in some improvements in the bill.

CHAIR—Mr Palmer, did you wish to add anything?

Mr Palmer—Not at this stage, thank you.

CHAIR—Does the acronym CPA stand for certified practising accountants?

Ms Hartcher—Yes.

CHAIR—Thank you. The dot points that you have on the last page of your submission under the heading ‘Consultation process’ are most useful for the committee. You are saying that, in the way your members do business, the fact that the rules have not yet been released for these six or so areas in terms of customer identification procedures makes it very difficult for you to comment adequately in relation to the exposure draft process.

Ms Hartcher—That is right.

Mr Palmer—That is the basis of our request that the time for consideration is not long enough. You have to have the rules first before you can consider them.

CHAIR—I think the point is that it would have been long enough had you had the rules at the beginning of the process. Is that right?

Ms Hartcher—Yes.

CHAIR—That is the sort of impression that I am getting.

Mr Palmer—That is fair comment.

CHAIR—It is interesting that you raise the definition of ‘loan’ and the sort of business that may therefore be caught in that process. I think the example of consumer credit, which is not an issue about which we have had a great deal of material submitted to us, being caught would come as something of a surprise to the Harvey Normans and Retravisions of the world.

Ms Hartcher—I think it would. There is also trade credit, which catches virtually every business that provides goods and services on a 30-day account, which is everybody.

CHAIR—I want to ask you a question under the heading of ‘Reporting of suspicious offences’. In fact, I think we are talking about reporting of suspicious matters, which is even broader than the concerns you that you raise. What would be your comment on that?

Ms Kennedy—I do not think that our comment was relating to the issue of whether they were matters, transactions or offences. Our concern really related to the predicate offences on which members are going to be required to report their suspicions. The concern is that the requirement is to report on suspicion of all crime. There are some other issues as well in terms of possible infringements of the tax law and other Commonwealth and state and territory legislation, but it is the requirement to report in relation to all crime that is our major concern. The FATF recommendations make reference to the need to address serious crime. We think that it is preferable for the focus and the resources to be in relation to those serious crimes rather than having our members trying to first of all be aware of what constitutes any crime and then be alert to the commission of any crime.

Senator LUDWIG—Do you say that the consultative process is too short and not sufficient to be able to detail all the issues that you wanted to raise? Perhaps you can expand on that. Do you still stand by the comments that you have made?

Ms Hartcher—The consultation process that we are going through is quite good as far as consultation on the outcome of the bill. The problem is simply that we do not have the rules in order to provide some appropriate feedback. We need to look at the package as a whole and how it will impact on our membership before we can assess what the compliance obligations will be.

Senator LUDWIG—That is where you lose me. I cannot understand how, if you have not got the full rules and guidelines and so you cannot comment on them, you can say the process is good. It is either adequate or inadequate, bad or any other adjective you would like to utilise. Can you meaningfully engage on the exposure draft and the rules and guidelines or can't you?

Mr Palmer—Today it is our view that we have had meaningful engagement in terms of preliminary discussions and a consultation process. What we are really alluding to here is the more detailed set of rules that accompany the draft legislation.

Senator LUDWIG—The process ends in mid-April.

Ms Kennedy—The 13th.

Senator LUDWIG—And that is it. What will come next? Has the consultative process been adequate?

Mr Palmer—As we said earlier, it is subject only to the receipt of the detailed rules in sufficient time for us to give them appropriate consideration.

Senator LUDWIG—Have you been promised those in sufficient time to be able to give them detailed consideration?

Mr Palmer—We have not got them as yet. That is why we are basically raising our concerns now that we are running short of time, in terms of having adequate time to consider them.

Senator LUDWIG—This is an opportunity to state that. Otherwise we will go away with the submission from you that you have been adequately consulted. That is what we will take away.

Mr Palmer—Our point is that we need more time to consider the rules upon their release. It really depends on when they are released.

Senator LUDWIG—And if they were released today, tomorrow or the next day?

Mr Palmer—If they were released today, tomorrow or the next day we would still need more time.

Senator LUDWIG—How much time would you need?

Ms Kennedy—In line with the ABA, it could take four or five weeks after the release of the last of the draft rules. There has been productive consultation in relation to the rules which have been released to date but it has been quite a slow process. We could only anticipate that

the process would be of equal detail and length in relation to any rules that are released further down the track.

Senator LUDWIG—Do you say that the risk based approach is too prescriptive?

Ms Kennedy—Yes.

Senator LUDWIG—How is that being addressed? Are you confident that that is going to be addressed between now and mid-April?

Ms Kennedy—The minister has indicated that we should have a new draft of the draft bill in the next day or so which is intended to address some of the concerns of the industry in relation to the prescriptive approach in part 2, the customer identification procedures. We have yet to see that new draft of the bill.

Ms Hartcher—We will know how productive the consultation process has been when we see the response to the issues we have raised. There has certainly been a very positive attitude to discussing the issues; we need to wait to see what the result of those discussions will be.

Senator LUDWIG—Do you think there will be a reissued exposure draft in the next couple of days or so? The issue of the loans and some of those other matters may be taken into account in the definition of business.

Ms Kennedy—We are not certain of that.

Senator LUDWIG—Did you participate in any of the roundtables?

Ms Kennedy—Yes.

Senator LUDWIG—When was the last roundtable?

Ms Hartcher—Last Tuesday.

Senator LUDWIG—How many have you participate in?

Ms Hartcher—We have been represented at every ministerial roundtable in the last two years.

Mr Palmer—We have been involved since inception.

Ms Kennedy—We have also been participating in the individual working groups.

Ms Hartcher—And in systems working groups under AUSTRAC, which were running in 2004-05.

Senator LUDWIG—Have you been able to get any movement in respect of how self-managed superannuation funds will manage to do their customer due diligence when they know you are a customer?

Ms Hartcher—Self-managed super funds are different from large super funds in that they have up to four trustees and all of those trustees must be beneficiaries. Our argument is that there is no value in imposing obligations on the trustees of a self-managed super fund as they are also the recipients of the benefits. If they are laundering money through that facility they are not going to report on themselves. Otherwise it just imposes unnecessary obligations on those who are not laundering money.

Senator LUDWIG—Is there an alternative to deal with that? Obviously there is an issue in ensuring that those products are not used for money laundering purposes. If there is a requirement, what should the requirement be? Or do you say they should be categorised as low risk?

Ms Kennedy—I think the ATO identifies the destination of the proceeds of the self-managed super funds and indicates that those funds really become consumers of financial products. In their capacity as consumers of those financial products over cash deposits, direct acquisition of shares or other financial products, they would be going through the same sort of process as any other customer of a financial institution.

Senator LUDWIG—Many of the businesses that you represent—not all of them—would be small to medium size.

Mr Palmer—That is correct. The people we represent are essentially the members, but their clients are typically small to medium businesses.

Senator LUDWIG—Yes. Even the people that you represent, their businesses—

Mr Palmer—Are small to medium businesses themselves.

Senator LUDWIG—In meeting the privacy principles of it, would they also be required to meet the current privacy principles or would some fall under the threshold of the $3 million turnover?

Mr Palmer—Some would, others would not. It depends. They all have different turnovers.

Senator LUDWIG—Have you looked at that issue on behalf of your members in respect of how they will balance the privacy issue and the requirements of this legislation?

Ms Hartcher—We have raised with the Attorney-General's Department that we suspect there will be some difficulties associated with it.

Senator LUDWIG—What are they?

Ms Hartcher—We have been training members to just keep the minimum amount of information on people. Now they will be asked to keep additional information on their clients.

Mr Palmer—We have not done a survey of that with particular reference to the point you make. We did conduct a survey, but it was more around the impact of certain other requirements that have a limit. Catherine might like to elaborate a bit more on that.

Ms Kennedy—We conducted a survey some time ago when there was some suggestion that members might be required to conduct customer due diligence on all of their existing customers. I think the most significant result of that, apart from the horror expressed by members, was that 98 per cent of the members said that all of their customers would already have bank accounts or be engaging in transactions with financial institutions. So I know the feeling from the members is that there should be as little duplication as possible of those customer due diligence requirements.

Senator LUDWIG—So they question why they would then have to go through that process again?

Ms Kennedy—Yes.

Senator LUDWIG—As an accountant you are dealing already with a range of financial institutions on behalf of the members.

Mr Palmer—One of the main points of our membership is that they do not initiate transactions. Invariably, they are only involved in them in a historical recording sense. Quite often, someone comes to them with the outcome—it may have been nine months since the transactions occurred. Typically, they might come when they are ready to prepare their tax return or something of that nature. So whatever the transaction is at a particular point of time, it is being dealt with through some other party such as a bank. Our people are then dealing with it much later.

CHAIR—I am not sure whether Senator Ludwig covered this area. I think you describe it as a lack of materiality, what is the threshold level of the value of the service. Do you want to comment further on that?

Ms Hartcher—It was in relation to some of the services that are covered in the designated services. There is a $1,000 limit for stored value cards, but in other areas there is no threshold. One particular area was in relation to postal orders. It is a public concern that quite often the users of services like postal orders are either people under 18 or elderly people who may not have particular types of identification if they wish to access that service. It was really just a matter of looking at the transactions rationally and identifying at what level a threat of money-laundering would come in.

CHAIR—What would be an example of the concern there? You are saying that, if somebody was purchasing a $50 postal order, on your interpretation of the legislation as it currently stands it would trigger minimum customer identification procedures which may necessitate the individual purchasing the postal order producing—

Ms Hartcher—A licence or a birth certificate or something like that.

CHAIR—to get a $50 postal order?

Ms Hartcher—Yes.

CHAIR—I think I understand the point you are making. Thank you for your appearance today and for the submission on behalf of both of your organisations. We will come back to you, if we may, if any issues are raised in discussion with other witnesses and take those up with you if we need any clarification.

Mr Palmer—Thank you.

[2.01 pm]

KNIGHT, Mr Brett, Head of Compliance, American Express

MANCY, Ms Michelle, Manager, Legal Affairs, General Counsel's Office, American Express

MULLINGTON, Mr Mark, Executive Director, Risk Management, ING DIRECT

CLAES, Ms Lisa, Executive Director, Sales and Operations, ING DIRECT

CHAIR—Welcome. You have made separate submissions. I invite you, initially, to speak to those separately and then we will go to combined questions. We will start with American Express. Thank you for lodging your submission with the committee, which we have numbered 15. Do you need to make any amendments or alterations to that submission?

Ms Mancy—No.

CHAIR—I invite you to make an opening statement.

Ms Mancy—American Express is a global company and carries on business in 110 countries. It has set up money-laundering programs in the US, the European Union and all other major countries that have this kind of legislation. American Express supports the upgrade of legislation which is aimed at preventing money laundering and terrorist financing in Australia. We have demonstrated support for Brett Knight's consistent presence and active participation at all ministerial advisory group discussions, AUSTRAC working groups and also the permanent AML-CTF advisory board. American Express operates similar business processes globally and has global programs such as its card authorisation platform. When a US card member comes to Australia to use their card and when an Australian card member goes to Italy, in each case the merchant's terminal is connected to the same global platform. For this reason you will see why American Express is particularly interested in technology based solutions and aspects of the proposed regime such as electronic verification.

In view of the fact that the law is not yet complete, the April deadline for completion of the consultation processes is too short. Even if all the missing rules are released in the next two to three weeks, it would not be enough time for organisations to absorb impact and effectiveness before responding in a meaningful way. I will give you an example of how the job has only been half done to date. As you are well aware by now, identification comes in two parts: collection and verification. We have draft rules for collection but nothing for how it is to be verified. This area is one of great financial burden to institutions, and we are 50 per cent incomplete on the information relevant to assess whether we can do it at all and how much it will cost. It is imperative that electronic verification be allowed as an acceptable method of completing identification; otherwise, the cost to organisations without branch networks would be inordinate.

Based on our global experience, we conservatively estimate our costs to comply with law in Australia requiring non EV identification to be $7.5 million. This would provide a significant competitive advantage to organisations with branch networks. We submit that, as a matter of fair play, the government should ensure that this type of regulatory regime does not favour one class of competitors over another—in other words, preserve competitive neutrality.

In supporting a risk based approach, meaningful thresholds should be set. There are no thresholds for any designated service except stored value cards and we would like to see a threshold for consumer credit arrangements. American Express card members spend more than customers of other institutions. Even so, the average spend on the American Express card in Australia is not more than $10,000 each year.

The reporting threshold should be increased as the current $10,000 figure dates back to the early days of the FTRA over 10 years ago and is no longer reasonable. It should be adjusted to account for inflation. The current $10,000 figure is also set substantially below the FATF recommendations. Lowering the threshold leads to significant increased compliance costs and there is no evidence that Australia presents higher risks than other countries with similar income levels.

The thrust of all these comments is the same: there is no appreciable risk of money laundering below certain minimal levels of transactional activity. The absence of thresholds means it is simply overburdensome to require this kind of identification.

The 'know your customer' requirements are excessive and burdensome as a draft identification list of minimum points is beyond the scope of the FATF recommendations. We refer you to the very convincing comparison table appearing at the end of the ING submission as appendix A on this particular point. Groups should be treated as a whole and should be able to share information which they need in relation to specialisation and group functions.

Complete civil immunity should be extended to any action taken to comply with the rules or guidelines. The draft law provides for protection in relation to actions taken in good faith and without negligence with respect to reporting obligations or in the mistaken belief that action was required under those sections. We submit that allowing suits for negligence creates a very big hole in that immunity. Negligence is a very elastic concept and this immunity is not really worth very much if it is subject to that kind of exception.

The government needs to prioritise laws relating to money-laundering prevention, privacy and discrimination, thereby ensuring that compliance with one will not affect a breach of another, rather than leaving it to business to tip-toe through a minefield of compliance regimes that seem to be at odds with each other. That concludes our submission. We would be pleased to assist the committee with any questions.

CHAIR—Thank you very much, Ms Mancy. We appreciate that. We have had a submission from ING Direct, which we have numbered 13. Do you need to make any amendments or alterations to that submission?

Mr Mullington—No.

CHAIR—Ms Claes, Mr Mullington, I invite you to make an opening statement.

Mr Mullington—With your leave, we will both speak during the opening statement. Thank you for the opportunity to speak to the committee. As part of an international group, we believe ING Direct Australia is well positioned to provide useful input on the development of an effective and robust AML-CTF structure in Australia. We have ING Direct operations in more advanced FATF compliance jurisdictions, including the UK, the USA and Canada, and we believe we are able to share those experiences with the Australian regulators in the design

of the Australian framework. In fact, we have in the UK hosted representatives from the Attorney-General's Department and they have viewed our operations in that jurisdiction.

In Australia, our primary businesses are direct household savings and home loans. They are the two things we do. We are the category leaders in direct or Internet savings, with over $18 billion in savings. Since we launched in 1999, a broad range of high interest online savings accounts have become available in Australia. There is now genuine competition and choice for Australian consumers in household savings.

