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Reference: Anti-Money Laundering and Counter-Terrorism Financing Bill 2006

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SENATE STANDING COMMITTEE ON

LEGAL AND CONSTITUTIONAL AFFAIRS

Wednesday, 22 November 2006

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

Participating members: Senators Allison, Barnett, Bernardi, Bob Brown, George Campbell, Carr, Chapman, Conroy, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Fielding, Fifield, Fierravanti-Wells, Heffernan, Hogg, Humphries, Hurley, Johnston, Joyce, Lightfoot, Lundy, Ian Macdonald, Mason, McGauran, McLucas, Milne, Murray, Nettle, Parry, Patterson, Robert Ray, Sherry, Siewert, Stephens, Stott Despoja, Watson and Webber

Senators in attendance: Senators Kirk, Ludwig, Parry and Payne

Terms of reference for the inquiry:

Anti-Money Laundering and Counter-Terrorism Bill 2006

WITNESSES

Committee met at 1.05 pm

CHAIR (Senator Payne)—Good afternoon, ladies and gentlemen, and welcome to this hearing of the Senate Legal and Constitutional Affairs Committee. The committee's inquiry into the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 and the Anti-Money Laundering and Counter-Terrorism Financing (Transitional Provisions and Consequential Amendments) Bill 2006 continues with its second hearing today in Sydney. The committee met in Melbourne last week.

The inquiry was referred to the committee by the Senate on 8 November 2006 for report by 28 November 2006. The committee also previously held an inquiry and reported on the exposure draft of the bill. The bill incorporates a number of amendments as a result of the consultations undertaken in relation to the exposure draft of the bill and evidence received during the Senate inquiry. It is intended that this inquiry will concentrate on changes made to the bills since the report on the exposure draft was tabled on 13 April 2006. The committee has so far received 40 submissions for this inquiry. All of those submissions have been authorised for publication and are available on the committee's website. The committee has received one confidential submission.

I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee.

The committee prefers all evidence to be given in public but, under the Senate's resolutions, witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they do intend to ask to give evidence in camera. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that that answer be given in camera, and such a request may also of course be made at any other time.

[1.07 pm]

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

CODINA, Mr Martin, Senior Policy Manager, Investment and Financial Services Association

MARTIN, Ms Nicola, IFSA Representative on IFSA AML Working Group, Investment and Financial Services Association

PINSON, Mrs Jennifer, Head of Compliance, Morgan Stanley

THOMPSON, Mrs Jill, Policy Executive, Securities and Derivatives Industry Association

CHAIR—I welcome our first witnesses today. Is there anything any of you would like to add about the capacity in which you appear today?

Ms Martin—I work at Colonial First State, and Colonial First State is a member of IFSA.

Mrs Pinson—I am also a member of the SDIA.

CHAIR—Thank you. In terms of submissions, the Investment and Financial Services Association has lodged a submission with the committee which has been numbered 20, the Financial Planning Association has lodged a submission which has been numbered 39 and the Securities and Derivatives Industry Association has lodged a submission which has been numbered 13. Are there any amendments or alterations that any of you need to make to those submissions?

Mrs Thompson—I would like to make one amendment. I would like to take out point 2, 'Part 5—International (Electronic) Funds Transfer Reporting', which starts on page 1 of our submission, No. 13.

CHAIR—So you would like to delete the whole of point 2?

Mrs Thompson—I would.

CHAIR—We will amend that accordingly. Thank you very much. I will now ask whoever wishes to from the various groups to make a brief opening statement and then we will go to questions from members of the committee.

Mr Codina—Thank you, Madam Chair, for the invitation extended to IFSA to attend these important committee hearings into the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006. IFSA very strongly believes that this committee process has the opportunity to make important recommendations to government on how the bill can be finetuned so that greater certainty is delivered for reporting entities without compromising the aims of the legislation. IFSA's submission to this committee makes a number of mainly technical but still very important points which we hope can still be addressed. IFSA does understand, however, that with any bill of this size and scope it is inevitable that last-minute refinements will be necessary to ensure that unintended consequences do not arise. IFSA is

hopeful that the government shares this view and remains willing, therefore, to refine the legislation where there is a sound reason to do so.

Before delving into the detail, IFSA would like to state on the record that the government has been very receptive to the needs of the financial services industry to date. Common sense has prevailed in many respects. This bill represents a substantial improvement compared to the first, released back in December last year. The efforts of the Attorney-General's Department, along with those of AUSTRAC, are noteworthy. They have worked in a genuine partnership with industry to better understand and resolve important issues. We believe that the legislation has benefited immensely from this consultative process. That said, not all matters have been able to be resolved in the time available. Our submission raises a number of important issues that we believe require attention before the bill is enacted. Unfortunately, with the very limited time available to comment on the bill since its introduction, it has not been possible to raise these issues earlier in the process and have them addressed in the manner described above.

I would like to turn briefly to some of the issues that we raised in our submission. As you will note from our submission, IFSA are quite concerned that the commencement periods of various obligations under the bill are not tied to the availability of relevant rules where appropriate. Information as to the rules currently envisaged and their expected delivery timetable is not yet publicly available, but we do understand from conversations with the Attorney-General's Department that such information will be released shortly, and we very much look forward to that. That information will allow our members to more confidently determine whether the proposed commencement periods are adequate, especially in relation to requirements that have a potential zero or six-month commencement date.

In addition, members are concerned that they could find themselves in technical breach of the act where a rule is released that suddenly makes a provision of the bill operational. Some have expressed concern that the record-keeping obligations that arise from day one may also place them in technical breach of the act. Perhaps more fundamentally, members are concerned that all the necessary rules are unlikely to be available before the legislative clock starts ticking. Instead, it now appears that relevant rules will be released during the implementation/transition period. This places industry in the position of having a reduced implementation period than that envisaged under the bill. We therefore are seeking a commitment that the rules which are relevant to the commencement of AML obligations will be available before the relevant obligation becomes activated under clause 2 of the bill. In addition, IFSA supports an approach which allows for greater flexibility around the 12-month 'amnesty period'—as some people are calling it—such that the minister is able to direct AUSTRAC to provide extensions where relevant rules have not been released in time to allow for the full intended legislative implementation period.

I turn now to a different set of issues. Item 54 of clause 6 of the bill represents a new limited designated service which captures AFSL holders where they arrange for the provision of a designated service by another reporting entity. IFSA's submission raises a number of important issues relating to this designated service. Very briefly, they include: its scope, the limitation relating to the designated business group and greater flexibility in record-keeping arrangements—which is something we hope we can obtain. Alignment of identification

obligations between the first and second reporting entity is also an issue that we think requires some examination. There are also some issues related to authorised representatives of these AFSL holders which, again, we would like the committee to take on board.

Finally, IFSA wishes to note that it fully endorses the Australian Bankers Association submission, which has also been prepared on behalf of the broader industry focus group of which IFSA is a member. We have attempted to minimise duplication between the two submissions to facilitate this process. IFSA also endorses the Australian Superannuation Funds Association submission with respect to superannuation matters raised, and the Australian Financial Markets Association, AFMA, submission with respect to financial market matters raised. As I said at the outset, IFSA is hopeful that the issues we have raised, even at this late stage, can be addressed in a manner that provides a satisfactory outcome for the industry without compromising the aims of the legislation.

CHAIR—Thanks very much, Mr Codina. We thank you for your submission.

Mr Anning—In the interests of allowing time for greater discussion, I would prefer to just make some initial comments rather than an opening statement because most of the issues are technical and explained in our submission. I would like to stress that we have involved our membership throughout the development of this regime. That has been an up and down process as the discussions have progressed on the role of financial planners within the AML/CTF framework. The result of the consultation process that we are undergoing at the moment is that our members are satisfied that the role seen for financial planners within the regime is the most appropriate one that has been discussed.

Overall, our members are satisfied with the regime that is enshrined in the bill. There are some technical issues, which I am sure can be addressed. I will only mention one of them: the scope of item 54, which relates to licensees arranging for a person to receive a designated service. It may be covered off in the drafting, but item 54 can be read as involving an obligation on a licence holder to undertake limited identification in relation to the provision of all designated services and not just those provided in relation to their Australian financial services licence.