We are also a major provider of home loans in Australia. We currently have $22 billion worth of home loans. During 2005, we advanced $8 billion of new loans and we expect during 2006 to advance something in excess of $10 billion. Based on the APRA data ING Direct were the sixth largest provider of home loans in Australia, so it is a significant business for us.

We have been actively involved in the AML and CTF consultation process. We are very committed to helping develop a framework that is workable and robust—that is, a framework that meets the FATF requirements, that optimises the prevention and detection of money laundering and terrorist financing and that facilitates and supports competition in Australian retail banking products and services.

We have made submissions to the Attorney-General's Department and AUSTRAC covering several matters, including competitive neutrality—technical neutrality and also channelling neutrality; that it should be internationally consistent; and that it is important to have a genuine risk based approach regarding electronic verification and third-party processes. Our submission to this committee focused on the need for a risk based approach and the timetable for consultation. We note that several submissions touched these topics. So, with the committee's leave, we wish to focus on two topics of substance, having particular relevance for our business, which we do not believe have received much coverage in the submissions—that is, electronic verification and third-party identification processes.

Firstly, third party. ING Direct is one of the largest providers of home loans through the mortgage broker channel. Today mortgage brokers account for something between 30 and 50 per cent of all home loans written in Australia. The mortgage broker channel has enabled us to deliver to Australians highly competitive home loan products. Whilst the draft AML and CTF legislation contemplates third parties such as mortgage brokers undertaking the identification process on behalf of lending institutions, the exact mechanism for this at this stage is unclear. However, the way the draft bill operates, it will create complexity and bureaucratic burden for the mortgage broker channel. It also creates serious concerns regarding our reliance on mortgage brokers undertaking that identification. We believe the legislation needs to contemplate an accreditation and registration process—that is, individuals and organisations become accredited to undertake the customer identification and verification process and, subject to certain controls, financial institutions be permitted to rely in good faith on that identification. At this stage, we are continuing to work with AUSTRAC on developing a viable solution.

Ms Claes—I would like to say a few words about electronic verification and our experience in the UK, which we believe could be easily translated into the Australian

commercial and legislative environment. I will give a few other contextual points. We have a million customers who have been attracted to our direct offering. Sixty-five per cent of those opened their accounts online and up to 75 per cent transact using online. However, it is not just online—we are a direct bank so we also use our call centres and our IVR services. This is a category which the Australian consumer clearly has an appetite for. All of our competitors in this segment now have very similar products. It is a growing category. We applaud the principles underlying the bill, and we would like to see the framework, particularly through the instrument of the rules, reflect this form of electronic commerce, particularly with regard to electronic verification.

In the UK, as Mark alluded to, they already have legislation which aims to be FATF compliant. Electronic verification is currently being utilised by not only our sister company in the UK but also many other financial institutions. It works. Eighty per cent of our new customers are verified in this way. Very simply, the way it works is that the customer identity facts that are required on the application form are sent to a third party commercial provider—in our case it is a credit bureau that also has access to other customer identity sources.

These facts are matched against these sources of dates and we are given a confidence interval as to the integrity of the match. In some cases it is a straight match and in some cases more information needs to be required. That confidence interval is derived by a number of analytical tools. Certain weightings or priorities are given to certain indicia of a customer's identity. It can be a full match, a partial match, a pending match or it can be no match at all—which is rejected. That then moves it into the second level of verification, which can involve documentation and it could involve face-to face. There is a lot of flexibility about the other means of verification that can be used.

In summary, we welcome the legislation but, given this channel for which the Australian consumer has a large and growing appetite, would like to see the flexibility allowed principally through the rules. We feel very strongly that identifying of customers should occur, but in a way that facilitates electronic commerce.

CHAIR—Thank you. Can I start at the point where Ms Claes left off. How have you found the consultation process proceeding in relation to these very specific areas of your businesses? What comments do you have to make about that?

Mr Knight—There has been a lot of consultation and I think it has taken some time for that consultation to become effective. There were originally the four ministerial advisory groups. They were broken off into AUSTRAC working groups. What I have found with the working groups is that there are so many people—sometimes there are up to 40 people on those calls for an hour and a half—and you have such a wide range of expertise on those calls that often they are not very productive. I think there has been a lot of consultation, but only in the last little while has it become very effective.

CHAIR—Specifically on the question of electronic verification, which we are talking about, is there specific working group on that area, for example?

Mr Knight—We have organised a sub working group. Actually, I have been leading—

CHAIR—I am going to need a map, I think, of the consultation process. I hope they are ready over there with their maps.

Mr Knight—Several of the participants in industry groups, including us and ING, which have international experience in this have organised a sub working group. It has been our intention to really look at what we are doing in other international markets, take those types of approaches and processes and adapt them to this market.

Mr Mullington—We would endorse the comment that the consultation process has been extensive. I think it has been positive and constructive. The feeling we get is that AUSTRAC has been somewhat underresourced to really respond in the time available. I think it was mentioned earlier today that, at this stage, we believe we have three rules. I think someone mentioned six.

CHAIR—Yes, someone has six. I did notice that there was a discrepancy there.

Mr Mullington—Somebody has six. We are jealous. We only have three.

CHAIR—We will get you three more by the end of the day if we can.

Mr Mullington—That is out of 30-odd rules. It is problematic for us to be able to say that we can meet the consultation timetable when we really do not know at this stage when we will get rules that we are required to then respond to.

CHAIR—As you said, I think, Ms Manse, in your opening remarks, even if you get the remaining 27—unless you secretly have six as well—in the next, say, week to 10 days, to come back by 13 April is a bit of a challenge for you.

Ms Manse—Yes.

Mr Knight—I would also like to point out a part of the process that I feel is lagging. There is a lot of international experience. The US implemented this type of legislation four or five years ago, and so has the UK. In my opinion and from what I have seen, the regulators have not really taken a lot of this global experience and applied it. In the AML-CTF advisory group meetings last week, there was a whole discussion on creating risk matrixes, which have been compiled very comprehensively in other jurisdictions for years. So I think they have not used the opportunity to look at other global jurisdictions that have this type of legislation to get best practices effectively.

CHAIR—So, apart from anything else, you as organisations working in this area internationally have very well grounded experience in dealing with the development of and complying with this sort of legislation. We appreciate the table in the ING submission. It does answer some of our questions about the comparisons between jurisdictions. I wanted to pursue with you whether there was more you would like to say about preferring a risk based approach in the drafting of the legislation.

Mr Mullington and Ms Mancy, I know you were here for a while today and heard other witnesses talk about their concerns in this area, starting with the ABA, credit unions and permanent building societies and moving on. We would be interested in your further comments on that and whether the consultation process is reflecting your input in that regard.

Mr Knight—Initially, the bill in and of itself was risk based, and I was pleased in that. Many of the rules, as they began to form in some of these working groups, did take an overarching risk based approach. But my personal perception is that, as these roles have developed, they have vastly moved away from a risk based approach to one of prescription.

What has happened is that the AUSTRAC working groups have 40 people from 40 different industries putting up examples of how their operations work and this and that. AUSTRAC is trying to take all of this and, instead of creating overarching risk principles, they have started to prescribe in very strict detail what institutions should do. As you can appreciate, a global company like American Express has complied with the USA Patriot Act for years and the last thing we would like to see is legislation come in that is prescriptive and contrary to our requirements in other jurisdictions. It makes us invest millions of dollars where we do not think that is effective.

Mr Mullington—We have a similar view. We believe that, with legislation that is too prescriptive and coupled with relatively severe civil and criminal penalties or sanctions, we run the risk of the whole emphasis of the industry being on compliance. In other words, it will become a tick-the-box exercise. That is a little bit similar to where we have ended up with FSRA. It is fundamentally about compliance; it is fundamentally about ticking the boxes.

The alternative is a risk based approach which really pushes institutions down the track of outcomes, in that an institution needs to build an antimoney laundering and CTF program to achieve certain outcomes. The regulator has the ability to review those programs and opine on whether they are adequate to achieve those outcomes or not, but it does not push the organisation down the track of compliance. We believe that the way the rules—the three that we have got—have developed to date are quite explicit, quite prescriptive and not risk based.

CHAIR—Ms Mancy, you mentioned competitive neutrality in your submission and in your remarks today and raised American Express's concern that there may be an emphasis on one approach to customer identification that penalises organisations, for example, who do not have branch networks. Based on your experience in the consultation process, how likely do you think that is? Are you expecting that to be a real problem for you?

Ms Mancy—If there is no electronic verification, absolutely.

CHAIR—They are big 'ifs' that we are dealing with. It is hard for the committee to get some idea, because we do not get to sit in the roundtables.

Ms Mancy—We can provide some numbers.

Mr Knight—Let me give you some perspective here. We have made some assumptions et cetera. If over the next two years when we look at our new customer acquisitions we have to use third parties to do customer identification using documents, that will cost us anywhere between $7 million and $9 million. That is a low estimate. We also believe that that is not really effective because documents can be forged so easily.

In the US we were required under the CIP rule of the Patriot Act to implement electronic verification processes. We had six months to do that. We spent $12 million in implementing an EV solution in the US, but our finding in the first years was that we avoided $7 million worth of fraudulent applications. We believe that EV is important because not only does it provide flexibility for our business model but it is effective in the fight against crime.

CHAIR—Do you have any differences with that position, ING?

Mr Mullington—No. Our concern is from a customer perspective. We strongly believe that it should be the customer's choice of what channel they choose to use in dealing with an

institution. If the legislation as it is rolled out or, indeed, the rules do not in the first instance permit or facilitate a workable electronic verification solution, what we are really doing is frustrating the desire of Australians to deal with financial institutions electronically. Putting aside the impact that would have on our business, it is a national interest issue.

Mr Knight—You will greatly curb in the future the development of new financial products and new channels. I can tell you that, globally—certainly in the experience of American Express—we are exporting more and more, offering services through the internet. The inability to use a customer identification process for those products would be very diminishing.

Ms Mancy—With regard to customers in regional areas or people who have difficulty gaining access to branches, we always considered that ability to be important.

Ms Claes—And changing working patterns.

Ms Mancy—Exactly, or people who cannot get to branches in business hours.

Senator KIRK—Thank you very much for your submissions. There has been a lot of discussion here about the electronic verification processes. In the AMEX submission, there is a considerable amount about the benefits of it. Can you outline for us some of the weaknesses of the electronic verification process, which is something that needs to be considered as well?

Mr Knight—I think the only weakness, if you can call it a weakness, is that certain individuals may not be able to be approved or identified through the EV model. If people do not have robust credit, if they are not listed with government databases or if they do not have a financial personal history, EV might not be a viable solution, so businesses like ours have to have secondary processes in place to say that we do not feel confident that a customer has passed the EV process and they have to go to a secondary identification method. That would be the only weakness or drawback—that is, it will not fit or work for everything.

Senator KIRK—But there is still a backup in place.

Mr Knight—There has to be, yes.

Senator KIRK—Is that secondary process documentation?

Mr Knight—Documents or other types of EV solutions. I think it is important to mention with regard to this concept of EV that there are many different kinds of EV. When you start talking about verifying corporations, that uses different methods. You use credit bureaus, you use licensing databases. There are many different EV processes, so I just wanted to put to the Senate committee here that EV is a concept but it can be applied in many different ways. If they are using EV to identify a corporation, it is going to be much different than identifying a person.

Mr Mullington—One of the weaknesses of electronic verification that has been proposed is compromise of privacy, particularly if we start talking about accessing government databases to verify the information provided. All of the models that have been put forward so far rely on a yes/no/maybe type of response. In other words, it is not about delivering data back to the financial institution; we take the data the customer has given us, put it to whichever database it happens to be and get a yes/no/maybe type response. Whilst privacy has

been floated as a concern with electronic verification, we do not believe there is a genuine concern there.

Senator KIRK—Is that how it works at the moment—that yes/no/maybe approach?

Mr Knight—We do not receive information about a customer—only if it matched.

Senator KIRK—With regard to the processes you have in place at the moment for EV, would they be considered adequate under the proposed regime, or do you think you would you have to put in place stricter measures?

Mr Knight—I am not sure what you are asking.

Senator KIRK—Sorry, in the proposed regime. Would what you are doing presently fit the bill of what is required under the proposed legislation?

Mr Knight—In general, those processes would, although, I would say that there needs to be a re-evaluation of them. We have been in discussion with Baycorp. I was in a meeting with LexisNexis the other night, who are also producing systems for their many different providers. With the new regime coming into place, they will have to fortify their systems and build better metrics. In principle, those processes are there.

Senator KIRK—You have spoken a bit about what occurs in the United States. Do you also have experience in some of the UK legislation that is in place there, which is similar?

Mr Knight—I am more an expert on US legislation. I think ING is more on the UK side.

Senator KIRK—I would be interested to know. We have had some evidence earlier today that the originally quite prescriptive regime was eventually replaced with a risk-based approach. What is your experience with that system?

Mr Mullington—Our experience is more in relation to the newer version. We have been operating in the UK for about three years now. We have been working very much in the risk-based environment, using electronic verification almost exclusively. This is Lisa's area of expertise.

Ms Claes—Just to continue on, we have a high level of success with electronic verification. We use an external commercial credit bureau, which has the data feeds in necessary to validate the information collected on the application form. Under the UK legislative environment, they have only a few identification criteria as a minimum and then there is very much a risk based approach, according to the type of product and many other dynamics. We have built our own compliance program around that, according to the particular product that we are offering. It is working well, and we have probed them considerably during the consultation process to try and surface any warts or regrets. It is going extremely well.

Mr Knight—The US regulator recently issued their first statistical findings since implementing the customer identification program model—FinSim, which allows for electronic verification—over the last three years. The findings were that less than two per cent of SAR filings, suspicious matter filings, related to customer identity theft. So we have found in the US very strong statistical proof to show that EV does not in any way increase the chance of identity theft. In fact, our experience, by saving $7 million over the last year, is that it is actually very strong and helps us to battle theft.

Senator KIRK—This question is for ING. As we know, the bill requires institutions to identify and report suspicious transactions. Is it clear to you from the legislation as to what would amount to a suspicious transaction, and how do you identify such a transaction, from your understanding of the bill?

Mr Mullington—The legislation as it is currently drafted does not explicitly identify typologies of suspicious transactions. We already have in place our own ongoing transaction monitoring capability. We have a piece of software which is able to reach out across all of our systems and monitor the transactions on customer accounts to look for unusual or unexpected activity. The typologies for suspicious transactions are defined by us as we go, based upon our own business experience. I think this really goes to the heart of risk based. If we have very explicit, dictated typologies then, yes, you will capture those transactions but you will ignore everything else that develops over time, and unfortunately the bad guys are usually a little bit ahead of the curve in terms of how to avoid detection. So we are finding that our own processes of monitoring transactions and ongoing developing and testing typologies against our database are the most effective ways to identify suspect activity.

Senator KIRK—Allowing for that flexibility over time, which is what you are saying, instead of having prescription. Finally, American Express, you made the comment that there may be some possible conflicts between these rules—the legislation and privacy and antidiscrimination laws. Could you elaborate on that, or is that difficult given that, from what you have said, we do not actually have the rules yet?

Ms Mancy—It is more a concern—and a lot of this is highlighted in the Office of the Privacy Commissioner's submission—around, for instance, whether or not you are going to approve a credit product on place of birth, country of citizenship. It makes asking those types of questions and using those answers to make a risk based assessment, we believe, contrary to discrimination laws.

Senator KIRK—And the privacy issues as well?

Ms Mancy—Yes. The whole gist of asking for this much information in regard to an individual, when the FATF recommendations sets out certain things it would be useful to know, and then we go so far beyond that. We consider that our customers will consider that to be a real invasion of their privacy and, since it is more than what we have needed to date, wonder why it is necessary.

CHAIR—On the observation you make in the last paragraph on page 4 of the American Express submission, you are talking about a connection with a foreign country. Are you talking about part 9, the countermeasures section about prohibiting or regulating the entering into of transactions with residents of proscribed foreign countries?

Ms Mancy—It is the 'know your customer' requirements. It wants to know the three requirements: place of birth, country of citizenship and residency. I think they are the three requirements, and that is what we are referring to there.

CHAIR—Do you have a view about the provisions of proposed section 83?

Ms Mancy—If I can grab section 83 to familiarise myself with it.

CHAIR—It was raised in passing in another submission and we have not really discussed it at any length today. It is in part 9.

Mr Knight—I am sorry—I am still not sure I understand your question. Would you mind repeating it for me?

CHAIR—If there is a proscribed foreign country where transactions are prohibited or regulated in a particular way, does that have an impact on your business?

Mr Knight—Absolutely. The US legislation—for example, section 311—allows the regulator to identify a jurisdiction or a territory as being a threat for money laundering, which prohibits all business from doing business there. We also have enhanced due diligence measures based on geographical risk within our company that say that if you go to deal with these certain types of businesses within this geography where there is high global AML risk you have to go through enhanced due diligence. That is how it has been handled in other regions and markets.

CHAIR—Do you have any comment to make on the way this section is structured? Would you like to take that on notice?

Mr Knight—Yes. Can we get back to you—I think I would prefer that.

CHAIR—I am interested in what your views are about its impact on your business and similarly with ING.

Ms Claes—You have to be an Australian resident to open a savings account.

CHAIR—So that deals with that problem in your business.

Ms Claes—Yes.

CHAIR—Good. It is obviously different for American Express.

Senator LUDWIG—I want to inquire about whether in the US model there are countries or geographic areas which are precluded. If you could provide that on notice as well, because it will probably be picked up here, I suspect, or it may be considered.

Mr Knight—Yes. The US Department of the Treasury has that capability under section 311, and just last week they added another territory. I would be happy to provide you with more information on that.

CHAIR—What did they add?

Mr Knight—I think it was Syria. May I make one last comment?

CHAIR—Yes.

Mr Knight—I wanted to also touch again on the whole concept of customer identification, because I am very concerned that they have not taken a risk based approach when writing this. I have written Know Your Customer client identification programs for businesses like American Express in over 22 countries, and I think the prescriptive way that they are attacking this is fraught with weakness and problems. When you start looking at corporate structure, you have holding companies, you have privately held companies, you have partnerships and you have public companies and non-public companies. We at American

Express have KYC programs written for each of these, but for the legislation to come out and try to prescribe for each one of these corporate entities what you have to do—

CHAIR—How that might operate.

Ms Claes—It will be an impossible task. It is really up to industry, who are really experts at their business and who know the resources that they can deploy, whether they are credit bureaus, government databases or their own due diligence. That would be a much more effective use of our resources, time and tools.

CHAIR—Mr Knight, would you like to send the committee any further information on that on notice? You have placed some emphasis on that and I think you could probably enhance that and add to what is already in your submission, which would be helpful for us. We are not sure how the process of examination of the bill will proceed from here. We obviously have an exposure draft, just like everybody else. We do not know what will happen to the consultation time frame. The committee will report. Whether we will then get the primary bill back for a further legislative committee examination I am not sure. If we do then there will be further opportunity to discuss it with stakeholders such as you.

Senator LUDWIG—We are at the mercy of the Senate.

CHAIR—We are at the mercy of the Senate, as my colleague points out, although he experiences a different sort of mercy of the Senate from the one that I do. If we do come back with a substantive bill in due course after this process has been concluded, I suspect we may meet again and then we may be able to pursue these issues further. Thank you all very much for both your submissions and your attendance here today. They have been very helpful for the committee.

[2.43 pm]

JONES, Mr Peter, Partner, Banking and Finance, Allens Arthur Robinson

CHAIR—Welcome. Allens Arthur Robinson has lodged with the committee a submission which we have numbered 27. Do you need to make any amendments or alterations to that submission?

Mr Jones—No, thank you, Madam Chair.

CHAIR—I will ask you to make an opening statement and we will go to questions at the end of that.

Mr Jones—Thank you, Madam Chair. I will put my comments today and our submission in context. We are not purporting to speak on behalf of the legal profession or any section of the profession, nor are we purporting to speak on behalf of any clients. The profession is dealing with policy issues through the Law Council. Clients would generally do that either directly or through industry associations.

That leaves us to talk more about technical issues and, I suppose, mainly in the context of an organisation that is primarily to be regulated, certainly in its traditional business activities, in tranche 2 not in tranche 1. At the moment we have some concerns that our traditional activities may be regulated in tranche 1. I am optimistic that those concerns will be resolved through the process of finalising the bill and the release of further rules and regulations. So I am not going to talk about those sorts of concerns today because I think they will be resolved; I am quite hopeful that they will be.

In the submission we tried to deal with some technical issues, as I say, which are of broader application; they are not just relevant to tranche 2 participants. I do not want to go through the whole submission now but there were two points that I thought I would mention. The first point is the rule-making power that AUSTRAC has. I was here this morning and I heard one of the other people before you mention their concern with AUSTRAC's rule-making power. That was expressed as a concern about the future. The example that we gave in our submission is really a current concern; we can see a practical application for it now.

The example we used was of dormant customers. In essence, we said that the exposure draft appears not to require reporting entities to take any action in relation to what we would call dormant customers—people who, at the time of commencement of the act, as it would be then, would not be having designated services provided to them. But when we look to the rules that have been released, the one that deals with AML compliance programs, for example, seems to suggest that all customers need to be risk classified and that reporting entities need to consider whether they need to get further KYC information in relation to all customers and whether they need to update the KYC information they do hold in respect of all customers. To us, that gives rise to the question of whether that is the intention and, if it is, whether AUSTRAC does actually have the power to make rules which do not appear to have any legislative basis. That was the first point I want to draw out of our submission.

The second point is a simple one but it is an important one because it concerns 'suspicious matter' reporting. That is an issue that we see in the FTRA as well but, given the detailed

process—the exhaustive process—we are going through now and the extension of the suspicious reporting regime beyond financial institutions or cash dealers to a much wider audience, we thought it was worth raising this particular point. That point is the apparent mismatch between an objective test as to when one has reasonable grounds to have a suspicion, which might give rise, you would think, to an obligation to report, and the actual obligation to report, which only arises once a suspicion has arisen. It is a technical drafting issue but it is one that we thought was important, given that context. That was really all I want to mention, other than to refer people to the submission. Thank you.

CHAIR—Thank you very much.

Senator LUDWIG—We really do appreciate the submission you have made.

CHAIR—Yes, it is very helpful.

Mr Jones—Thank you.

Senator LUDWIG—Some of the close examination in your submission is helpful for us as committee members and also to understand how the legislation will work. With some of these issues, the tipping off was not readily apparent. Allens have the background knowledge. Of course, it is going to present a significant issue, depending on the corporate structure that you have adopted, in relation to how you then proceed to adhere to the rules or to section 95(1) which prohibits disclosure. That would be especially so if the person who had the knowledge was also the executive director of one or two or three different entities differently configured. They have a duty to their board and they have a duty to their shareholders, if it is a public company. They have a duty, under APRA or ASIC, to advise. There might be conflicts that arise there. That is the way I read your part—is it right?

It seems to me that it will lead to issues where you may come across information that should be passed through your corporate structure from one side to the other, for the obvious reason that if it is happening in that area it may very well be happening in a related entity in another part of your process. There is no way that you could then clear that through AUSTRAC, or someone else either, is there? It seems to suggest that you cannot disclose it. You cannot get a leave pass to disclose it to another entity. Is that the way you see it?

Mr Jones—Yes, absolutely. You are right to point out the fact that there are legal questions. There will be situations where your obligations under the act will conflict with other duties that you have, but there are commercial issues there, for the sake of good governance and the general wellbeing of the economy—you do not want these sorts of problems to spread, if I can put it that way, through a commercial organisation. We have seen instances of this. There are franchise models, for example, where this creates a problem. Under FTRA, where the same types of arrangements prevail, it is probably more typical to have only one cash dealer in a group. Whereas, given the extension of the designated services here, you are far more likely, I think, to have more than one reporting entity in a group. That is one of the situations where there are unintended consequences of section 95.

Senator LUDWIG—This is a longer bow, but is it also built on the way the exposure draft is currently drafted? You said the example in FinCEN issued guidance of 20 January 2006 can deal with the issue. It has come up, it has hit a problem and a guidance to overcome the problem has been issued. It has created, I guess, a safe harbour. If an entity discovers it was

doing that then it was doing it in accordance with guidance 20. It provides a defence, I suspect. I am not familiar with that and I will have a look at it. Whereas the way the exposure draft is worded, it is a narrower application—you are either inside section 95(1) or you are outside section 95(1).

Mr Jones—Yes, that is right. The other model we mention is the UK one, which only proscribes an effect.

Senator LUDWIG—I see. That is what I was missing. I did not want to use that example because I could not quite see it. So it is the effect?

Mr Jones—Yes, as long as you do not prejudice an investigation then you can disclose. That is another way to describe a safe harbour, obviously.

Senator LUDWIG—Do you say that suspicious matter reporting and its interplay with 39(2) should adopt your wording?

Mr Jones—We did not really commit to wording because we did not want to get into the policy area. We just wanted to highlight the potential problems there. If in fact you never form a suspicion but you did have reasonable grounds upon which to have formed a suspicion, technically you do not have an obligation to report, but I would have thought that the regime would have been better served if you did have an obligation to report if you had reasonable grounds.

Senator LUDWIG—I accept that you keep away from policy, but section 311 is the part I mentioned. You say that is an alternative.

Mr Jones—Yes, exactly.

Senator LUDWIG—You use the phrase.

Mr Jones—Yes.

Senator LUDWIG—That would overcome in part the inconsistency, in your view?

Mr Jones—I am sorry to keep saying this but depending on the view you take on the policy then, yes, that is one way to solve the problem.

Senator LUDWIG—The rule-making power is an interesting one.

CHAIR—Before you go off onto that, would you mind if we stayed on matters under ‘suspicious matter reporting obligations’ for a moment. One of the witnesses raised with us this morning, or it was in their submission, the breadth of knowledge that staff of relevant entities are going to be required to have to be able to form a view, let alone a suspicion, of behaviour. You refer to section 40(5) in your submission, where the reporting obligation extends:

… to information relevant to the investigation of an offence that is an offence against the law of a foreign country and that corresponds to an Australian offence.

You make the quite reasonable observation:

In practical terms this requires the reporting entity to consider (and therefore by implication have full knowledge of) offences in all foreign jurisdictions.

The challenge that presents seems to me to be pretty significant.

Mr Jones—I would not like to be under that challenge as a lawyer. I cannot imagine how laypeople would be able to feel that they were competent to make a decision about what foreign laws require. We are very careful whenever we provide a legal opinion that we only do so in relation to the laws of this country and sometimes the laws of just one state. It would not be realistic to expect people to be able to keep up to date with, let alone once know, the laws of all foreign jurisdictions.

CHAIR—Indeed. Thanks for clarifying that.

Senator LUDWIG—It will have extraterritorial effect.

CHAIR—It is really quite significant.

Senator LUDWIG—Yes. I want to come back to the rule-making powers. I want to understand section 191 in relation to the obligations for rules 11, 13 and 17. They impose no obligation on the reporting entity in relation to dormant customers. You raise the two reasons:

> In the first instance the extension of the AML/CTF program rules to customers who may no longer have an ongoing relationship with the reporting entity and no KYC obligations under the Act has practical and resource implications.

It seems to me that they want both—they want both the previous and the future information. Is that how you read it? If you accept that they sought to regulate that area and they sought to ensure that there was an adequate rule and adequate legislation to underpin the rule, then the result would mean that they want both past and present customers.

Mr Jones—Yes, and that would amount to risk classification for all customers. The question is: how far back do you go? Where do you draw the line? That is the practical issue. Who is a dormant customer? Who is beyond the reach of needing to be risk classified? If they have not done anything with you for five years and then walk in the door tomorrow, are they a new or an existing customer? Part of this will be dealt with when we get the rules about continuity of relationships and what disqualifies a relationship from being a continuous one. I do not want to jump the gun on that score, but I do think you need to address the practical issue about dormancy.

Senator LUDWIG—The only peculiar one is the designated service item which is on your page 1, in regard to item 17, bills of exchange. If that is right, what you are putting, then they do have the cart before the horse.

CHAIR—If that is combined with the Institute of Chartered Accountants and the CPA Australia view, then it is quite remarkable.

Mr Jones—I do not purport to an expert on bills of exchange. I pretend to be too young.

CHAIR—Me too!

Senator LUDWIG—I am not going there.

Mr Jones—I have a colleague at work who is adamant that that is exactly how it needs to be changed, so I am relying upon her there.

Senator LUDWIG—And the promissory note and letters of credit.

Mr Jones—Yes, all three.

Senator LUDWIG—I can see how they would—because otherwise the issuer would not have to have a 'due diligence' or 'know your customer' effected upon them, would they?

Mr Jones—No, that is right.

Senator LUDWIG—So they could draw a promissory note providing it was not above the $10,000 and it was not suspicious.

Mr Jones—Yes.

Senator LUDWIG—Thank you.

CHAIR—I think that probably deals with most of our issues. As Senator Ludwig said, your submission is particularly helpful to the committee, and we are very grateful for that. Thank you very much for your time this afternoon.

[3.04 pm]

ATKINS, Ms Liz, Acting Director, AML Reform, AUSTRAC

LINK, Ms Louise, AML Reform Team Leader, AUSTRAC

RYAN, Mr Paul, Acting Deputy Director, Regulatory and Corporate, AUSTRAC

MARSIC, Ms Sonja, Senior Executive Lawyer, Australian Government Solicitor

BANNERMAN, Mr Bruce Kenneth, Principal Legal Officer, Funding and Assets of Crime, Criminal Law Branch, Criminal Justice Division, Attorney-General's Department

GRAY, Mr Geoffrey, Assistant Director, Criminal Law Branch, Attorney-General's Department

DRENNAN, Federal Agent Peter, National Manager, Economic and Special Operations, Australian Federal Police

WHOWELL, Federal Agent Peter Jon, Manager, Legislation Program, Australian Federal Police

CHAIR—Welcome. Does anyone have any comment to make on the capacity in which they appear?