The other issues I would like to flag up-front are to support Mr Codina's remarks about the need for the release of rules to be timely in order for our members to absorb the guidance that we intend to provide to them in the implementation of the AML regime. And we anticipate a continuation of the open, cooperative approach that has been displayed by the government and officials within AUSTRAC and Attorney-General's in the development of those rules.

Mrs Thompson—The SDIA would like to thank you for the opportunity to appear here today. We also believe that AUSTRAC and the Attorney-General's Department have both worked extremely well with the industries affected by the first tranche of this bill. As we are all aware, there are still some issues that may create, or seem to create, some unnecessary burden on some of our members, they believe. Again, we must say that it is disappointing that the attendant rules to the bill have not been updated since 4 July. It is very hard to make some useful comments, seeing that we do not have the guidance.

On one particular point: the definition of the 'politically exposed persons' not now being in the bill is of concern to our members. They feel that it is going to leave people in the position

of making a subjective decision on occasions, which they would not want their employees or the organisation to do. While some of our membership can rely on their international parent supplying their own name and background checking facilities to assist us, the rest of our industry is probably more reliant on purchasing a commercial product and using the DFAT system for name checking—which is fairly important in our industry, given the fact that they are real time transactions. The client expects the transaction to be done so that they do not miss the market. This is going to be a very expensive exercise, and there will be no guarantee for KYC purposes that all required individuals and companies, including PEPs, will be listed.

I have looked at some of the commercially available products to assist our members on this. These products have an international focus. There is no national focus and, for any organisation that is going to run these sorts of programs, that is going to take quite a while to build. Our members feel that a preferable solution would be a centralised database for name checking either run by the government or commercially run. All those who are required to comply with the new legislation would be able to have access to that. Our members are quite aware of the cost of buying these and of their ongoing costs for their businesses.

Our membership is also concerned that AUSTRAC should have the power to have an enforceable undertaking from reporting entities but that it is not as restricted as the power that ASIC is given. We would like to see the undertaking actually aligned in the powers. The power that AUSTRAC will have is very broad going forward.

On another note, we also believe it is very important that a proper education policy and program is given for the general population to understand what the requirements are going to be. When FSR came in, it was basically left up to the financial industry to educate the population. It would be very difficult now to do that. I think everyone has to be aware of what is going to happen when they do come to financial service providers and what is going to be required of them to produce information on who they are.

I have one other point. It seems that AUSTRAC's power goes a lot broader than the financial investigative unit, the FIU, internationally. I am still not quite sure whether the government looked at that deliberately and decided not to use the FIU in any way or to belong to it. I think Morgan Stanley is a firm that belongs to it. The powers for AUSTRAC are generally very broad.

CHAIR—Thank you, Mrs Thompson, Mr Anning and Mr Codina, for your statements and also for your submissions. I will start with IFSA's suggestion in relation to an amnesty in terms of the timing process. I am not really sure that I understand how you think that would work in practice. Could you elaborate on that a little, Mr Codina.

Mr Codina—Part of the difficulty here is that there is a general statement in the explanatory memorandum indicating how this would apply overall, but there is no other information to explain in detail how that amnesty period is intended to play out. If you take the view that the amnesty period will kick in, if you like, at the point at which clause 2—which dictates commencement of obligations under the bill—says that a certain part becomes active, that 12-month period starts ticking from then. It can raise a few issues for industry when that particular part becomes activated, especially when a lot of the substance of what people are required to comply with is dependent on a rule which may be released at some

point down the track. If the rule were to come out after the legislation made that part operational, it would mean that not only have you lost the legislative implementation period to that point because you did not know what the substance of the obligation was going to be that you had to implement but, further, if the 12-month amnesty period runs from the legislative clock rather than from when the rule is released then you also have an issue.

CHAIR—I now understand the point of difference you are making. You will see that the rules implementation timing issue has been raised with the committee in a number of submissions and in our hearing in Melbourne as well. We will have an opportunity to talk to both AUSTRAC and the department about that in the continuation of the hearings tomorrow.

Mr Codina—Thank you.

CHAIR—So we can have as many people asking questions as possible.

Senator LUDWIG—With the Financial Planning Association, Mr Anning, how many of your members would not hold—or would they all hold—Australian financial service licences?

Mr Anning—They would either be licence holders as salaried employees of a licence holder or authorised representatives of a licence holder.

Senator LUDWIG—So they could be an authorised representative. How would that work? The idea is that under table 1, item 54, 'in the capacity of holder of an Australian financial services licence', notwithstanding the submission by the derivatives—you, Mrs Thompson—in respect of how broad that might be, they would then have the requirements under this legislation. But how many people might be a representative, for argument's sake? What sort of structure is out there at the moment?

Mr Anning—The vast majority of our members at the practitioner level would either be salaried employees of a licence holder and therefore acting in that capacity or an authorised representative. Of our members, there would be about 600 licensee members, so the number of authorised representatives would be considerable. But it is envisaged that, while the licensee had the reporting entity obligations, the authorised representative as the agent for the licensee would fulfil those obligations.

Senator LUDWIG—So how many would not hold licences? Or is it a requirement, to be a financial planner, to hold a licence?

Mr Anning—To provide financial product advice under the Corporations Act they would either have to have a licence or be acting under a licence.

Senator LUDWIG—And when a member fails to renew or does not renew, what happens then? Do they report to you that they do not have a licence any longer, or what is the way the system works to ensure that the members who provide this advice all hold licences appropriate to the products they are using?

Mr Anning—They would need to notify the association, but that is a condition of membership. I think probably more importantly they would be taken off the ASIC register of licensees and—

Senator LUDWIG—Does ASIC check on that every year? Or does it just have a register that ASIC holds in perpetuity? Or do they renew every 12 months?

Mr Anning—The licences continue until revoked or given up.

Senator LUDWIG—Is there an expiry date on them, or does ASIC just issue the licence and they remain at large until such time as they either revoke or remove their name from the registry?

Mr Anning—The licences are open-ended until they are terminated by either party.

Senator LUDWIG—Does anyone check on whether the person who is a financial planner has an appropriate licence? Is ASIC charged with that?

Mr Anning—ASIC is charged with it because it is an offence under the Corporations Act to provide financial product advice without the licence authorisation, and there are requirements for the licensing number to be displayed in premises and on stationery.

Senator LUDWIG—Thank you. Mrs Thompson, do you still hold that, in item 54, 'a designated service' is too broad?

Mrs Thompson—The members feel that it is too broad.

Senator LUDWIG—Why do you say that?

Mrs Thompson—Where it states, in table 1, item 54, 'in the capacity of holder of an Australian financial services licence, making arrangements for a person to receive a designated service other than a service covered by this item', it is unclear and could potentially cover almost any service provided by the reporting entity. It could also revert back to the old designated service of providing financial advice. That was discussed, I think—we looked at numerous submissions—as being totally unworkable for either party.

Senator LUDWIG—What is the type of designated service that you are referring to? Could you put a bit of colour on it to explain the type of services at the outer end—in the sense of those ones that you think might be caught?

Mrs Thompson—Really just pure financial advice.

Senator LUDWIG—You say it is broad and those fall in the middle. What is on the outer end?

Mrs Thompson—Perhaps any financial advice will be captured. When a client comes to an SDIA member and wants financial advice, they quite often get financial advice and they walk away and do not do anything with it. Some people shop around for what they are looking for. That could become a designated service.

Senator LUDWIG—That is a person who might come to one of your members and ask whether they should invest in a particular derivative?

Mrs Thompson—Yes.

Senator LUDWIG—Then the response is: 'This is a particularly good buy. I'm not sure of the market, but here is a package. Thank you very much. You might want to enter into correspondence about it.' And the person chooses not to at some point or they choose to. If they choose to then you might take on some of the responsibility in terms of a reporting entity,

but if they walk away at that point you then say that it could potentially be caught by the broad definition?

Mrs Thompson—That is right.

Mrs Pinson—So effectively they do not become a client if they do not take up the advice at that stage.

Senator LUDWIG—Yes, that is right. I am just trying to understand the flow of customer relations. Mr Anning, have you had a look at that in terms of your members who might just provide financial advice, or are you happy that it does not cover that?