Ms Marsic—I am acting for AUSTRAC.

CHAIR—I remind senators that under the Senate procedures for the protection of witnesses, departmental representatives should not be asked for opinions on matters of policy and, if necessary, must be given the opportunity to refer those matters to the appropriate minister. The Attorney-General's Department and AUSTRAC have not lodged submissions with the committee. The AFP has lodged a brief submission with the committee, which we have numbered 12. Do you need to make any amendments or alterations to that submission?

Federal Agent Drennan—No, that is fine.

CHAIR—I am open to suggestions from you, ladies and gentlemen. Does each organisation wish to make an opening statement? Mr Gray—

Mr Gray—I have some comments.

CHAIR—has had the benefit of enduring the entire day's proceedings—or the opportunity, depending on your perspective. I do not know whether you want to make a statement in response to any of those. I do not know how helpful that will be as I imagine we have a range of questions. I do not know whether the AFP wants to speak to their submission, and I am not sure what AUSTRAC wants to do in the absence of Ms Atkins at this point.

Mr Gray—I would not mind making some very short preliminary comments, if I may.

CHAIR—Let me check with the other agencies.

Mr Ryan—We will wait for Ms Atkins to arrive.

Federal Agent Drennan—We will stand by the submission we have submitted.

CHAIR—We will start with Mr Gray.

Mr Gray—Thank you for that. As you said, we have sat through the evidence that has been given, which is a very useful exercise. The point is we are in a consultation period, and we see these committee hearings as being part of that consultation period. We have listened with interest to the things that industry has said. The positive approach that industry has taken is good; the acceptance of the need for legislation in this area is good. With respect to the comments made about working with government, I think we would put it more highly than some of the comments have suggested. We think it has been very productive from our perspective, and a good process. We have been very pleased with the support we have been getting from industry and from the people we talk to.

There were some comments this morning about the whole process being a bit guarded. From our perspective, it has been a very positive exercise. The point is we are in a genuine consultation period. We have been receiving representations and we have been attending the working groups you have heard about, and there has been a lot of information coming in. Most of the things people said today have been said previously—in a different context, in different ways—and we have heard it when it has been said previously and we have taken things on board.

People obviously have to speak about the exposure draft which is out there, but I can guarantee that the final bill, even if nothing else happened from here on, would be different in a whole lot of respects from what we have here. That, of course, is part of the process and makes it a bit difficult for people to comment on, and we have the difficulty in, firstly, making announcements about changes that will be made, because it will be a government decision—it is not up to us as officers to make that call—and, secondly, because the consultation period is not over. It is possible that things will change; people will come up with good ideas that we will be more than happy to take on board. Some of the evidence given this morning was that comments have been made, they have sat on the table and not been reacted to. From our perspective, that is not the way the process is working.

Another thing I wanted to mention was in relation to the number of rules. There was reference from a number of people who gave evidence this morning about the number of rules. The 36 figure is misleading in that it is the number of rules—if you go through the bill and work out all the places where there could possibly be rules, you come up with something like 36. That is not necessary at this stage—and probably never—to get the full set of 36 rules. What we are looking to move towards by 13 April are the key rules, the vital rules, the rules needed to make it work. With my numbering—and I might throw to Sonja, who has been in charge of that—I come back to five sets of rules. There are the AML programs rules, identity verification rules, suspect transaction reports rules, correspondent banking rules and threshold reporting rules.

Of those, AML programs are at a very advanced stage, suspect transaction rules are at a very advanced stage, and I think threshold reporting is too. The real work that has to be done is in ID verification rules and the correspondent banking rules. We have heard a lot of discussion about the risk based approach. The current approach being taken in relation to both of those rules is to create a further version of them based on the risk based approach, and that will be presented to industry over the next short period. We hope that we will be able to

produce draft ID verification rules in time for the next meeting of the ministerial advisory group on Thursday. I think correspondent banking rules will take a little longer because we are still getting information. They are going to be drafted in consultation with industry.

I really do not think the position is quite as bleak as some of the evidence has suggested. I am still optimistic that by the end of the consultation period we will achieve the aim of having sufficient material so that Bruce and my people can then work on redrafting the bill and produce something which can be introduced into parliament. As we have heard this morning, industry would like a further look at the bill before it goes to parliament. Those submissions have been made to the minister and that approach will be discussed again on Thursday. It is really the minister's call as to whether there is that further period of consultation or further opportunities for industry to examine the bill, so I cannot make any commitment in relation to that. At this stage the minister is still keen to introduce legislation as soon as it can be done. Bearing in mind the length of time that this process has taken, we are very keen to push on. We have now been evaluated by FATF and 12 months after the evaluation we are going to be called upon to explain progress, so there are time pressures which people should not lose track of.

CHAIR—Thank you. I do not think there is any suggestion from any of the stakeholders who have appeared before the committee today that progress has not been made and that you are not responding positively to FATF's review of those matters. But I would say our program today has incorporated a significant number, if not a majority, of key stakeholders in the consultation process that the department, AUSTRAC and other agencies have been engaged in over an extensive period of months if not years in preparation for this legislation. Not one single representative who appeared before the committee today, from over 14 different sets of witnesses, has said that they feel in a position to finalise their commentary by 13 April, which is the deadline set by government so far in this process.

I understand that the shifting or not of the deadline is not a matter for you or the other agencies represented here today, but as to adequate consultation there has been an enormous emphasis by the minister and the agencies concerned—and I thought there was a quite positive response. No matter how much Senator Ludwig tried to get them to tell him it was terrible, they kept telling him it was okay, much to his frustration, except for X, Y and Z. I do not think there is any criticism there, but I think there may be very significant criticism when, as you said with regard to threshold reporting for correspondent banking issues which the ABA regard as 'most significant issues', they are still being worked on at such a late stage. That might take a week; it might take two weeks—that brings us two weeks closer to the 13 April deadline.

As a member of this committee, I would like you to take on board that, while, in my view, the committee has heard very good evidence about the consultation process, it would be an enormous shame to destroy that at the end by overplaying the date of 13 April and not giving these very important stakeholders in your process the opportunity to properly deal with these rules. You might say it is not 30 rules but five packages, which sounds to me like they contain enough subrules to make up 30, but I think it is very important. That is just my observation from both the reading of the submissions and the evidence that we have received today.

Obviously, we also have the detailed issues which have been raised with us today. Let us take one. Broadly speaking, it is the question of the training of staff in their capacity to report suspicious matters and transactions. The breadth of reporting entities which will exist after this legislation is enacted, if it is enacted in any way close to its current incarnation, will be enormous. We have one set of submitters telling us this afternoon that if you are Retravision and you are issuing consumer credit for the purchase of a television or a fridge possibly you will end up caught by the legislation. We have the extremely good submission from Allens Arthur Robinson also commenting on those matters. How do you envisage that staff operating in those environments will be trained to comply adequately with this legislation not to make the sorts of arbitrary assessments that other witnesses, such as the New South Wales Council for Civil Liberties, have raised and to deal with the really quite serious and onerous requirements put on them as staff members in reporting entities?

Mr Gray—The intention of those provisions of the legislation is not to require people to become experts in foreign law, Australian law or anything else. What they are intended to do is to ensure that, if people have suspicions about the source of the money or the activities that people are engaged in when they present to them, they then put in a report. I would submit it is a fairly simple concept: if you do not have a suspicion because there is no basis for you having grounds for suspicion then there is no suspicion and there is no report.

The legislation does build on what is already in the FTR Act. The key parts of those provisions are taken word for word from what is already there. I must admit that we thought that what we were doing was building on experience. Those provisions have been there since 1988 and the number of suspicious transaction reports has gradually risen during that period from a fairly low level to the level that it is now at. They have never produced the sorts of problems which people are now saying that these provisions will produce. As for this idea that people will have to sit home at night boning up on foreign tax law, that is not what is intended.

Having heard those submissions and comments, we would be quite happy to have another look at these provisions. Bruce and I were discussing this in the course of people giving evidence, to work out if there are better ways of doing it, ways which avoid those sorts of issues. But I personally really think that, of all the issues that we are going to run into under this legislation, the sorts of issues which arise in relation to suspect transaction reports are minor in the overall context of things because what is intended is quite clear: we want people in reporting entities, when they are dealing with their customers, to ask themselves, ‘Does this look suspicious?’ If it does then the default is that they report.

Some of the suggestions are that you would write it down and report it only if your suspicion is that they have committed an indictable offence. Quite frankly, it is nonsense to think somebody on the counter is going to be able to say, ‘I’m suspicious about this transaction. I think it could be an indictable offence. No, it is probably only a summary offence, so I will not report.’ To put that sort of obligation on a person is worse than what is in there, which is generality: ‘I think there’s something smelly about this,’ so you put in a report to AUSTRAC and then you have complied with your requirements. What AUSTRAC do with the report is a matter for AUSTRAC.

In relation to the privacy issues, I hear what they say and you can see the faults in doing what they say in relation to suspect transaction reports. But I do not know that there is a solution to some of the issues that they have raised. But what we then expect of the entity is that essentially they forget that they have put in a suspect transaction report, because it becomes the responsibility of AUSTRAC and the law enforcement agencies to decide whether to take action. We do not want reporting entities to be keeping records and blacklists of people who have put in suspicious transaction reports.

CHAIR—How will you stop them?

Mr Gray—I suppose you would point to history and say, 'I don't think it's happened under the FTR Act until now so I was sparring at shadows trying to address problems which have not arisen.'

Senator LUDWIG—But what if you point to the UK experience where it has happened?

Mr Gray—I am not sure about—

Senator LUDWIG—It is what we have been told has happened.

Mr Gray—We have been told that there has been excessive reporting. I do not know that we have been told that they have got blacklists of people and will not deal with people because they have put in suspicious transaction reports. I have not seen anything suggesting that.

Mr Bannerman—As to the source of that about excessive defensive reporting in the UK, it might be worth noting that that seems to come off the requirement in the UK legislation that once you have this suspicious report you cannot act further without having it ticked by the UK regulatory authority. So not only was there a large number of defensive reports but things came to a halt while those ticks were coming through. That has never been the suggestion in our legislation. I think some of the suggestions about learning from the UK experience might in fact be extrapolating from that, as opposed to considering whether the detail in their identification requirements is actually less or more than our suggestions.

Mr Gray—I would like to extrapolate from that. Yes, we have heard it said that we should be learning from the overseas experience. We accept that entirely and we have looked at the overseas experience, especially the UK and the US. But there are differences with the Australian system. I do not think we can pick up and apply overseas provisions slavishly. We have to modify them for the Australian environment. I make the point that although we can look at the UK experience there are limits to how far we can take that.

Mr Bannerman—I suggest that in relation to the question on how you are going to train staff to recognise risks and so on, there is at least an attempt in this bill to ensure that the programs require that sort of training for staff, whereas if you look at the existing FTR Act there is just the broad obligation. We recognise that experience will build over time and that at least there is an attempt to build a platform.

Senator LUDWIG—We will come back to the process. A consultative process began in 2004. When were the roundtables established?

Mr Gray—That was last year.

Mr Bannerman—It was about the end of July and went through to early September.

Senator LUDWIG—I take it they are still sitting?

Mr Gray—No. There were four roundtables and they morphed into the present ministerial advisory group, which is the minister and—

Senator LUDWIG—Perhaps you could slow down and just tell us what happened there.

CHAIR—There are some AUSTRAC working groups as well, aren't there?

Senator LUDWIG—I was going to come to the lot.

CHAIR—We are hoping for a map.

Mr Gray—We do have a map. The ministerial advisory group is co-chaired by Tony Burke, representing the industry, and the department, except when the minister attends. There have been two meetings so far and there will be another on Thursday. The minister will have attended all three.

Senator LUDWIG—That is the ministerial advisory group.

Mr Gray—Yes.

Senator LUDWIG—Do you have an acronym for that?

Mr Gray—MAG.

Senator LUDWIG—I thought you might have something lawyer-like.

Mr Gray—Actually, it is probably the AML-CTFAG, so it is the AML-CTF advisory group, because there was a previous group called the ministerial advisory group, and that is the peak body. The people on there are the minister and representatives of the peak industry bodies.

Senator LUDWIG—So who is on that exactly? Are you able to say?

Mr Gray—Quite a few of the people who have been here today. Tony Burke is there and Richard Gilbert.

CHAIR—The ABA and IFSA.

Mr Gray—CUSCAL, which is the credit unions.

Senator LUDWIG—What about consumer advocate groups?

Mr Gray—We do not have consumer advocate groups on that. That is an industry based group.

Senator LUDWIG—So who looks after the consumer interests?

Mr Gray—The consumer interests are looked after through the parallel discussions that were referred to, with the privacy lobby and the consumer groups.

Senator LUDWIG—What has broken out from that? That has met twice and a meeting is scheduled for this Thursday. How long is the life of that group?

Mr Gray—That is planned to be an ongoing body which will probably meet quarterly. There will be one or perhaps two meetings a year with the minister. We are still working on

the process. It is envisaged that that will be an ongoing thing to supervise the implementation and administration of this legislation in the short term.

Senator LUDWIG—Its role is to supervise the administration of the legislation?

Mr Gray—Yes, because there is going to be an ongoing need to get this legislation moving. In the short term, that body is meeting, as you can see, more frequently than once a quarter.

Senator LUDWIG—Before that there were the 2004 roundtables—is that right?

Mr Gray—That is right.

Senator LUDWIG—There were four of those?

Mr Gray—Yes.

Senator LUDWIG—How many times did they meet?

Mr Gray—There were four meetings, so there was only one meeting on each of the four occasions. That was a wider selection, a wider representation from industry, so it is a larger body, but it was essentially again with the industry.

Senator LUDWIG—That started in July 2005, and there were four separate meetings?

Mr Gray—That is right.

Senator LUDWIG—And it met once with the minister?

Mr Gray—No, the minister attended all four.

Senator LUDWIG—So who were the industry representatives on those—IFSA, ABA?

Mr Gray—That is right.

Senator LUDWIG—Consumer groups?

Mr Gray—No, no consumer groups. Again, it was an industry forum. The process and the reason for the four meetings is that there was an agenda of issues and it took four meetings to work through from the top to the bottom. We had a draft of a bill. The decisions that were made or the agreements that were reached in the course of that process were then fed back in, and the bill underwent significant changes before it was released as an exposure draft.

Senator LUDWIG—So what were the others? Were there working groups?