Mr Anning—We are happy to support those making sure that it does not cover advice. But in our discussions with government and with officials we understand that item 54 is worded the way it is to trigger the limited identification procedures at the stage of implementation of a client's financial strategy rather than at the advice stage. The obligations and the exposure draft which were released last December were actually being triggered at the advice stage. We argued that that would be quite a significant compliance burden in return for very little intelligence.

Senator LUDWIG—Yes, I recall the argument relatively clearly.

Mr Anning—So we believe that item 54 at the moment just applies to arranging for provision of a designated service. Our issue is, as I said, that it is open to argument—that it could be taken that it is read that a licensee when providing any designated service, such as a loan, which is not regulated under the Australian financial services licensing regime, may still be required to undertake those limited identification procedures in relation to that designated service, whereas others under the act would not be required to make those same identifications.

Senator LUDWIG—Yes, I understand. Can you provide a short snapshot of the work that financial planners now have to do in complying with this legislation? I was looking at it more from a business perspective: you have a small financial planner, maybe one working under a licence in a small financial planning organisation or even one of the licensees. What are the obligations that they would now have to meet? Can you just give a short description of that and your view about how much work there is in fulfilling the obligations?

Mr Anning—Our expectation is that, with the risk based approach which is now central to the legislation, the obligations on most of our members should not in most cases be more than what they are doing at the moment. For example, the draft rules offering safe harbours for identification of low- and medium-risk customers require three pieces of information in relation to the client: name, date of birth and address. The planner will be required to verify two of those three from a list of documents. So those obligations are not onerous compared to the know-your-client obligations which apply to financial planners under the Corporations Act in any case. The issue, of course, is for higher risk customers. Most of our members probably do not have high-risk customers coming in very often, but there will be challenges for our members in determining the level of further know-your-customer information that they will be required to obtain from the client. We want to work with other industry groups and government departments on developing guidelines of common risk assessment principles.

Senator LUDWIG—Do you expect, both through you and through the Commonwealth, a reasonable campaign to provide information to both your members and the public about these obligations?

Mr Anning—I certainly support the need for the government to run a wide-ranging information campaign to the public. Our association is preparing its own package of guidance and information for our members to inform them of the full range of obligations they will have under the legislation.

Senator LUDWIG—Thank you.

Senator PARRY—Mr Codina, you mentioned that you supported all the submissions of your colleagues at the table. Have you seen the submission from the Australian Friendly Societies Association? I understand it is posted on the web. Are you aware of the submission?

Mr Codina—I have not seen their latest submission, no, but I have seen prior submissions of theirs.

Senator PARRY—Is the Australian Friendly Societies Association affiliated or connected with you in any way, shape or form?

Mr Codina—No.

Senator PARRY—So they are a stand-alone entity?

Mr Codina—Yes.

Senator PARRY—With regard to the Australian Friendly Societies Association submission, do you want to make any comments as to whether you think they have a valid submission or otherwise?

Mr Codina—As I have said, I have not read this latest submission, so I cannot comment.

Senator PARRY—Thank you. Each of you have raised the issue of section 229 of the rules and, in particular, wanting to see the rules, I suppose, as soon as possible, as rules are developed. I want to come to the thrust of 229 and have it established on the record that none of you have an issue with the fact that rules need to be implemented in the way that has been designed. I am gathering that is a 'yes'—the *Hansard* cannot record body movement.

Mr Anning—Yes.

Mr Codina—Yes.

Mrs Thompson—Yes.

Senator PARRY—Okay, thank you. What about the way that the AUSTRAC CEO has the responsibility of drafting and setting those rules: do you have an issue with that at all?

Mr Codina—Speaking for IFSA, that is broadly consistent with other powers extended to regulators such as ASIC and APRA, who also have, as agencies, the power to write their own instruments. What we would like to see is a little more framework around the consultation requirements associated with that, as opposed to having a concern with the actual enabling power here.

Senator PARRY—I think that has been loud and clear with your submission and what you have all indicated today. It is very important to also have on record that you believe that that is

their right and division 7 is going to be satisfactory in its implementation. Getting early consultation is about the only issue you have with section 229. Would that be correct?

Mrs Thompson—Correct.

Senator PARRY—Thank you.

Senator KIRK—Thank you very much for your submission. I have a question for the FPA. In your submission, with regard to clause 236 you say that the defence provisions are insufficient protection from prosecution in the event of disregard or wilful neglect by authorised agents. You draw an analogy, I think, with the Corporations Act, which you say is different in its operation. Could you outline for us where you see the problems with the current section 236?

Mr Anning—It may not be an actual problem with the defence provisions, but we would like reassurance that they operate as they have been explained to us. I will start at the beginning. Given the way that the regime has worked that we discussed with Senator Ludwig—that there would be many authorised representatives actually carrying out AML obligations on behalf of licensees—it was felt that there may be instances where licensees have done everything possible in terms of setting up policies and procedures and training to ensure that their authorised representatives carry out the applicable identification procedures but there may be still scope for the agents to not fulfil those requirements.

A number of our members looked at section 236 and they were not convinced that it provided adequate protection for them. They came from the perspective that within the Corporations Act there was dual responsibility according to the provision of the act which applied. There were different obligations in terms of the licensee and the authorised representative. With that background, a number of our licensee members said, 'We understand how the provision should work, but we would like at least reassurance in the explanatory memorandum that our understanding is actually correct.' That is, provided the licensee has done everything possible in ensuring that their agent fulfils the applicable identification procedures, that should be an adequate defence to any risk of prosecution.

Mr Codina—That is an issue that we raised in our submission as well, and we support the comments that the FPA has just made.

Senator KIRK—You said that you would like some reassurance in the explanatory memorandum. I would have thought it would be better to have it in the legislation itself. Do you have any ideas as to a proposed amendment or wording that you think could be inserted there in order to clarify the situation in the way in which you described, if that is what is intended?

Mr Anning—No, we have no alternative wording. I have to say that the view within the FPA itself is divided and that some believe the provision is adequate. Really, we are putting it up as an issue and we will trust in the draftsmanship of the Attorney-General's Department that it actually does achieve what we have been assured it will.

Senator KIRK—It is something for us to raise with them.

Mr Anning—It is a question for higher legal expertise than we have.

Senator KIRK—I also have a question for the SDIA. You mentioned in your submission and also here today that the definition of 'politically exposed person' is no longer there and that you have some concerns with that. I have to say that I am not aware of what definition was in the draft exposure bill. Could you remind me and give your thoughts as to why it has been removed and why it is necessary for it to be reinserted again?

Mrs Thompson—From memory—and someone may correct me—when it was initially in the definition, it was quite broad. It captured quite a few people surrounding one political person, so to speak. Now there is nothing. I do not know what is intended in the rules and if there is going to be anything, but in going forward times change quite quickly and people move around. Our members are quite concerned that they may be making fairly subjective decisions on their clients, perhaps new clients, or that maybe a client could escape through because the member does not understand what is required and there is no guidance on these types of people. They could be money laundering or financing terrorism these days. So the members would like to see some guidance on what to look for with these people.

Senator KIRK—Again, perhaps that is something we can raise with the Attorney-General's Department when they come before us.

Mrs Thompson—It may be.

Senator LUDWIG—Have you had the opportunity of raising outstanding matters that you have which are more technical in nature with the Attorney-General's Department? What response have they given you?

Mr Codina—We have provided a copy of our submission to the Attorney-General's Department and we have had some discussions around some of these issues including, in fact, this morning. However, I think that—and probably appropriately—the Attorney-General's Department is observing this process and awaiting what might happen coming out of this committee process before it decides whether or not certain amendments will or will not be recommended for government action.

Senator LUDWIG—Thank you. I was more interested in whether you had tried and failed or are still in the process of trying to succeed.

Mr Codina—No, I think the department continues to be receptive.

Senator LUDWIG—The consultative process for these matters has gone on a while. We are now down to the final furlong, and no rules have been finalised or updated for this current bill, and there are no guidelines. Does it concern you that you effectively have to rely on the Attorney-General's Department to produce those rules and guidelines in a timely way? Because the intention of the government is to pass this legislation before Christmas.

Mr Codina—I think that it is an issue for us and for the industry to, as I said, try to assess something like clause 2, which sets out the timetable for when certain obligations have to be implemented. That is more challenging when the full gamut of what that might mean is not known at this point in time—where a rule may or may not be drafted down the track. From our point of view, as I mentioned at the outset, it is critical for our members to get a sense of that road map, that categorisation of the rules that perhaps are yet to be released, sooner rather than later so that our members can be much more confident about which are the rules that, at

this stage, the government and/or AUSTRAC do not believe are required; which are the rules that the government and/or AUSTRAC believe are rules that will only be drafted on the basis of industry approaching government or AUSTRAC and saying, 'We need this particular rule to provide flexibility,' or whatever it might be; and then which are the rules that are actually in the pipeline. That is the sort of information that really is very important at this stage.

Senator LUDWIG—You are not in a position to fully inform your members until such time as you do see the rules—to be able to link them up and provide information to your members about what actions they should take to ensure compliance with the legislation and compliance with the rules, are you?

Mr Codina—To an extent, that is true, but the fact that we have managed to negotiate a phased implementation period has taken a lot of the heat out of that. I think that if everything had a point-blank start date then we would be much more concerned about that issue, frankly. The fact that AUSTRAC is prepared to take more of an assistance role, an educational role, for 12 months as obligations come in is again something that takes a lot of heat out of that. It enables the industry, I suppose, to have some level of comfort that, even though we may not know everything that we have to do right now, there are mechanisms that mean that hopefully we will have everything in place by the time we need it.

Senator LUDWIG—Thank you.

Ms Martin—I would like to add a comment to that from the industry's perspective. The timetable for implementation is going to be extremely tight, with the complexity in a financial services business and the number of systems that we operate. I come from a superannuation and managed investments background, but being part of the CBA group there are banking systems and we have to do an assessment of all of those systems to work out how we are going to implement this legislation. And the rules are critical to that, because we need to understand what they are to be able to implement them and start doing the road map for them. I always use the analogy of trying to build a house without the architectural plans. It is a very big undertaking.

Senator LUDWIG—That is why I raised it. I imagine that industry would expect to see the rules and the legislation, given that it is risk based and it is basically a framework piece of legislation that is designed to operate through the rules. Without clarity in the rules, you cannot refer back to the framework to understand what your obligations are and advise your members. That is why I continually ask that question about the rules and try to understand industry's perspective, because what you are signing up to is probably reflected in the draft rules and will probably work the way you expect, but it may very well not. If it does not work then there is limited opportunity to address it down the track.

Senator PARRY—I can completely understand where Senator Ludwig is coming from. It would also be fair to say, though, that it would be silly having a set of draft rules today that are changed next week, changed the week after and then changed the week after that because of operational issues, or whatever issues. Wouldn't it be better for industry to have the rules fixed and hard—or at least moving forward with the sorts of rules that are not going to change every five minutes? That is the other side of the coin that we need to look at. I was with an industry association in the past, and there is nothing worse than getting updates and changes

constantly. It is nice to have one thing to move forward with. So maybe an early release would be detrimental. Do you have any comments about that?

Mr Codina—For us the process by which we get to the rules is as equally critical as the rules. For us the consultation element, which I have stressed from the very outset, has meant that at least those rules we have have been very carefully negotiated and pored over from both sides to the point where they are workable. This is probably a bit of a general motherhood statement, but those rules which we have are workable and they provide sufficient certainty. We hope that we can have that sort of process for the remaining rules as well.

Senator PARRY—Despite reports to the contrary occasionally, the government does listen. Consultation is going to be the key in moving forward. I think I share Senator Ludwig's view that, practically, these will work. There is no guarantee that the rules are going to be exactly what industry wants, but I think that they will work and I think they are going to be sensible rules. That is the only way we will move forward.

CHAIR—Thank you for your submissions and thank you for attending today.

[1.53 pm]

VAILE, Mr David, Vice Chair, Australian Privacy Foundation

WATERS, Mr Nigel, Board Member and Policy Coordinator, Australian Privacy Foundation

CHAIR—Welcome. The APF has lodged a submission with the committee, which we have numbered No. 9. Do you need to make any amendments or alterations to that submission?

Mr Waters—No.

CHAIR—I invite you to make an opening statement and we will go to questions after that.

Mr Waters—I would like to thank the committee for the opportunity to appear and also to recognise the valuable contribution that the committee's earlier report has already made in respect of some changes to this legislation. I do not want to waste the committee's time by whingeing about the consultation process. I think you are well aware that we are somewhat dissatisfied with the nature of that process. I would just say, though, that the late release of the privacy impact assessment and the government's response to it, which basically rejects more than two-thirds of the recommendations, demonstrates the very one-sided nature of the government's approach to taking account of input that has been provided over the last two to three years.

The Privacy Foundation wants to go on record as saying that we have no objection to a sensible approach to combating terrorism and serious and organised crime. You will not get any argument from us about a balanced and measured approach to dealing with that issue. But this bill is not a balanced and measured approach to dealing with that issue. In our view, the legislation is so seriously flawed that it should be withdrawn—and, if not withdrawn, it should be rejected by the Senate.

We note that many other submissions support at least some of the concerns that we have raised. I think it is particularly significant that many business groups have concerns about the proportionality and lack of specificity in the legislation, and a whole range of the issues that we have raised. Having said that, I think there are some additional concerns which we have which are shared by Liberty Victoria. I understand that you took evidence from them last week. If in fact the legislation is to proceed, we would suggest that there is a need for some improvements or amendments in some key areas. The first of those would be greater honesty about the objectives of the legislation, including a change to the title of the legislation. It clearly is about much more than just anti-money laundering and counter-terrorism financing. The scope of the reporting regime, and indeed the entire regime, really extends out to breaches of any state, territory or Commonwealth law. So it is really dishonest in our view to shelter behind a label that says that this is just about serious organised crime and terrorism.

Secondly, in common with a lot of the other submissions you have received, we believe that it is quite inappropriate to leave so much detail for regulation and rule making by AUSTRAC. That creates not only a level of uncertainty about the obligations but also really prevents the public from understanding the full implications of the regime for their privacy. Thirdly, we believe that there needs to be attention to issues of thresholds for both customer identification on the one hand and reporting on the other. We believe that the absence of

thresholds in respect of some transactions, like international funds transactions and suspicious matters, is unacceptable. It basically broadens the net far too wide. Where there are thresholds, we believe they should be indexed. We note that the government has rejected the recommendations about indexation in the privacy impact assessment.

Fourthly, we would really like to express our major concerns about the suspicious transaction reporting regime—or suspicious matters now as it has been extended beyond the current definition of suspicious transactions. We believe that the effect of this regime will be—to put it in populist terms, which I think it does need to be put in—that there will be literally thousands of relatively untrained amateur spies acting on behalf of the government in reporting suspicious matters and under a legal obligation to report suspicious matters; and therefore, understandably, probably erring on the side of reporting rather than not reporting because of the criminal offence and penalty provisions in the act. When you combine that with the total absence of any transparency or remedies for individuals, the suspicious matters reports are basically secret files which individuals will never know exist about them and never have any opportunity to challenge. This is a completely unacceptable reporting regime in a free society, and I do not think it is any exaggeration to say that this sort of regime is one that the East German Stasi would have been proud of and would have welcomed.

Our final key area for improvement, if indeed the legislation is to proceed, would be in relation to oversight. We call on the committee to address the issue of continuing oversight, hopefully with both parliamentary committee oversight on a regular basis and also a strengthened role for the Privacy Commissioner and other watchdog agencies in relation to systemic monitoring and auditing of the operation of the act. It is not sufficient in a case like this to rely on a complaint based regime for the simple reason that many people will never know that they have been reported and therefore not be in a position to make complaints. I will stop at that point and invite questions on the submission.

CHAIR—Thank you very much, Mr Waters. Mr Vaile, did you wish to add anything?

Mr Vaile—Not at this stage.