Mr Gray—There were working groups sitting under that process. It was realised that there were specific tasks which needed attention, so working groups were set up under that process which have now morphed into the four working groups—as referenced—sitting under the ministerial advisory group.

Senator LUDWIG—We will deal with them first. How many of those working groups were there?

Mr Gray—How many working groups, Sonja?

Ms Marsic—There are currently four working groups.

Senator LUDWIG—No, how many originally sat under the four roundtables in 2005?

Ms Marsic—There were four working groups as well. They are now different working groups, but it was the same number.

Senator LUDWIG—What were they? Did they have a name? What area were they looking at?

Ms Marsic—There was a working group looking at the AML-CTF programs. There was one looking at identification. There was one looking at international issues. There was a fourth one that only industry members participated in, and I do not know what that group was. I think it was looking at a number of legal definitional type issues, but the government did not participate in that.

Senator LUDWIG—Who was represented on those working groups then?

Mr Gray—That was AUSTRAC. I think you attended all of the three that we were invited to.

Ms Marsic—That is correct.

Mr Gray—These were the initiative, essentially, of the financial sector. It set up those working groups initially.

Senator LUDWIG—So they were financial sector—consumer groups or advocacy or privacy groups?

Mr Gray—No. Again, this is all industry, the financial sector, that we are talking about here.

Senator LUDWIG—So those groups have finished?

Mr Gray—No, they have morphed.

Senator LUDWIG—Morphed again!

Mr Gray—They have changed and become working groups reporting to the advisory group. The thinking was that we should build that structure on what was already there.

Senator LUDWIG—Yes, it is always best to have someone else do the hard yards! So there are now four working groups?

Mr Gray—There are four working groups. Each of those is co-chaired by industry representatives and government. In three cases, the government co-chair is AUSTRAC; in one case, the co-chair is the department.

Senator LUDWIG—What do they look after?

Mr Gray—There is one about AML programs. There is the international working group, which is one I co-chair. There is a risk principles working group, and there is an identity verification group. We have found that they cover the full range of issues which need to be addressed which have so far arisen, with some flexibility in their—

Senator LUDWIG—So are the privacy groups, privacy advocates or the Privacy Commissioner represented on those?

Mr Gray—Not on those, no.

Senator LUDWIG—Where are they then?

Mr Gray—They have been consulted as a parallel, a separate process. There have been discussions—

Senator LUDWIG—They are not part of industry?

Mr Gray—We are not part of the financial sector. For the purposes of this exercise, we have drawn the distinction between the financial sector and the consumer/privacy—

Senator LUDWIG—Was that a policy decision?

Mr Gray—I do not think it was a policy decision so much as what is feasible and realistic. The object in this whole exercise has been to keep the process moving. We will meet with whoever wants to meet with us, and talk about whatever they want to talk about, but there is a limit to how many people you can fit into a room and how many issues you can address.

CHAIR—Or teleconferences.

Mr Gray—I might just talk about that process and how many issues you can address in the given time. It is a matter of logistics and practicality; it is not a matter of policy. The senator has mentioned the way these working groups are operating and it is working quite well considering the limitations with the telephone link-ups. There is also a meeting once fortnightly with the co-chairs who get together as a clearing house. So we have that as another virtual subcommittee. It is telephone link-ups and we are never quite sure how many people are on the end of the line and how many people are phoning in. We can have a meeting with people in three different cities with 40 or 50 people, which has its limitations, but it also has advantages that you do get the full range of views and people are able to have input.

In relation to the privacy sector and the consumer advocates, we have not seen any way in which we can incorporate them into that process, so we have spoken to them separately. AUSTRAC have established liaison with the privacy sector. They had a meeting—

Mr Ryan—The privacy consultative group.

Mr Gray—They had a meeting in Sydney the day before the exposure draft was released. We gave them an advance copy of the exposure draft and agreed that there would then be a roundtable with a wider representation, and that was held as a video link-up, which was—

Mr Ryan—About two or three weeks ago.

Mr Gray—The things that have been said today were, basically, said to us on that occasion.

Senator LUDWIG—So that is between AUSTRAC and the Privacy Commissioner?

Mr Ryan—And the Attorney-General's Department.

Mr Gray—And the Treasury.

CHAIR—The privacy consultative group is auspiced under AUSTRAC?

Mr Ryan—It is.

CHAIR—And the members of that are?

Mr Ryan—The Victorian Council of Civil Liberties, the Office of the Privacy Commissioner, the Australian Consumers Association and the Australian Privacy Foundation.

CHAIR—And they have met once?

Mr Ryan—We had a meeting with them two to three weeks ago, which was the meeting after the release of the bill. They were given a copy of the draft exposure bill the day it was released and we have since had another meeting with them, a few weeks ago, to talk about the issues that came out of that.

Senator LUDWIG—But that is the first time that they were brought into the process?

Mr Gray—No, there were discussions—

Senator LUDWIG—In a formal way. You set up a formal group.

Mr Ryan—We have had many years of formal discussions with that privacy consultative group. In a formal way they were brought into the discussions the day the bill was released. But in terms of having ongoing consultation with that group, that offer is always on the table with that group. They chose not to meet with us until the bill was released. So that was their decision.

Mr Gray—And there were earlier discussions, earlier meetings. The people who gave evidence today said that consultations took place in 2004, which was before I was involved in the process. But you were there then, Bruce.

Mr Bannerman—Yes, there were general discussions in 2004, but the detailed discussions have only been since the release of the bill.

Mr Gray—Essentially that is because, as we found when we were trying to deal with industry back in the early days, the call was always: 'Well, give us something. Give us the package, give us the material so we can comment.' It is interesting that the privacy people are still saying that today. We can understand why. They want to know what the rules look like. The response to that is: 'The rules are being developed as a result of the consultation process.'

Senator LUDWIG—You do not know when the rules and guidelines will be finalised? Even the five sets that you have spoken about—you cannot give us a definitive date when that is going to be released? You can understand their criticism that they cannot examine the rules or guidelines until they can see both the exposure draft and the rules and guidelines? It seems transparent to me.

Mr Gray—I can understand the comment, obviously. Nonetheless, we do have a bill. In some ways it is a strange process to develop legislation in this way. There is an exposure draft. The government does not always issue exposure drafts. The exposure bill is out, and people have asked for rules and guidelines. Generally you do not develop the whole package of legislation, the rules and guidelines before enacting the legislation. This is a different exercise.

CHAIR—We currently have a suspended inquiry on this committee because the department and OPC—in this case, Office of Parliamentary Counsel, not the Privacy Commissioner—at one stage last year presented a head bill without a consequential and transitional bill, and every single stakeholder came to the table and said: 'I'm sorry. What do you expect us to comment on? How do you expect us to do this job?' We regarded that as a perfectly reasonable assessment for them to make in that particular process. As I read the development of this legislation, much of the detail is in fact in the rules and guidelines. So it

is a perfectly reasonable expectation for stakeholders to want to work with the fullest information available, and that means the rules and guidelines.

Mr Gray—We accept that. I have said it is an unusual process, and I think the nature of this bill justifies the process. It is a difficult process because of the iterative nature of the process. It is, as I said at the outset, a genuine consultation period. When industry points out problems or the privacy sector or anybody raises issues in relation to it, we go back and have a look. That is why we do not have final rules. We could have put out rules, but there is not much point bringing out something which is not going to survive the consultation period.

Senator LUDWIG—If it is supposed to be a principle based exposure draft then, by that name, it is about principles; therefore the actual black-letter law, the rules and regulations, is what everyone is sweating on. The import of all the submissions we have received to date is that they cannot progress any further. They have certainly raked over the coals in respect of principle based legislation, so much so that they have attacked where they consider it has not adhered to being principle based and in fact, they say, is prescriptive. They have pointed out those deficiencies. But they are still holding their fire until they see the rules and guidelines, which is perfectly logical.

So how can you say that it is a true consultative process when they cannot consult on, I suspect, the real substance of the legislation? That is the difficulty I see. From my perspective—I do not know about the committee's perspective as a whole—it is very difficult to come to a conclusion from the submissions as to what the deficiencies are, other than from the consultative process. That seems to be deficient because after four months the minister will say, 'I've allowed the legislation to be exposed for the public for four months,' but if it is principle based then in truth it has not been four months. We now have a month to go and five significant packages have not been seen by industry. That is the concern I have.

Mr Bannerman—Except to note that industry in fact has been involved in the very discussions on the drafting of these rules. It is consultative and cooperative in that process.

CHAIR—At the risk of repeating myself and boring everybody further, we understand that. I made that expressly clear at the beginning. I understand that absolutely. But these people are dealing with detail and the financial transactions of millions and millions of clients in some cases. I think Tony Burke put it very well this morning. His approach was very constructive, so was the approach of the other deposit-taking institutions who were present in that panel and so was the approach of all the witnesses who have come before us today. They have been very constructive, and you are equally constructive. But every single one of the 14 has come with the rider that Senator Ludwig and I have pursued.

Senator LUDWIG—One of the concerns they have is that they are required to spend millions and millions of dollars to get this right, so they are as keen as cut mustard to find out what they have to do, because they do not want to have to do it again. In other words, they do not want to have the bad experience that people in the UK had, which was a prescriptive approach that then had to be pulled out and reintroduced. The submissions also say that that was an expensive process over there and they do not want to follow the same path here. But it seems to me that you are following the same path. They have criticised your exposure draft as being prescriptive. They have not seen the rules. Therefore, their concern and criticism still is

that it will be overly prescriptive and that in fact some time down the track you will be introducing amendments to the legislation to reverse gear and take a principle based approach.

CHAIR—A risk based approach.

Senator LUDWIG—Yes, it is principle based legislation with a risk base underneath it.

CHAIR—Yes.

Senator LUDWIG—You cannot even seem to agree on what 'risk based' is. Do you have a definition of that?

Mr Gray—I do not know if we have a definition. I am not sure that we have to define it—the concept is clear. The principles are in the legislation and then there is flexibility for the industry to determine, using a risk based assessment, what their regime shall be. Then that will be embodied in an AML-CTF program, which will be subject to audit.

CHAIR—What do you say to those witnesses today who have said they are very concerned that the development of the material they have seen so far is becoming overly prescriptive and is not as risk based an approach as they would like in practice?

Mr Gray—The response to that is that there have been discussions and what the industry has said has been taken on board. The documents that finally emerge from this process—the vital rules that need to be drafted—will reflect that discussion.

CHAIR—For your benefit, I would also note and agree that the evidence today was not consistent on that point. There were some witnesses who leapt with enthusiasm into telling us that they were much happier that things had become more risk based in the last three weeks. Then there were others who were continuing to criticise a lack of a risk based focus. The committee is grappling with that as well.

Mr Gray—That is the problem: people have different—

CHAIR—And we held a lot of new roundtables, so we did have that benefit.

Mr Gray—The roundtables have been very interesting. This whole process has been very interesting. Working with the people we have heard today has been very interesting and very constructive and good. The problem that they face, and this comes up time after time, is they have to comment on the exposure draft of the bill which is before the committee.

CHAIR—We understand that is static and that does not make life any easier.

Mr Gray—Some of them are commenting on the exposure draft and some of them are commenting on what they think the bill is going to look like.

Senator LUDWIG—Where they think they have moved you to.

Mr Gray—Where they have moved us to.

CHAIR—My crystal ball, however, is in the repair shop at the moment, so that is not really that helpful to me.

Senator LUDWIG—I am shattered.

Mr Gray—I understand the comment. Coming back to the point, nobody here is saying that there is anything unreasonable in wanting to see the package before commenting. What I

am trying to say is that we are in fact in a real consultation process, and it has challenges of its own. We would not want us to take a fixed view on any of the issues.

CHAIR—Does Ms Atkins want to make a contribution on some of these matters? We took a brief opening statement from Mr Gray, and the AFP made a brief submission. Do you want to put anything on the record, Ms Atkins? We understand that we began this session early, so please do not worry about that at all.

Ms Atkins—I do not have an opening statement to make. I am sure we are in agreement with the department. Just on that last issue, though, about what 'risk based' might mean and whether we are being too prescriptive, I would say that our view is that the AML-CTF program rules, which are indeed in the public arena, have been worked on very closely by a working group that involves industry. I do not have the benefit of having the heard the evidence this morning, although I am aware of the sorts of views that the ABA and others have.

As to the work in the working group on the AML program rules, we are feeling fairly comfortable that we have achieved a risk based approach—a set of rules that set out a framework in which entities can judge their own risk and deal with that in an appropriate way. I am sure you have been told that that is the way we are now moving on customer identification as well. So we have had a bit of a turnaround as part of the consultation process. Shortly we hope that rules in relation to customer identification will be available as well through the working groups in the first instance, because that is the way this process is working—it works closely with a smaller group in order to come up with something that a larger group can then look at and comment on.

Ms Marsic—I would just add one more comment. In December AUSTRAC did release some draft guidelines on the AML programs. In those guidelines there is a section which sets out what we mean by the risk based approach. That has been out for public consultation since December.

Senator LUDWIG—I think industry has seen it. I am not sure there is a meeting of the minds on whether that is a risk based approach or not or whether in fact the legislation then is risk based.

Mr Gray—People lose track of what has been issued and what they have in front of them. That is a measure of the size of the project.

CHAIR—I was looking at the AFP submission to us, which indicates that you as an organisation were making a further submission, I think, or that you will be finalising your position on issues as they come up. But, in relation to other submissions that have been made in your consultation process, you would have heard the APF tell us today that they were trying to encourage the transparency of the process. They had made some application under FOI and found it financially prohibitive for them to pursue those processes. How does that add to the transparency of the consultation process, just out of interest?

Mr Bannerman—The history of it is that that FOI application was made by them back in 2004 in relation to working papers that led to the discussion papers. There were five sector-specific discussion papers and they were on the website. Various members of industry who gave us working material that led to the dissemination of those did so on the proviso that that

was confidential. It is unfortunate that the thing played out as it did. But we have been trying to say to the privacy people that the real meat of the scheme had not been worked out at that stage. It has only now been worked out in first exposure draft form. When that was available it was made available to them at the same time as everybody else—in fact, it was the day before it was publicly released. It was not until that stage that there was really anything that they could respond to. We are strongly aware of the privacy implications of this. We have certainly been talking with the federal Office of the Privacy Commissioner and we expect there will be a need for various amendments and so on.

Senator LUDWIG—Is the privacy impact assessment something that you are able to say that you are going to do or is that the minister's prerogative?

Mr Bannerman—I think there needs to be a ministerial—

Senator LUDWIG—So it has not been agreed to at this point in time?

Mr Bannerman—Not at this stage, no.

CHAIR—It is a strong recommendation of the Office of the Privacy Commissioner, as I read it.

Senator LUDWIG—It is.

Mr Bannerman—Yes, I think that is right.

Senator LUDWIG—Is there any suggestion that the transaction threshold of $10,000 is going to be reviewed?

Mr Gray—It has not been suggested. That is taken over from the FTR Act. I think part of the thinking is that, as time goes by, there are fewer transactions conducted in cash and therefore, although the value or the significance of $10,000 comes down, by the same token it is the equivalent of what it might have been in 1988, say, $7,000, and so still raises suspicion. I think that is the current thinking. Liz may have further information on that.

Ms Atkins—Certainly we do not believe that there is any reason to review that level at the moment. Reporting at that level is of use to AUSTRAC and its partner agencies in their work. People from the privacy groups in particular have raised this in AUSTRAC's privacy consultative committee. While we are always open to reviewing that if necessary, at this stage we believe that the $10,000 threshold is still a reasonable threshold to have.

Mr Ryan—Similarly we would be of the view that the zero threshold for wire transfer reporting should remain. I know there have been some suggestions that that ought to be looked at, but, based on the way our current scheme works and the intelligence value that we can provide to law enforcement in particular regarding low-value wire transfers, we would maintain that that position needs to be maintained.

Senator LUDWIG—Would that be the same for stored value cards and the like?

Mr Ryan—There is a little bit of a different issue there with stored value cards. There is in fact a threshold suggestion there.

Senator LUDWIG—Of $1,000.

Mr Ryan—Correct.

Mr Gray—Because the concept of stored value cards is so wide. If somebody buys a prepaid bus ticket for $10, we do not want to catch that. There is a self-evident need for a threshold. With other products, if there is a need for a threshold, if that industry makes a representation, we are certainly happy to look at a threshold. But under a risk based approach it is a question of whether we then just say, 'If you think that particular product is low risk below a threshold, put it in your risk based management program.' Initially the way this bill was drafted, the structure was that everything was in, subject to exemptions. This is in relation to customer identification and verification. If the approach is risk based—as I think Richard Gilbert was noting this morning—there is no longer the same importance attached to exemptions.

Senator LUDWIG—What about the issue that has been raised by the Australian Privacy Foundation? They are concerned that appearance and behavioural factors as well as supposedly factual matters which there is no reason for employers or reporting entities to know are part of the reporting requirement for a suspicious matter.

Mr Gray—Sorry, can you run that past me again?

Senator LUDWIG—They say that they are concerned that the reporting requirements for a suspicious matter will also take into account appearances and behavioural factors. This is on page 7, item 39, of their submission.

Mr Gray—I do not know what I can say in relation to that. If a person's appearance and behaviour give rise to suspicion on the part of the bank then there would be an obligation to report. I do not see how we can write into the legislation 'as long as you don't form that suspicion on a racist basis'. I think there are limits to what the legislation can do. If we decide that we want suspicions reported then some suspicions will be reported, if people do it properly. Some of those suspicions will be groundless and some will be based on things they should not base suspicions on.

CHAIR—I guess it is like the point that American Express raise in their very useful submission to the committee, which is about minimum custom information on individuals and the sorts of information that are going to be required in the Australian context. They say:

> For the purpose of issuing a relatively low risk product such as a credit card, it is of no business value to record: place of birth, nationality or country of residence. Verifying these particulars would be disproportionately costly and labour intensive and would yield no information of regulatory value for AML/CTF purposes. In addition, such information of necessity becomes a surrogate for identifying ethnicity, which in turn may lead to inappropriate assumptions being used as a basis for decision-making. The legitimate objectives of privacy and anti-discrimination laws may thus be undermined.

I do not think American Express make those sorts of observations glibly, without due consideration being given at the most senior levels of their organisation as to how they think this may have an impact. They have extensive experience with the USA PATRIOT Act, as Mr Knight made clear, and these are concerns which have been raised by the committee, so the committee is duty bound to consider them.

Mr Gray—Those comments are directed to some words which appear in a draft of some ID verification rules, which list matters on which an entity has to obtain information. We keep talking about the risk base. The exercise now is redrafting those rules to make them risk

based. That is a specific comment directed at what was a draft rule which had quite specific prescribed requirements.

CHAIR—So you are telling me that is changing.

Mr Gray—That is changing, possibly.

CHAIR—It is maybe changing.

Ms Atkins—It was a specific list that was put out which has been reconsidered in the context of comments in the working groups where American Express are represented. Such list as there may or may not be under a sort of revised, risk based way of looking at identification of customers will take account of those comments and may well be quite different from what they seem at the moment.

Senator LUDWIG—When will the revised version of those rules be released?

Mr Gray—The aim is to have it with industry before the meeting next Thursday, which is only two days away, and to discuss it at the meeting on Thursday. Where it goes from there depends on what the meeting decides to do with it. So it is imminent, and there is still some drafting work that has to be done between now and close of business tomorrow—extensive drafting work.

CHAIR—Given that we have kept Mr Gray here all day—

Ms Atkins—The people involved are actually still drafting.

CHAIR—Could I ask a question in relation to a different class, if you like, of our witnesses today. That is the Australian Casino Association. They are a very different organisation. They are not a deposit-taking institution, they are not a financial institution, and they are very keen to support the legislation, as far as I can tell, and they are obviously very keen to comply with the requirements they already have with AUSTRAC—which, they reported to us today, operate well as they exist. They are satisfied with the consultation so far. But we were left with some questions about the practicalities of some of the issues that they raised. They were slightly restricted, I suspect, by what they could place on record, given the nature of the processes and the confidentiality of those.

I wonder how much attention has been given to the practical assessment of what members like theirs would be required to do under this legislation. They are very concerned about a number of issues, first of all ensuring that persons who are identified as high risk customers are not 'tipped off'—I think that was their phrase.

Senator LUDWIG—Yes. If you can imagine a betting agency—we will not just pick on the poor old casino—the provisions of the legislation obviously require that you cannot tip off, in other words, provide advice. But if they compare that with 'know your customer', if they start asking a number of questions to know their customer—because this might be the first time that they have seen the customer, because it may not be a regular customer; they may be someone who is interacting at a significant level on that night as they walk in off the street—they say, 'What happens when we start asking all these questions?' Effectively at some point it moves to tipping off, because the person will say, 'Am I suspected of something?' because of the number of questions. 'You are not asking every other client all these questions, so why am I being asked these questions?' Do they then fall foul of the

tipping off legislation, where the person walks away saying, 'Obviously I should get out of here.'

CHAIR—That is the first set of their concerns. The second was what they describe as a safe harbour for those of their staff who act reasonably and in good faith. Whether that will be provided for in the material is, I guess, still to come. And then there is the process for amendments to the rules and how that will be done—what sort of review mechanism will be in place so that that is an independent and transparent process.

Mr Gray—The answer to the tipping off is no. The only tipping off provisions in here are if you have put in a suspicious transaction report, you are not allowed to tell people that you have put in the report. Correct me if I am wrong on that.

CHAIR—I construed their concerns slightly differently. I thought that they were concerned that, if they went down the road of getting more information from the person on the premises, the person on the premises may therefore decide there was some reason for them being asked.

Senator LUDWIG—You know, 'Why are you doing this?' 'We are putting in a suspicious transaction and we require this information.' They cannot say that, but they might say, 'We are required by law to ask these questions.'

Ms Atkins—That is right, and there will be nothing at law stopping them from saying, if they wanted to, 'We consider you to be a high risk.' All they are not allowed to disclose is if in fact something has triggered an actual suspicion rather than a view that the customer is high risk. Somebody can be a high risk customer and never raise a suspicion, because even though they are high risk, their business is completely legitimate. It is only about putting in the suspicious matter report that the tipping off provision applies. If a customer comes to bank or a casino under privacy laws and asks whether they have been classified as high risk, I do not see that there is any way they can refuse to tell them.

Mr Gray—Certainly there is nothing to stop them if they want to tell them.

Ms Atkins—That is a business decision for them and a decision based on the privacy laws that apply to them.

Senator LUDWIG—If you asked, for argument's sake—and it might get a bit circuitous—'Am I high risk?' and the answer is yes, you can reasonably assume that there is a high probability of any transactions you make will be monitored and trigger the suspicious matter reporting and have a report provided to AUSTRAC.

CHAIR—I think there are some terminology issues in that conversation. Did you want to clarify something, Ms Atkins?

Ms Atkins—It would not necessarily trigger a suspicious transaction report; it might make a person wonder whether it had, but it would not necessarily. Unless you have actually disclosed that you have lodged a suspicious matter report, then you are not going to be in breach of the bill.

Senator LUDWIG—The point is that the person asks, 'I am high risk?' 'Yes, you are.' 'Have you lodged a suspicious matter report in respect of that?' They cannot answer that.

Ms Atkins—That is right. I understand what you are saying, which is that—

Senator LUDWIG—I do not know whether a yes or no is going to matter at that point.

Ms Atkins—under this bill there is a high risk. It is no different to what we have to do under the freedom of information legislation now when somebody asks us whether there is a suspicious transaction report about them. We deal with that issue and whether we can use the neither confirm nor deny provisions of that legislation in each individual case. It has been changed now.

Senator LUDWIG—It is a bit like in Queensland: if you asked whether they had a file on you, you were certain to get one after you asked even if they didn't have one before.

Ms Atkins—Not at AUSTRAC.

Mr Gray—About rating someone as high risk, maybe if I was a financial institution and I was concerned about that, I would not use terms like high risk, low risk, medium risk; I would call them category A, category B and category C and soften it. The whole point being that if you are classified as high risk it does not mean every transaction is going to be recorded. That is not the only reason for classifying them. Under the AML program, if you are classified as a high risk category dealing with a high risk product then we expect the institution to provide enhanced due diligence—to keep a watch over you and to look for suspicious patterns. I was trying to get away from the terminology. Yes, okay, I am classified as high risk by the Commonwealth Bank. It does not mean that I am high risk because they have put in a report or because they are about to; it just means that because of my background or the type of product, which I think is going to be more common than the background of the person, it is high risk—it is a cash account, which I can put money in and take it out as opposed to a term deposit.

There were three things you raised. The second thing was defences and the question of safe harbours. We have had this discussion and it has been raised at the outset with industry. There is nothing in here for the moment. What they want is to see a provision in here saying, 'Whatever happens, if you have taken reasonable steps and exercised due diligence, you have a defence against criminal prosecution.' The reason we have not put it in there is because it is odd in these days of having the Criminal Code to have a provision like that in specific legislation. We think it is covered by the Criminal Code. That is something else I was discussing with Bruce in the course of the day: we are quite happy to look at that and to part from the principles of the Criminal Code, if that is going to—

CHAIR—That's what tortures McDonald.

Mr Gray—Not him any more.

CHAIR—No, I know, but I do not want him to have nightmares about what we are doing to his baby.

Mr Gray—I won't tell him if you don't!

Senator LUDWIG—If you do it, use a letter.

Mr Gray—If we need to depart from matters of principle, in order to achieve legislation which is acceptable to Australian industry and the Australian community, then we will do so.

CHAIR—I think, Mr Gray, if appropriate defences are available in other legislation that will not be a problem. It is just a matter of there being appropriate defences available somewhere.

Mr Gray—That is the issue that we have got to work through. There are a few issues like that. Take the ABA's list of issues which runs for pages and pages. If we take out those we have already discussed and, we think, resolved, and if you take out those which are going to be dealt with under the risk based approach, there are just a few—some of them knotty—that have to be resolved. You were asking before whether we can make the time limit. I envisage that, if we are getting towards the end and we still have those issues, we will sit in a room together with a whiteboard and roll up our sleeves and hammer it out.

CHAIR—Gee, I bet our witnesses can't wait for that.

Mr Gray—They have enjoyed that process. It has to be said, and it has been said before, that it has been an excellent cooperative process.

CHAIR—There is no disagreement from me. Perhaps I am concerned—

Mr Gray—I think they will enjoy it, is the short answer.

CHAIR—I am going to bore you now. I am going to go back to what I said at the beginning, which I now say for the third time, and that is to say that these professional organisations think that, unless you gave them the rules and the guidelines two weeks ago, they no longer have enough time.

Mr Gray—Yes. We have heard that from them.

CHAIR—And from the committee.

Senator LUDWIG—The broader issue is that the consultative process is not simply concerned with industry and how industry is going to operate under these rules and effect them. There are wider concerns, which have been expressed to this committee. They concern privacy groups—and, I suspect, consumer groups, though they are absent from these submissions; from my own knowledge, though, I would imagine they would be interested in how consumers are going to be affected. There is no indication that there is going to be a public campaign of awareness. That has been an issue raised by some—

CHAIR—Credit unions.

Senator LUDWIG—as well as the credit unions, to ensure that they are not—

Mr Gray—We are fully proposing that. The question is: when is the appropriate time? We fully accept that and industry have pushed for it, because they want a public campaign to make it clear to people that these new obligations are coming from government and not from industry. We have listened to that and said, 'Yes, that sounds fair. We will do that.' That commitment has been given.

Ms Atkins—The consumer organisations are, in fact, involved in our consultation process. They are represented on AUSTRAC's privacy consultative committee and in the wider group which, through that committee, we have put together. We have only had one meeting with them so far but we have met with them and consumer groups were involved.

CHAIR—I have one more specific question. We spent some time this afternoon listening to both ING DIRECT and American Express. There was an emphasis in their submissions on the question of electronic verification. Can you tell the committee whether that will be expressly provided for in the rules?

Mr Gray—It will not necessarily be expressly provided for because, under a risk based system, you do not have to express things because that would become prescriptive but certainly the intention is there. This is the problem that you run into. People want risk based flexibility. At the same time they want clear guidance on what they are required to do. I think that is fair enough, because different industry sectors want different things and we have to have a process which allows each of them to be given what they need. Electronic verification has been discussed once or twice in the course of the process.

CHAIR—I am taking that as irony.

Mr Gray—That was irony.

CHAIR—Excellent; I am not completely exhausted then.

Mr Gray—The message has been heard loud and clear. The minister in roundtable conferences has basically said that there has to be an electronic verification system. The concept is: you cannot change. The idea of this is not to stop legitimate industry which is operating in a certain way from operating in that way, unless the risks of money laundering are so high that they should not be operating in that way. You cannot take an industry which operates entirely in an electronic environment and say, ‘Next week you have to have branches because of these provisions.’ That has been the challenge: to come up with electronic verification procedures which are as robust as paper—leaving aside, for the moment, how robust paper identification and verification are.

Those issues are there. Where that debate will now move is onto the risk based approach, the current concept. The risk based approach will say that you as an entity have to have robust verification procedures and if you are satisfied that electronic verification is sufficiently robust and is appropriate then an entity can develop that. That is a risk based approach. Then, the onus will move on to our good friends at AUSTRAC with their audit function. We think that the Attorney-General’s Department is likely to be involved in further debate and discussion about what the electronic verification involves. I do not think that issue is going to go to bed for quite some time but we are talking about an implementation period for this legislation; we are not talking about everything being in place on day one.

CHAIR—That addresses to a reasonable degree, by the sounds of it, the competitive neutrality question that American Express are concerned about—totally reasonably.

Mr Gray—That was an example of them commenting on the bill as it stands.