CHAIR—One of the aspects of the privacy impact assessment which is of interest to me is the number of agencies that will have access to information collected by AUSTRAC. It is quite a broad range of recipient agencies. The PIA suggested that that should be dealt with very carefully. I am interested in your comments on that as well, Mr Waters.

Mr Waters—We certainly share that concern. At the moment I think there are over 30 separate agencies that have access to AUSTRAC data online. That access is relatively unrestricted in that it is left to the discretion of the individual agencies as to when they access information, and how they use that information is subject to a very broad set of criteria. There is clearly the potential for that range of agencies to be expanded in the future. It is not only the number of agencies but the matters for which they are able to access information that gives rise to the concern. This comes back to the issue of the dishonesty of the title of the bill. Agencies like the Child Support Agency and Centrelink have been added to that list of authorised agencies in recent years and they are clearly using the data for—

CHAIR—Probably not for counter-terrorism financing inquiries.

Mr Waters—Yes. It is not for serious organised crime matters at all; it is for a whole range of other things. By all means, let us have a debate about whether it is appropriate to widen the net, but let us not try to pretend that that is anything to do with counter-terrorism or money laundering.

CHAIR—The PIA also recommended a review of operations of the bill after two years. Is that something your foundation would support?

Mr Waters—Indeed, we would. Not as a substitute for the other accountability mechanisms—

CHAIR—No, I understand that.

Mr Waters—but, in addition to them, yes.

CHAIR—Thank you very much.

Senator KIRK—Thank you for your submission. I was not present at the committee's hearings in Melbourne but I understand that is when the PIA became available. I take it that it is still not publicly available for people to—

Mr Waters—I believe it is. It has appeared on the website within the last two days. When I looked on Friday it was not there but by Sunday it was. It really did not allow time for any significant perusal of that before these hearings. I have only been able to look at the recommendations and the government's response to them and not at the detail of the PIA. It really frustrates the whole object of doing a PIA if it is not made available.

Mr Vaile—Our general assessment was that most of the recommendations were not particularly controversial or extreme. In many cases, we probably would have recommended going further than those recommendations. So I suppose it means that it is even more disappointing that so many of them have been rejected. It is also disappointing that people have not had a chance to consider them and maybe talk to us before we came along today about whether there were some things in particular that we should be focusing on.

Senator KIRK—Were you involved in the consultation process at all in relation to the—

Mr Waters—To the PIA?

Senator KIRK—No, sorry. I meant more broadly to this bill.

Mr Waters—We have been at a number of meetings with the Attorney-General's Department and AUSTRAC. One of our frustrations is that the process, on the face of it, looks as though it has had a very high level of consultation; it is just we have felt like we have been talking to a blank wall and that the issues we have been raising have not been addressed. There have been a much wider range of closed meetings between the Attorney-General's Department, AUSTRAC and industry groups in which some of the detail has been developed. It appears to us that the wider consultation meetings that we have been involved in have simply been window dressing.

Senator KIRK—Looking at your submission, it seems to me that there is no particular reference to provisions of the Privacy Act. I obviously understand that if there are any inconsistencies with this legislation the Privacy Act is going to override them. Have you done any analysis of the detail of the Privacy Act and to what extent this bill does go beyond—

Mr Waters—Clearly, the Privacy Act does offer a base level of safeguards which will apply to those agencies and organisations which are covered. The only thing we welcome in the government's response is the commitment to extend the Privacy Act to cover the small businesses that would otherwise be exempt in relation to they way they handle AML/CTF information.

But I think it is disingenuous of the government to say, as they do in response to a number of the PIA recommendations, that they are accepting those recommendations—and then say, in brackets, 'to the extent that the Privacy Act applies'. In fact, in many cases the Privacy Act does not have the effect that the PIA recommendation is seeking to address. It is very much a sort of minimalist baseline which does not deal with the specific issues that are of concern.

Mr Vaile—I can give you an example of that. If you take the case of, say, a financial counsellor or financial advisor, under a reading of the bill, if they were to discharge their full fiduciary obligation to their client before giving them advice when they were coming to them and potentially revealing a lot of details, they should be saying something like: 'By the way, you should know that I will be obliged, if I am suspicious of matters here, to make a report. You'll never know that I've made the report, you'll never have a chance to see the report and you'll never have an opportunity to understand any implications that may go with that. And it'll probably sit around for a more or less indefinite time. So, before you say anything to me, just be aware that if that obligation is triggered I have to do that and I'll be subject to criminal sanctions if I don't.' Ideally, if that is actually what is going to happen then, because of that special relationship between the adviser and client, it should be that explicit, that frank and that useful in terms of helping the client to understand the nature of the communication they are about to enter into.

If you look at the alternative, the broad notices that pop up under the Privacy Act, you have a page full of very complicated jargon and pseudo legalese and a broad thing saying any other agencies and any other things required by law—which is often where the sting, the real impact, is. So what I would be concerned about if we were relying just on the minimalist protections of the Privacy Act is that, instead of being told something like that up-front in plain English, you get a thing saying, 'Here's a 13-page disclaimer and there are sections at pages 7, 9, 10 and 11 about privacy and, by the way, just sign it.' I suppose that is the sort of problem that you face when you rely on the broad and relatively unenforced and confusing obligations under the general privacy law.

Senator KIRK—So are you suggesting that there be a requirement that there be a more detailed statement provided to a client?

Mr Waters—Yes, and I believe that was one of the PIA recommendations as well which the government has rejected.

Senator PARRY—Thank you, Mr Waters, for your very frank comments, which are important to hear. I can appreciate what you are saying about the Privacy Commissioner. Are you aware that the government, I think in about September this year, introduced the Australian Commissioner for Law Enforcement Integrity? That role may someway appease your concerns. I am interested in whether you have any comment about that. There will be an independent commissioner who will have the ability to inquire into any law enforcement

agency, any form of corrupt practice, and then a parliamentary oversight committee. So, first of all, are you aware of that?

Mr Waters—I was dimly aware of that new agency but, to be honest, we have not had the opportunity—I don't know whether David has—to get across the detail of what level of additional accountability it provides. Obviously, we would welcome anything in the way of oversight, and it sounds like it probably does provide some marginal increase in oversight.

Senator PARRY—It certainly will provide an increase, and it will be a bipartisan parliamentary oversight committee. I just mention that in case that assists in some of your concerns.

Mr Vaile—I suppose my off-the-cuff response would be to say that that is interesting in relation to the core law enforcement agencies. One of the problems is that this is spreading way beyond law enforcement, so I would query what other agencies it covers, which is obviously one of our core concerns.

But probably the greater concern is this sort of black hole of untrained suspicious matters reporting by the ever-expanding army of junior temporary clerks who end up at the front desks of banks or real estate agents or whatever. They, de facto, become a part of the criminal intelligence network, if you like, but they are probably not counted as a law enforcement agency. They have the capacity by these reports to adversely affect someone who they mistakenly or maliciously or whatever report on, and that information goes into the enforcement system and other systems. But at the point of collection you are dealing with people who are probably outside of that oversight and who also have not had what we would think of as a much better threshold for this sort of surveillance, which is training and experience and the professional obligations covering how, say, a police officer or an intelligence officer would operate, as opposed to a Saturday-morning school-aged temp at a real estate agent's.

Senator PARRY—I appreciate that, Mr Vaile, and you have made a very good point. This is just one other thrust at a more acute end of oversight. You also mentioned, Mr Waters, in your opening statement, that you believe the title of the bill is incorrect. There is only so much you can put in a title but, taking on board what you are saying, can you point to any provisions, any clauses, within the current bill that you feel do not fit within the ambit of the title of the bill?

Mr Waters—I think it basically goes to the reportable matters being much wider.

Senator PARRY—So there is no specific clause that is not related to the bill; it is just that you believe some clauses may extend beyond what you believe they should extend to?

Mr Waters—Yes, that is right. I think it is much more fundamental than any particular clause; it is that the whole regime, the whole scheme, is basically about reporting suspicion of breaches of any Commonwealth, state or territory law. There is no threshold in relation to the seriousness of the offence or the nature of the offence. So, on a plain reading of it, I would see that a clerk in a bank would be under a legal obligation to report somebody parking in a no-parking zone outside a bank. We are continually told by Attorney-General's and by AUSTRAC: 'Don't be silly; we will have a commonsense approach to this.' We just do not think that, with something as serious as this, it is enough to rely on the discretion and

common sense of even the agencies, let alone a vast army of untrained and unqualified reporters.