CHAIR—Which, again, is where the committee is also restricted to.

Mr Gray—I understand.

Senator LUDWIG—A matter raised by American Express as well is immunity from liability. They say it is a feature of other AML-CTF regimes where there is reasonable leak protection from civil liability for persons complying with the new regulatory regime.

Mr Gray—There are certainly provisions to that effect in here.

Ms Atkins—It is at section 46.

Mr Gray—Whether they cover everything that needs to be covered—

Ms Atkins—It covers the reporting of suspicious matters, threshold transactions, international funds transactions—

Mr Gray—I think the issue of negligence comes in. I have heard this point made—I am not sure this is the point they were making—that if you look at 46 it has to be action taken in good faith and without negligence. The question is: shouldn't it just be good faith? Why have you got 'without negligence' as well? That is an interesting question and something we have taken on board.

Senator LUDWIG—It is negligence per se; it is not recklessly negligent. So there is no recklessness. It is quite a high order.

Mr Gray—If you are going to sue in negligence then immediately if the suit of action is negligence the protection has no application. That is the comment that has been made. I am not sure where that form of words came from. I am not sure that we are necessarily wedded to that form of words. You will understand we cannot give commitments and undertakings in advance of government decision.

Senator LUDWIG—We are taking it as an iterative process. We are raising matters and seeing whether you have looked at them.

Mr Gray—We certainly have. We have a long list of issues of that kind. It is more than a drafting issue; it is significant and it is on the list of issues we will address.

Ms Marsic—I note that clauses 36 and 37 also make provisions for defences in relation to identification. That is in part 2. There are those provisions throughout the bill.

Senator LUDWIG—I will not go into any detail but Allens Arthur Robinson made a significant submission—it is really partly a legal submission more than anything else—on certain matters that stretched from designated services, control tests, the rule making power, intermediaries and suspicious matter obligations, and they highlighted various matters within that, including tipping off at 95(1). Rather than go to those and seek your response, it might be easier for you to take that on notice and indicate whether you have taken those matters into consideration. Some of them seem quite relevant, and I would not mind an explanation—in particular, for designated services—as to whether they are right or wrong.

Mr Gray—There are no rights or wrongs in this exercise.

Senator LUDWIG—There is if someone adjudges it at some point. There is a positive or negative view. There is also the rule making power and whether there is sufficient under the legislation to—

Mr Gray—The rule making power goes to another point you made. There is a requirement for AUSTRAC to consult with industry before forming rules. That is essentially limited to reporting entities—there is nothing there about privacy. I think the point has also been made that they would like to be consulted, as well. That is something else we need to look at.

Senator LUDWIG—Do you think at the moment that it is only industry and not privacy?

Mr Gray—Industry and law enforcement.

Senator LUDWIG—Yes.

Mr Gray—We think that meets the point, at least as far as industry is concerned, of requiring consultation before the rules are enacted. The other point that was interesting along the same lines was the regulations—the countermeasures—under clause 83. What industry has been asking for there, and the point was made, is that if it sets up a business with a particular country and the government brings down a regulation saying that country is on a blacklist, it could cost industry billions. It is obviously a point government would take on board. What it wants is some sort of provision in here that says, 'Before regulations are enacted there has to be consultation.' Again, we have heard what it has said, but you do not normally find that the regulation—

Senator LUDWIG—I would not mind if you did that.

Ms Atkins—Doesn't the Legislative Instruments Act provide for consultation?

CHAIR—Indeed, that point has been made today, but we also responded by saying that consultation has different meanings in different people's perspectives.

Senator LUDWIG—I remember speaking to the Legislative Instruments Act, and, upon reflection, I was more hopeful than what the reality turned out to be.

Mr Gray—So the questions are: is it necessary, is it appropriate and is it something that can be done? It is a valid concern, and a point we have heard. And there are a lot of other things. Some of the things we are not going to be able to do for various reasons, but I do not think there is any point anybody has made where we have said there is no substance whatsoever to it.

CHAIR—There is concern about duplication. For example, it is described in the Certified Practising Accountants and the Institute of Chartered Accountants' submission as the impact on SMEs, and those sorts of issues. How are they taken into account in considering the impact on business?

Mr Gray—Accountants have really—firstly, they want it to be taken out, and there are financial advisers—

CHAIR—They did not argue that hard today, though, Mr Gray.

Mr Gray—No, there have been other forums. The financial planners are picked up in table 1 if they provide specific product advice, but they are not if they provide general advice. The concept was that they are gatekeepers, so let us bring in the regulations and the rest of it at an early point. They have raised the question of whether, one, it is appropriate and whether, two, it is feasible, and the problems that it poses to their members to suddenly take off one hat and put on another and then require a person to provide identification material. Again, we have heard that. The accountants for the most part will be caught up in the second tranche of this legislation, because that is where we will have to grapple with how we regulate a lot of industry sectors that have not formerly been regulated. One of the issues that will be looked at in the wash-out after the consultation period is whether those provisions remain in table 1.

The other thing about the line of transaction or the line identification—which is essentially what it comes down to; an awful lot of the problems in this area, the submissions, come back to identity verification. Nobody seems to object to the concept of having an AML program, as long as we allow them to have it risk-based and flexible, and they can work out what to have in it. And Richard Gilbert said that. He has said consistently he wants certain products taken out of the identity verification rules, but the rest of the requirements he is quite happy for his people to comply with.

I think it is the same with the accountants. I do not think the accounting sector has any fundamental objection to the idea of having AML programs, but they do not want to have to identify people. And again, the good old risk-based approach may give them the flexibility to come up with systems that will be appropriate and things that their members can do. The other thing is there is absolutely no point putting on obligations people that they cannot comply with.

CHAIR—Sure.

Mr Gray—But if I could finish that thought, I know I stopped—

Senator LUDWIG—It is late in the day.

Mr Gray—Until you start having these meetings with people, you are not always sure what it is they can do. There are elements in the bill—in the rules—which are designed to draw comment. Some of those are spelt out in the bill itself, but the whole thing is designed to produce comment from people who know the business, people who know their products. We are getting a fairly good idea on this side of the table about how the financial sector in Australia operates, but we will never be able to match the other witnesses who are here today.

CHAIR—Mr Drennan, what are the key issues in this for the AFP? You have made some oblique references in your submission, but what are the key issues for the AFP?

Federal Agent Drennan—In relation to the risk-based approach, there is a need to ensure there is some framework to ensure compliance. The fact that we are addressing the issues of money laundering and terrorist financing is obviously a concern to the AFP that the framework gives us the best opportunity in the environment in which we exist to counter both of those issues, which is quite a relevant point when we talk about suspicion itself. That is a trigger point, and the broader that trigger point can be cast, from our perspective, the more it would support law enforcement efforts by us and our partners.

The other issue concerning knowing your customer is complementary to that broader issue of identity security. Again, the emphasis on financial institutions and service providers to assist in that process would certainly support the efforts of us and other law enforcement and intelligence agencies. They are probably the real key issues that we see the bill and the framework providing for and are the ones which are of concern to us.

CHAIR—What role, if any, does the AFP play in the consultation process at any of the round or otherwise-shaped tables we have been discussing in the past few hours?

Federal Agent Drennan—An ongoing one is probably the best way to put it.

CHAIR—Do you attend any of them? Are you represented at any of them?

Mr Whowell—At different times. We are not formal representatives but we have been asked to comment at different times when industry has asked for a law enforcement view. We have made ourselves available to both the department and AUSTRAC to do that. As Mr Gray has pointed out, with this being an iterative process, we are just keeping pace with developments as best we can and looking for what the key points are going to be. That is why we have made ourselves available to you today as well.

CHAIR—You offered in your submission.

Senator LUDWIG—You are effectively an end user. Why wouldn't you be interested in the development or be on the roundtable, to ensure that the product that is developed is suitable and you can use it? The dissemination of information, I suspect, is not just going into a vat, never to be looked at.

Federal Agent Drennan—Exactly. We are involved on an ongoing basis with the department and AUSTRAC in providing input into the various aspects that come up which particularly relate to that, again, where possible, being able to provide the practical experience of that application. By way of example, if you look at the issue that came up earlier about the training of people, our view is that there is a reflection there of the type of environment and the type of activity that is occurring. Our input into this on an ongoing basis is what we are seeing on a day-to-day basis and providing some input to the department and AUSTRAC on the things that can be picked up there. So it is reflective throughout the bill as opposed to specifically.

Ms Atkins—In relation to participation of the AFP in the consultation process, AUSTRAC has quite sophisticated partner liaison arrangements with all of the agencies that have access to our information. We have been using those processes to raise with those agencies issues that we think are of particular interest to them that are raised by industry and keeping them informed of the way things are going. We have a raft of partner agency consultations going at the moment. So, rather than trying to have all our partner agencies adding to the already large numbers at the roundtables, that is the way we have approached it from a government perspective—that AGs, Treasury and ourselves are at the roundtables and we do the rest of the consultation within government.

Senator LUDWIG—Your job will be to develop the rules and guidelines.

Ms Atkins—The rules and guidelines which might underline both the rules and the way AUSTRAC might implement the legislation. That is right.

Senator LUDWIG—Is it a resource issue that you have not had them developed to date for the consultative process? Do you not have enough bodies?

Ms Atkins—I do not think that is the case. One of the issues around resources is that having more people will not get the rules out any faster. The rules are so interrelated that the people working on them need to be across all the issues. So we have a group of three particular people who are directly involved in drafting the rules together and who have that across-the-board knowledge to be able to put them together.

I guess the particular rule that everyone is focused on when they say that they have not seen them is the identification rule. The issue there has been the discussions with industry

about the approach that the bill currently takes, which is very specific and very procedural. Those discussions have been around: what should be the approach? Should it be risk based? How should that approach be framed? That is where that rule has taken us some time.

Issues around electronic verification are extremely difficult as well. How do we find a robust system of identifying your customer when they are not there in front of you? The minister has made it clear that we need to find a way to do that. While we would have hoped to have had a set of rules out and we did in fact have a draft set of face-to-face identification rules and some rules about minimum 'know your customer' identification, those issues around electronic verification and then around the risk based approach to identification have meant that we have moved on. While the discussions have been ongoing, there is not a bit of paper out there with them just yet, but they will be in the next few days.

Senator LUDWIG—There are effectively only three people working on these rules and guidelines.

Ms Atkins—No. There are three people specifically drafting them. There are a large number of people involved in the development of the policy and the operational issues underlying the rules. I do not think having more drafters—

Senator LUDWIG—You are not seriously suggesting—

CHAIR—Just let Ms Atkins finish.

Ms Atkins—I do not think having more drafters would mean that the rules would have been out any more quickly.

Senator LUDWIG—The Office of Parliamentary Counsel have a raft of drafters and they tend to meet the legislative requirements of the day by having that number. Have you increased the number of drafters recently, or have you utilised your in-house expertise?

Ms Atkins—We never had in-house expertise. AUSTRAC has had no rule-making power before. We have employed two officers from the Australian Government Solicitor's Office, of whom Ms Marsic is one. We have a member of staff, who was in our regulatory area but who is a lawyer, working alongside them. They are our full-time, actual drafters.

Senator LUDWIG—When did they come on board? When did they start with you?

Ms Marsic—I started in May of last year and my colleague started in November of last year.

Senator LUDWIG—When did you start drafting the rules?

Ms Atkins—It would have been in May. Once we had some idea within government of what the draft legislation might look like, we were able to start work on what the rules might look like.

Senator LUDWIG—And you have no capacity at present to expand that?

Ms Atkins—As I said, I do not think adding extra resources at this stage to our drafting resources would get the rules out any more quickly. Because it is partly a consultative process—it is an iterative process—I do not think having more drafters will get more rules out.

Senator LUDWIG—The consultative process whereby people should be able to look at the rules and regulations is going on now. Was there a time line that you were supposed to meet in getting the rules and guidelines out?

Ms Atkins—We put together a time line. Not all the rules need to be out.

Senator LUDWIG—We will deal with that issue first.

Ms Atkins—We put together a time line, which has slipped in some cases but in others it has been complied with.

Senator LUDWIG—Can you tell us what the time line was for the guidelines and rules?

Ms Atkins—Rules. Apart from guidelines which we put out originally with the package when it was released, I do not think we had any intention to put out within this period all the guidelines that might be necessary under the bill and the rules.

Senator LUDWIG—How many would that be in total?

Ms Atkins—The guidelines?

Senator LUDWIG—Yes.

Ms Atkins—I do not think we can specifically say that. We know that there will need to be guidelines on suspicious matters, AML programs and customer identification programs, if we go down that track. Over the years, various issues might come up about interpretation on what AUSTRAC does and does not do that would require guidelines to be put out. So I do not think we can enumerate the number of guidelines that might ultimately be necessary.

Can I also say in relation to rules that over the transitional period for this bill there will be rules that need to be developed. While there will be some rules in place at a set point in time, such as the suspicious matter reporting program and customer identification rules, the rules and what they might look like is not a static point in time issue. There will be many times when we will need to consult industry about new rules and changes to rules. In relation to the time line, we can probably give you a document, which I do not have with me, that sets out the time line that we provided to industry to give them some idea about how the process might go forward from the date of release.

Senator LUDWIG—When was that document provided to industry?

Ms Marsic—That was provided to industry on 30 January, at the last roundtable.

Senator LUDWIG—This year?

Ms Marsic—Of this year—that is correct.

Senator LUDWIG—After the consultative process began?

Ms Marsic—That is correct. There are essentially three broad categories of outstanding rules: one is the identification rules, the next one is the reporting obligation rules and the third would be a miscellaneous category of definitions and the like. With the identification rules, we provided some non-face-to-face identification rules to the working group in accordance with the time frame, but subsequent to that there was a policy shift in the sense of making the provisions in the bill more risk based, which has meant we have needed to start a new process of drafting rules. As you heard earlier, those rules will be available later in the week.

On the second category—the reporting obligations—on 14 February the AML program working group was given a copy of some draft rules on threshold reporting obligations. So they have had that one for a month and we have been talking that through with the working group. That, in a sense, is going to form a bit of a template for some of the reportable details that might be reflected in other rules—on international funds transfer instruction reports, for example. Once we get the feedback from industry on those rules, the others will follow suit. With the definitional issues, we have got behind on those ones whilst we have been focusing on the more substantive rules. But they are in the process of being developed now, and not all of the places in the bill that provide for potential rules in relation to definitions will necessarily need rules to be made. Decisions are yet to be made as to how many of those rules actually do need to be made right now.

Senator LUDWIG—How far behind are you in respect of those definitional matters?

Ms Marsic—I had hoped to have had some rules with the working groups a couple of weeks ago, and I think that is reflected in the time line. The time line for the definitions was an ongoing time frame that we had hoped to have completed by about now. We had hoped to have started providing those definitional rules a couple of weeks ago.

Senator LUDWIG—So you are a couple of months behind?

Ms Marsic—No, a couple of weeks behind.