Senator PARRY—I think that is an extreme example, but I take that on board. Division 2, section 41, 'Reports of suspicious matters', is one of the core clauses that you mention. I went through it again after your opening remarks. In particular, under (1)(g), (h), (i) and (j)—in fact, even in bold print—it clearly specifies the provisions of money laundering and financing of terrorism. Under (f) and the subparagraphs under (f) it does refer to other state and territory and federal taxation matters, but they would link in, in some way, with financing of terrorism or with money laundering for the purposes of the act. So, if that was an area you were reliant upon, I fail to see the issues, unless there are any other particular clauses that refer to matters that are not linked to the title of the act or the intention of the act or the bill.

Mr Waters—I did not read those as being in any way complementary—that there had to be an initial threshold of money laundering or serious crime and then only if that were the case would you trigger reporting of the other offences. My reading is that they are independent.

Senator PARRY—Thank you.

Senator LUDWIG—In terms of the breadth of the suspicious matters reporting, it is very broad and it seems to include all types of offences. Is that your understanding of how it would apply?

Mr Waters—Yes.

Senator LUDWIG—There does not seem to be much that you would not have to provide a report on—

Mr Waters—That is right.

Senator LUDWIG—the way the legislation is worded.

Mr Waters—Yes.

Senator LUDWIG—I take it you object to the breadth of it. How should it be confined—or is that putting you on the spot, Mr Waters—in the sense that it is designed as legislation to address anti money laundering and there is a requirement then to look at predicate offences as well? I suspect the breadth of the reporting requirement is to try to capture predicate offences. I will have an opportunity tomorrow to ask a bit more about that, but I would not mind having your view.

Mr Waters—Certainly it would be our view that there should be sufficient experience now of the operation of the FTRA regime in AUSTRAC to be able to give clearer and more objective criteria for reporting that confine it to matters that have, in their experience, cropped up in relation to major organised crime, terrorism and suchlike. It just seems to us to be an unacceptable sort of dereliction, if you like, of their responsibility to simply throw the doors open and say, 'Well, you'd better let us know about anything that really gives rise to suspicion, and then we'll, in a sense, give you the assurance that we'll only deal with it responsibly later.' That is placing the onus really too much on discretion and common sense in use. There ought to be a much greater objectivity in the criteria.

Senator LUDWIG—One of your concerns, as I understand your submission, is not only the breadth but also the amount of suspicious matter reporting that will have to be made—

Mr Waters—Yes.

Senator LUDWIG—and how the reports are then stored and who can then access them. We heard some evidence about that today. But then, for the length of the period that the reports are stored, people will not be able to access to know whether or not they have a suspicious matter reported on them. Is that a concern?

Mr Waters—That is very much a concern. I have not put this in the submission, but I think one possible solution to that issue is the same one that we have raised repeatedly over the years in relation to telecommunications interception, which is an equivalent to the requirement under the US wire-tapping laws to notify people after the event, after a period of time has elapsed and there has been no investigation and no reason to continue to hold that person under suspicion. In the first place, there should be notification at that point and, secondly, there should be a greater obligation to dispose of the record, because at the moment our understanding is that suspicious matters—or, currently, suspicious transaction reports—remain indefinitely on the AUSTRAC database. That means, on my calculations, that there must now be literally hundreds of thousands over the 15-year period.

Senator LUDWIG—I suspect more, quite frankly.

Mr Waters—Yes.

Senator LUDWIG—In terms of the mobile phone prepaid accounts, I am just wondering whether you could explain that a little bit more to me. I would have started with the premise that you should be able to identify, if you are going to purchase a prepaid mobile phone using a form of identification. I am just curious as to what your position there is and why.

Mr Waters—There has been an obligation under the Telecommunications Act to do that. It has not been basically enforced or practised for very practical reasons—that is, the way the mobile phone industry works, with a lot of resellers, very small operations, that really are not in a position to take that obligation seriously. As you may know, there has been a consultation exercise run by ACMA inviting comments, basically, on the balance between law enforcement needs on the one hand and both the practicalities and the civil liberties and privacy issues on the other. We think that the effect of this legislation—and I only became aware of this just before I finalised the submission—could be to pre-empt that whole debate and discussion which ACMA has been undertaking and basically subject prepaid mobile phone accounts to the customer identification requirements in this bill, separate from any more considered approach to the issue.

Senator LUDWIG—By ACMA.

Mr Waters—I understand that there have been similar debates in other jurisdictions, like Canada and New Zealand, and they have come down in favour of not requiring detailed customer identification for prepaid mobiles.

CHAIR—We are hearing from the Australian Mobile Telecommunications Association tomorrow too, so they may take us to that point, I suspect.

Senator LUDWIG—On the level of thresholds that are available in the legislation: have you had an opportunity to look at whether you think they are proportionate and appropriate for the types of requirements or obligations that are then imposed—in the area that you deal with, in terms of the consumer and privacy protection?

Mr Waters—To start with, we are concerned that there are no thresholds for international funds transfer reporting, so if you wire $5 to your granny in England it gets reported. We think that is completely ridiculous and disproportionate. Where there are thresholds there is room for debate about exactly what they should be, but we would certainly argue that they should be indexed, that there should be a sensible debate about what the levels are now and then there should be some indexation. The effect of inflation creep has effectively reduced the $10,000 and the $5,000 thresholds in the act since they were first introduced. We do welcome the $1,000 threshold for stored value cards which, if it works properly, will have the effect of excluding small value stored value cards like public transport tickets and telephone cards.

Senator LUDWIG—And gifts, hopefully.

Mr Waters—Hopefully. Again, we would like greater reassurance about that.

Senator LUDWIG—We will have an opportunity tomorrow to pursue that a little bit further.

CHAIR—Yes, we will. In terms of the threshold issue, the Office of the Privacy Commissioner made the same point: the threshold has been sitting there for some time and has been eaten away not insignificantly by inflation.

Mr Waters—In relation to the threshold point, I point to the generic point we made at the beginning of our submission about the reliance that the government places on the need for this legislation to respond to the FATF 40 recommendations. We still, despite raising this issue repeatedly over the last two years, have not seen the government address the question: why are we being asked to have legislation which appears to impose lower thresholds and tighter identification and reporting requirements than those in some of the other jurisdictions which are members of FATF? I think the government needs to be put on the spot about addressing that.

CHAIR—I am sure senators will take up your suggestion, Mr Waters, if I know them well. I must say that I was very pleased that out of the committee's last report the government chose to conduct a PIA. I know you are not happy with the PIA, but I thought you might have at least acknowledged that it was a good thing that had happened, and your submission did not do that.

Mr Waters—Yes, apologies. We certainly do welcome the increased use of PIAs. But I repeat the point that they have limited value if they are not there to inform the debate.

CHAIR—I understand that, but it does at least give us a basis for this discussion and to pursue the sorts of issues that you raise, Mr Vaile.

Mr Vaile—It is sometimes easy to overlook the positive, and you are right: we should be saying thank you. That is a very useful procedural contribution. The fact that we have to go so quickly to saying that it is a pity that you rejected two-thirds of the—

CHAIR—I was very excited. I regarded it as a significant advance myself, I must say. Senator Ludwig is surprised—there you are.

Mr Vaile—I think it does give a discussion like this and ones that follow from it a much firmer foundation. You may not agree with all of the recommendations but you know someone has actually been through with a certain brief to try to provide viable, workable solutions, not just the people with particular stakeholder interests. It is much better to be doing that than everybody trying to start from scratch.

CHAIR—That is absolutely right. I must say that I found it a useful document. The only other thing I would say is that, as you know, tomorrow both AUSTRAC and the Attorney-General's Department are appearing before the committee. There will obviously be questions that go to privacy issues in that discussion and then on the breadth of the bill and a number of other matters which you have raised in this discussion and in your submission. Although we do have a fairly tight reporting time, if there were to appear on the transcript anything that you wanted to pursue further with the committee in brief written form we would be very grateful to receive those submissions.