Senator LUDWIG—When will they be finalised? Will they be finalised during the exposure draft period—that is, before 16 April?

Ms Marsic—That is the intention.

Senator LUDWIG—We keep getting different dates. It is the 13th, from memory.

Mr Gray—The 13th, indeed.

Mr Ryan—Can I make a point in relation to an issue you raised earlier, and that is the resourcing that AUSTRAC is putting into this. It might seem on the surface that AUSTRAC rule making is only with a few people, but in fact right throughout AUSTRAC, in a number of business areas, there are a lot of resources and a lot of effort being put into this to support the likes of Sonja in developing the rules. I do not want you to go away with an impression that AUSTRAC has only a small number of people. In fact, there are a lot of resources across a lot of bodies dedicating their time to this effort.

Senator LUDWIG—Perhaps I am going away with the feeling that, looking at the output, the output is inadequate at the present time. AUSTRAC is going to be the regulator at some point. Is there an oversight body that is going to look at how you conduct your regulatory work? In other words, is there a body that will ensure that the dissemination of information, the people you disseminate it to, the legislation you work under and the way that you hold information is within—my words—the rule book?

Ms Atkins—There is the Privacy Commissioner’s current role in relation to that, but as to whether there is going to be any specific oversight for AUSTRAC, that has not been raised with us.

Mr Gray—No, it has not.

Ms Atkins—It is a policy question for the department, perhaps.

Mr Gray—There is the Privacy Commissioner, the Ombudsman and the ministerial advisory group, which will give opportunities to industry to raise concerns directly with the minister, if they have concerns. But, no, there are no proposals beyond that.

Senator LUDWIG—But you will hold significant information and significant power as a regulator in being able to enforce and provide sanctions. That is right, isn't it? The penalties will be significant, I take it.

Ms Atkins—The provisions are already in the bill.

Senator LUDWIG—Yes, and they are significant penalties.

Ms Atkins—Yes. They need to be the sorts of penalties that enable us to enforce the requirements.

Senator LUDWIG—And you will be able to institute legal proceedings.

Ms Atkins—Yes.

Senator LUDWIG—Will you refer those to the DPP or will you do those yourselves?

Ms Atkins—In the case of criminal proceedings, they will be referred to the DPP. You will have seen that there are civil penalty provisions in there. What the structure of AUSTRAC might look like in terms of dealing with those sorts of actions we have not finalised yet. Obviously that is something we will be doing over the implementation period as well, but we have not decided. There are various options available to us, of which in-house capacity is obviously one.

Senator LUDWIG—You do not have that at the moment?

Ms Atkins—We do not have an enforcement capacity at the moment, no, although Mr Ryan is head of our regulatory area at the moment and we are certainly looking at moving towards that.

Mr Ryan—We are in the process of looking at such a policy at the moment, yes.

Senator LUDWIG—You might have to remind me—what is the largest civil penalty that will be available under this proposed exposure draft?

CHAIR—Mr Bannerman, this sounds like your moment.

Mr Bannerman—It does not roll off my tongue at the moment.

Ms Atkins—Are they actually in there or are they still in consultation mode? I think it just says we would like to—it has the criminal penalties.

Senator LUDWIG—You said they were, you see, so I thought I would go there.

CHAIR—To be advised.

Ms Atkins—No, there is provision for civil penalties, but that is one of the things that are still up there.

Ms Marsic—It is proposed section 140.

Mr Bannerman—The penalty provisions are in there. We have a note in the bill as to what the actual penalty should be. So the framework is there and we thought the appropriate thing to do was to seek comments from stakeholders through this exposure period as to the level of penalties.

Senator LUDWIG—So there is no level of penalties expressed?

Mr Bannerman—No.

Ms Atkins—No. In fact, there is an X and a Y in the provisions, in section 140.

Ms Marsic—That is right. Clause 140(4) will set out what the maximum pecuniary penalty is. If you go there, you will see that it has 'X penalty units' there at the moment.

CHAIR—To be advised.

Senator LUDWIG—That is why I was hoping someone would know.

CHAIR—I wanted to raise with AUSTRAC specifically the question of the amount of data that AUSTRAC will potentially be holding and access to that data from other agencies, either under the existing arrangements or as authorised by AUSTRAC. Have you had an opportunity to look at the Office of the Privacy Commissioner's comments on that in their submission?

Ms Atkins—I have not personally, no.

Ms Link—I have had a preview.

CHAIR—In that case, this will be a longer discussion. The Office of the Privacy Commissioner makes quite clear what I would describe as its significant concerns about the arrangements that will obtain under the bill as it is currently drafted. These concerns are not just in relation to AUSTRAC's capacity to hold information already but that under the new bill other federal, state and territory agencies, including welfare and support agencies like Centrelink and the Child Support Agency, will retain the ability they currently have to access personal financial information held by AUSTRAC, and then AUSTRAC will be able to decide which other agencies, subject to the provisions in division 4, will be permitted to access personal information that AUSTRAC retains.

They then go on to say that replacing the existing provisions of the FTR Act with new legislation that has a greater scope and impact does not actually justify the continuance of the present data sharing arrangements, particularly in relation to welfare and assistance agencies. The Office of the Privacy Commissioner put quite forcefully that they believe a statement of the legislative objects of the exposure bill should 'reflect an intention to allow such agencies to scrutinise the AUSTRAC data for their purposes'. So the bill should be clear on that. It should not be a matter of people having to work out who has access to what and second-guess the process. The bill should make it clear, and this committee has always been quite explicit on those points. We also believe these things should be made clear in legislation.

The office then raise three factors which they believe support the need for careful review of access provisions to PI which is held by AUSTRAC under the exposure bill. They include, firstly:

> The likely increased volume and richness of personal data that will be available for collection by AUSTRAC—

On the face of it, that is absolutely compelling. There is no argument there. Therefore, that will be accessible by other agencies for purposes which are, as the bill is currently structured, not related to anti-money laundering and counter-terrorism activities. It will just be accessible. Secondly:

the extent to which the community may be aware that personal information provided by individuals in the course of a wide range of financial and commercial transactions may be scrutinised by a number of government agencies;

And thirdly:

the extent to which the exercise of the discretion reposed in AUSTRAC to make its data accessible to other agencies is a transparent and accountable process.

The office of the commissioner makes the observation that that process should be 'proportionate to the breadth of the scheme and the amount of data the designated agencies will have access to'. They make some suggestions in relation to an alternative approach to access. For example, they note that in section 99(1) of the exposure bill, AUSTRAC is currently permitted to authorise in writing other agencies to access AUSTRAC-held data for purposes of 'performing that agency's functions or exercising its powers'.

If you look at the substantive legislation that establishes any of those agencies, from the tax office to Centrelink, they can be defined very broadly and in very general terms in any of those other pieces of legislation. So the commissioner suggests that it might be appropriate for those purposes to be defined in greater specificity. They also suggest that 99(1) could be amended to be much more privacy sensitive, by narrowing the purposes for which information can be accessed to those purposes which are consistent with and relevant to the underlying policy intent of the AML/CTF regulatory scheme. They also suggest that the section could be amended by requiring transparency, including by mandatory consultation, and oversight over how that authority is exercised by making the written authority made by AUSTRAC subject to parliamentary scrutiny and disallowance.

In light of the current discussions about shared information, identifiers and things like that, the Privacy Commission makes some very valid points about the information which would be held by AUSTRAC and the powers that AUSTRAC will have to gain access to other agencies for very broad and completely general purposes. Confining that to purposes to do with anti-money laundering and counter-terrorism financing would seem—to me, at least—to be a sensible restriction. I am interested in AUSTRAC's comments. That is a lot of information out of the Privacy Commissioner's submission. I understand that. I had hoped that that would be something which could have been brought to your attention earlier. If you want to take that on notice, we would appreciate your comments.

Ms Atkins—I am happy to take it on notice. Some of the issues are issues that the department will need to comment on, and some are for our partner agencies. Could I say, though, that section 99(1) of the bill allows AUSTRAC to authorise specified officials of specified designated agencies. It does not allow us to decide which agencies may have access. The designated agencies are those agencies listed in section 5 under the definition. That provision is about what we do now, which is not specifically set out in our act. In our MOUs with our partner agencies, we actually specify a limited number of officers who have access to our information. This is a provision that legislatively for the future will require us to specify

them. So it is not like AUSTRAC can say, 'These are more agencies, other than are on the face of the bill, that can have access to our information.'

CHAIR—But it still does not avoid the point that agencies like Centrelink, the tax office or child support already have access under your legislation.

Ms Atkins—That is right.

CHAIR—The bill leaves that structure based on the aims and objectives of those agencies under their legislation which, as the commissioner observes, can be very broad and very general, not related at all to the purposes for which you are collecting the information which is supposed to be, under this bill, anti money laundering and counter-terrorism financing.

Ms Atkins—Some of this comes back to the questions about the definition of money laundering and the fact that the predicate offences for money laundering are extremely broad. We will take it on notice, but some of those issues are matters of government policy about who should have access to our information and for what purposes.

CHAIR—Sure, and that is the way the committee reports. We wait for government to comment on the policy points that we make in the committee process.

Mr Gray—The Child Support Agency and Centrelink are the two which have been highlighted. It is purely a question of government policy. Tax has always been in there as a source of AUSTRAC information because the taxation power underpinned the FTR Act. It has been pointed out to not say anything about tax. This was one of the comments made in the privacy forum. I think we have taken that on board and included that in the objects clause. They said you should have some other stuff in there and we have taken that on board.

Ms Atkins—However, disguising money which you have because you have evaded your tax would surely in anyone's definition be money laundering. It is disguising the profits of tax evasion.

Mr Gray—It is picked up as a specific thing. I think that is right. I would argue that point, but I think because tax evasion is picked up as a specific thing under the suspect transaction reports, I do not have any real difficulty with the concept of it being highlighted up front. Some of the other suggestions they have made about what should go in the objects clause I think we have some greater difficulty with, but some of those comments make sense and we can look at that.

Senator LUDWIG—Once you add it to your database, it is no longer a paper file. It will stream from another database into your system and queries can come from another agency which you have a memorandum of understanding with. The Privacy Commissioner is right when he says, 'The richness and volume of the information will be significantly enhanced by this purpose'—that is, the purpose of AML—'but it can be used for a different purpose.' So let's take tax out of it and simply say that it can used for a different purpose. There is not safeguard that that different purpose is not some minor offence that some other agency is pursuing.

CHAIR—One of the responses in the past has been that privacy protections are in place by the application of the IPPs. For example, I think it was the Australian Privacy Foundation today who said, 'That's all well and good, but amongst the state and territory agencies who

may be permitted access, the New South Wales Police are in fact exempted in New South Wales.' If that is incorrect, then it might be worth while looking at the *Hansard* on what the APF said on those matters.

Ms Atkins—I think we need to point that out.

Ms Link—I might just add that the memoranda of understanding that we currently have with our state and territory partner agencies actually state that they undertake to comply with the information privacy principles.

CHAIR—I know but they get exempted all over the place, and this is an issue I raised in estimates under the document verification system pilot. The RTA in New South Wales is a participating agency which is exempt from having to comply with the privacy act in New South Wales. I am paraphrasing myself there—which is even worse—from estimates. I do not have the estimates *Hansard* in front of me. So if I have said anything incorrect about any of those agencies, it is due to my faulty memory. But that is the general issue which is raised by people.

Ms Atkins—Section 99 of the bill does deal with that issue in relation to state and territory areas, and it says that we can only specify them if they undertake that they will comply with the IPPs.

CHAIR—So that was happening elsewhere; also, there is potential for a problem. I have one process question. If reporting is made on a particular transaction and it ends up in the creation of incorrect information on an individual, what is the process for them gaining access to the records to correct incorrect information?

Ms Atkins—Formally it would be under the FOI and privacy acts and the provisions there about correction of information. They apply to us just as they apply to any other agency. I am not aware of any instances of somebody asking us to correct information. I am not aware of any cases. Until reasonably recently there have not been many FOI applications to AUSTRAC. That is changing as people become more aware of our existence, and no doubt after public campaigns relating to the new bill that will increase for us. But the same procedures would apply. I am not saying that nobody has applied; it is just that none of us here are aware of it.

Mr Ryan—AUSTRAC has some programs in place internally for improving the integrity and quality of our data. If we get a $50 million transaction that does not look right, we will check to see if something is wrong with it and we will go back to the institution and say, 'Hang on, we do not think this is right.' So we have those sorts of programs in place.

Ms Atkins—Incorrect information is not useful to us.

Senator LUDWIG—Following that point, one of the matters raised by the Australian Privacy Foundation concerned the impact where you have disclosure. Sections 93 and 94, which are secrecy provisions, effectively do not provide for exceptions to the Privacy Act or FOI subject access. In their item 57 I suspect they can go on and make a submission where there is information being held by you and where people might want to find out what it is in order to be able to correct it. But they then find that they may not be able to do that. Whether

or not that is a legitimate process might be a policy position but the way it would work means that they cannot in the current proposal.

Ms Atkins—I do not think that we would agree with that interpretation. We would say that FOI and privacy provisions apply. Suspect matter reports are a little different, but I do not think that we would argue—and I am happy to take any comment from A-G's—that if that interpretation were open, that it was an intended one. Certainly in relation to international funds transfer, instruction reports and threshold reporting we would not have a view that there should generally be no access and no ability to have the record corrected. It certainly was not intended to exclude that. Perhaps we need to have a look at that and make sure that the provisions to do that are there.

CHAIR—Obviously the committee does have some concerns in relation to the privacy issues—and the issue was mentioned in both the Office of the Privacy Commissioner's submission and the APF's submission. If there are issues that you see that are changing with the iterative process of bill or other matters that you can readily address to give the committee some assistance we would be grateful.

Ms Atkins—We will do that.

Mr Gray—You foreshadowed a question that you would be putting to us so I dug out some information from the UK on how they deal with privacy. The answer seems to be that a Data Protection Act in the UK applies to a data controller who, as far as we can work out, just picks up all of the reporting entities under the UK legislation. That is the way it seems to work. Privacy is dealt with in a separate regime.

Senator LUDWIG—Yes, they have a data protection regime.

Mr Gray—They do not seem to have exceptions for small businesses so the issue does not arise for them in the same way that it does for us. We are aware of course that that is an issue which will have to be addressed and will be addressed. It is a model which we use to apply privacy principles to small business. That will be a government decision. There are policy issues that have to be addressed there.

Senator LUDWIG—I accept that. That would be a policy decision.

Mr Gray—But that has to be done—there is no question that we have to do that.

CHAIR—Senator Ludwig has indicated that he will put further questions on notice. I thank all the officers who have assisted the committee this afternoon. We are very grateful, as it does help the committee, that you were able to be here for the substantial part of the day to hear the engagement we had with earlier witnesses and therefore have some awareness of the issues which will be important to the committee. Thank you very much.

Committee adjourned at 4.55 pm