Mr Waters—I am intending to be at most of your hearing tomorrow, so I hope to be in a position to make additional submissions.

CHAIR—Thanks, Mr Waters, that would be very helpful to the committee.

Senator PARRY—We still have about six minutes for this section—if Senator Ludwig is finished?

Senator LUDWIG—Yes, thank you.

Senator PARRY—Could I take us back to clause 41, because it is really the hub of one of your key objections to the bill. I see clause 41 as being in two parts, and I would be interested to know if you do not see it this way. Basically there is a provision of service between two entities: the reporting entity and the first person. For an obligation to report a suspicious matter, conditions under (a), (b) and (c) in subclause (1) have to exist 'and any of the following conditions'. The key is the 'and' in 'and any of the following conditions is satisfied'. The first two, (d) and (e), basically deal with false identity, and (f) is where all these other things that you were concerned about come into play—that it casts a wider net than terrorism and money laundering. Then (g), (h), (i) and (j) are straightforward. The way that I read (f), the trigger for that—and I have just had a glance at the revised explanatory memorandum—is if you are engaged in providing some form of financial transaction service and you become aware during that first stage that there is also an investigation, potential prosecution or evasion under other federal or state legislation, and it seems to specify proceeds of crime or taxation. Do you read it that way?

Mr Waters—I apologise, Senator; I do not have the bill in front of me. Could I take that on notice and provide you with a clarifying statement specifically about that point?

Senator PARRY—Yes, certainly. As it is one of your key objections, I think it is important that you have the same understanding that we have—and no doubt, because of your submission today, we will take this up with the department tomorrow. Thank you.

CHAIR—Mr Vaile?

Mr Vaile—I would just reinforce one of the other comments that I think is made in our submission, and that is in relation to the broader impact of the legislation. As you can understand, one of our concerns is about the creation of an excessively broad discretion, with an excessively broad number of collectors involved and an excessively broad number of receiving organisations. If our interpretation is correct, it is potentially creating a much larger scope for the improper use of discretion, if you like, whether it is accidental or malicious, whether it is due to policies that are not understood or poor training or whatever. That is one way of putting the broad, principal concern that we have.

A second aspect of this, and I suppose it flows on from our concern about the naming of the bill and the identification of its true subject matter, is the potential for its articulation with a range of other proposals that are afoot at the moment. They would include, I think, the Document Verification Service and the proposed ID card that is trading as an access card, smartcard, people's card, whatever card—

CHAIR—Mr Hockey's initiative, you mean?

Mr Vaile—yes—and a number of other related proposals. I think we spell them out.

CHAIR—You do.

Mr Vaile—I think it is worthwhile emphasising that this is creating, potentially, a regime that is not based on privacy and risk management of the security of personal information but based on a generic assumption that everybody is possibly guilty and that we need broad, ubiquitous surveillance and a seamless, total net of surveillance. Some of the narrow uses of surveillance in law enforcement investigation are obviously the sorts of things that we would support in appropriate cases. I suppose the concern, looking at the overall system that is being put in place, is that, when you look at all of the parts articulated together, none of them are actually described or presented as part of this broader system. The end result is that the sort of regime that people will be living under is probably going to be a lot more intrusive than necessary, a lot more intrusive then people would expect and a lot more expensive for small business. I just wanted to draw your attention to the integration of this issue with others and the potential big picture which probably is not being properly aired at the moment.

CHAIR—Thanks, Mr Vaile. As you say, you have made some observations about that in your written submission as well. So thank you for highlighting those. That concludes our discussion with the Australian Privacy Foundation. Thank you again for your submission today and for your appearance here this afternoon. Mr Waters, if there are matters to pursue out of tomorrow's discussion, we look forward to hearing from you further.

Mr Waters—Thank you.

Proceedings suspended from 2.28 pm to 2.42 pm

CURTIS, Ms Karen, Privacy Commissioner, Office of the Privacy Commissioner

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

CHAIR—We now welcome our next witnesses from the Office of the Privacy Commissioner. The Office of the Privacy Commissioner has lodged a submission with the committee, which we have numbered 40. Thank you very much for that. Do you need to make any amendments or alterations?

Ms Curtis—No, no amendments.

CHAIR—Thank you, Ms Curtis. Perhaps you would like to make an opening statement, and we will go to questions at the end of that.

Ms Curtis—Thank you for the opportunity to appear before the committee today. As explained in our submission to the inquiry, my office has made three submissions during the development of these bills: two to the Attorney-General's Department as well as one to this committee's inquiry in March this year. The office has also appreciated the opportunity it has had to discuss the issues with the Attorney-General's Department and with AUSTRAC.

In its submissions, my office has recognised 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 counterterrorism financing standards. My office also recognises 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, however, it is important that, in giving effect to these standards, consideration is also given to the impact that they may have on the privacy of Australians' personal information. Measures to address money laundering and terrorist financing must be proportionate.

The provision made in the consequential amendments bill to ensure that small businesses will be covered by the Privacy Act when handling personal information pursuant to AML regulation addresses a key concern of my office. The commitment by the Attorney-General in the second reading speech to provide resources to my office to enable it to develop guidance and advice for small business is an important practical step to ensure that these reporting entities will be able to meet their obligations under the Privacy Act. We also have been funded to undertake audit and complaint-handling functions.

My office does, however, remain concerned at some elements of the main bill. Previous submissions have suggested that the question of which Commonwealth agencies may access AUSTRAC data is of such importance that it should be considered separately from the broader reform of AML regulation. Additionally, my office remains concerned about the extent to which information is available to state and territory agencies, particularly in the sense that individuals may not be able to complain or seek a remedy when their privacy may be compromised.

My office has highlighted the opportunity given during this period of reform for the substantial transaction threshold to be raised. An effective way of limiting privacy risks is to minimise the amount of information collected in the first place. Raising the threshold from

$10,000 would help to ensure that the amount remains relevant to the purposes of AML-CTF regulation and would reduce the chance of unnecessary collection.

My office is pleased that our advice for the government to undertake a privacy impact assessment, which was also a recommendation of this committee in its earlier report, has been acted upon. We are also pleased that the PIA and the government response to it have been made public. I welcome any questions from the committee.

CHAIR—I will go first to the question of your additional funding in the second reading speech. There is also a reference to additional funding of $13.1 million for AUSTRAC for a public education and awareness campaign. I assume that goes to consumers. What role does the OPC have in relation to educating the public in Australia about their rights to protection of their privacy in legislation like this? As I read the second reading speech and as I read your submission, the funding referred to by the Attorney is quite clearly directed at small businesses.

Ms Curtis—I think the Attorney-General's Department has been given $13 million for an education and awareness campaign. If my recollection is correct, funding for AUSTRAC is $139 million. Obviously, AUSTRAC would be able to answer the detailed questions about what they propose to do with the money.

CHAIR—That might be the case. I am just reading the paragraphs in the speech.

Ms Curtis—We are proposing to work with the Attorney-General's Department as they embark upon a wider education program but to have that specific element concentrating on the smaller businesses that would become entities under the coverage of the Privacy Act. As you know, there is a general exemption from the Privacy Act for businesses under $3 million, unless they trade in personal information or are a health service provider.

CHAIR—In another part of your submission and in your remarks today is the question of access to AUSTRAC information by designated agencies. This appears to be a burgeoning industry. You have made it clear previously that the addition of further agencies to that list should be done separately from the regulatory process. I think you said that you have a preference for it to be done legislatively. In the history of this committee at least—even in relation to AML—that has been our preference as well. Could you comment on that?

Ms Curtis—It is always better for the enabling legislation to have as much detail in it as possible, including in those areas where it would seem that it extends the operation of the legislation. Having scrutiny of the legislative program, even though the regulation will be a disallowable instrument, is not as robust as having parliamentary inquiries or parliamentary scrutiny of the legislation.

We were concerned particularly about the increasing number of agencies but also about the increased amount of information that may be available. There is going to be a lot of information whizzing around as well as being accessible. So we thought it might be important to take one step back to try and look at those wider issues rather than just look at anti money laundering.

CHAIR—You also made some comments in your opening remarks about access by state and territory agencies and the gaps there. On the first exposure draft, you made some suggestions about how that might be resolved. What response did you get to those suggestions?

Ms Curtis—The process has not changed. I think there was acceptance of the general idea that there were some gaps. The Attorney-General's Department in particular understands this, which is why we have a reference to the Australian Law Reform Commission. One of the key issues that we will be looking at is national consistency. Down the track one would expect that some of those anomalies will be removed, but at this point in time we have the problem that only New South Wales, Victoria, the Northern Territory, Tasmania and the ACT have legislation that covers the operation of their public sector agencies. The other states do not.

So we have those problems, that some of the handling of personal information by those state and territory agencies is covered by their own legislation, but otherwise there is a gap. The clause says that they can ask those agencies with the IPPs, but there is a question mark over what actually happens then. There is no compulsion; I do not have jurisdiction, then, over that. It would appear that it is not clear. There is not clarity.

CHAIR—Have you seen the submission of the Australian Privacy Foundation to the committee for this inquiry?

Ms Curtis—Yes, I have had a look.

CHAIR—Early in the submission there is a reference to the privacy impact assessment, and they note some concerns about the rejection of 36 of the 96 recommendations of the privacy impact assessment. What is your comment on that?

Ms Curtis—I think we need to careful when we look at those recommendations, because some—and I have not gone through them all in detail—of the recommendations that have been rejected related to whether small businesses were going to come into the coverage of the act. They were rejected by the government because they are going to put an amendment to the Privacy Act. That is one aspect of it. Another concern would be that a lot of the rules are probably going to address a number of the issues as well. So I think you need to look very carefully; it is not a two-thirds rejection of the recommendations. Some of them actually are being adopted. I am pleased that it has become open. The government's response and the PIA itself have been made available and I think that is excellent. The more PIAs that become publicly available, as well as government responses, the more that will help people's understanding of the way their personal information is handled. It will also help to set more of a trend within other government departments and agencies.

CHAIR—The Australian Privacy Foundation has also expressed in their submission that, notwithstanding what you have said about the nature of the recommendations and those which have been accepted and rejected, they also interpret some as being rejected because they are described as only being accepted to the extent that the Privacy Act provides protection. They express a concern that in fact it does not provide the sorts of protections that are, perhaps, asserted in that observation.

Ms Curtis—That probably relates to a different interpretation of the Privacy Act.

CHAIR—What is your interpretation, then?

Ms Curtis—Perhaps I have not got such a purist interpretation as the Australian Privacy Foundation does, and it is appropriate that they have that interpretation. The legislation is a

balance, and that is clear in the legislation itself. Our legislation is to allow for competing interests—social and business interests—so, again, it is a balance.

CHAIR—There is a lot of concern in submissions and in evidence being given to the committee through this hearing process about the absence of final sets of rules or, at least, advanced sets of rules. Are you involved at all in the process of the drafting, or are you being consulted by AUSTRAC?

Ms Curtis—We are not involved in the drafting, but we have been consulted by AUSTRAC. We provided some comments back to them on their initial set of rules. We have also established—

CHAIR—Can I just interrupt there to ask, when was your last contact with AUSTRAC on the question of the rules and their drafting?

Ms Curtis—We wrote to them in October this year. We also met with AUSTRAC—a number of my officers and me, with Neil Jensen and a few of his senior people—in July, and we established a mechanism to have ongoing discussions. We will next be meeting in the week beginning 8 January next year to discuss, at officer level, progress on the rules.

CHAIR—So you are not expecting to see rules before then?

Ms Curtis—I might ask my colleague.

CHAIR—Mr Solomon?

Mr Solomon—Not necessarily, but this is an officer level meeting that we had agreed we would have on a regular basis. We are expecting to talk with AUSTRAC about how they have looked at our comments on the rules and what changes, if any, they have decided to make in relation to that. We are expecting get a picture from them about where they are heading with the rules at that stage, though we are not expecting anything new before that meeting.

CHAIR—It is 8 January.

Ms Curtis—Possibly the week beginning—

CHAIR—The week beginning 8 January. Everyone will be back early from Christmas holidays. Thank you very much.

Senator LUDWIG—Of the recommendations that were not picked up, that have been rejected—and you indicated earlier, in response to Senator Payne, that some of those related to matters that would be covered by the rules or that might relate to change in your legislation—which are still live issues for you? I wonder if you have had a look at those in terms of high, moderate or low concern—if you have looked at those in that light. If you have not, could you provide that?

Ms Curtis—We have not had a look at it in that light yet. I certainly have not; I am not sure if my policy area has.

Senator LUDWIG—I understand that a significant number have been rejected. You have indicated that some of those are not as bad as they look on first blush, but I want to have a look at how bad or good they are. If it is a good news story then please tell the committee. But are there still some serious concerns that remain outstanding, that have been rejected? It does not give an indication more broadly of how serious they are in terms of privacy.

Ms Curtis—We would have to take that on notice, because there are so many of them I could not answer that now unless we flipped through each one.

Senator LUDWIG—I understand that. I was hoping you could take that on notice and provide feedback.

CHAIR—Except to say that we have a very tight reporting timetable, as ever.

Ms Curtis—So when would you like a response from us?

CHAIR—Friday, if that is possible.

Ms Curtis—I undertake to deliver you something. Whether it will be all 96 recommendations, I do not know, but we will get you something.

CHAIR—Thank you.

Senator LUDWIG—Have you had a look at the use the electoral roll may be put to?

Ms Curtis—I have had a very quick look at the explanatory memo and what the clause said. That is the extent of it.

Senator LUDWIG—With regard to the consequential amendments, a number of submissions have indicated that there are privacy concerns about the use to which the electoral roll might be put. I wonder if you could take it on notice as to whether you share some of the concerns of the Australian Privacy Foundation in respect of that or whether you think there are sufficient safeguards in place.

Ms Curtis—We will take it on notice.

Senator LUDWIG—With regard to the suspicious matter reporting and the broad nature of the reports that have to be provided, it seems that they extend to a wide range of offences and are not simply restricted to anti-money-laundering offences. That might be because they have to pick up predicate offences and the like. Have you had an opportunity to look at whether or not that is appropriate, given that it is really a chain of events? Once you report a suspicious matter it goes into AUSTRAC's database. It is then able to be accessed by a range of agencies, including state agencies, and then held by them, which leads to the question of whether they can download the material, whether they can store it themselves, whether they can institute query searches on that material to then build a picture of a range of transactions or of a person, and then what use that may be put to. By that stage it could be well outside the original purpose of this bill—that is, addressing money laundering. Is that appropriate or not and what safeguards might be considered to be put in place? That is a lot, I know, but you might already have turned your mind to some of it.

Ms Curtis—In one of our earlier submissions we did talk about it, but we concentrated in this submission process on the new issues that have been raised, whereas the suspicious matters have been around for a while.

Senator LUDWIG—It has been altered now. It is a lot broader than it was.

Ms Curtis—We can look at that. But, in part, that also travels out of the privacy regime, to being far broader than that. However, the amount of personal information that is collected is of interest.

Senator LUDWIG—Yes, I did not want to address that more broadly, outside your remit, but rather in terms of the privacy of individuals and how that is protected.

Senator KIRK—I would like to go back to a point that Senator Payne raised with you. You indicated that your understanding is that $13.1 million in additional funding will be provided to Attorney-General's to administer the scheme.

Ms Curtis—Something of that order.

Senator KIRK—So you are not aware of whether or not any of that amount will be allocated to your office?

Ms Curtis—No. We are receiving $1.8 million or thereabouts over four years. I can give you the exact amounts per year if you would like.

Senator KIRK—That is okay. I just wanted to get an idea, because some of the other witnesses—Baycorp for example—have suggested that, as a consequence of this legislation, there could well be an increase in the number of inquiries, complaints and the like that are made to your office. Have you contemplated that, and have you made any assessment as to the additional resources that you might require in order to handle this increase?

Ms Curtis—We have proposed to receive $255,000 this financial year, $692,000 the following year, $460,000 the year after that and $416,000 after that. Early on, it is going to include a lot of preparation of educational material, fact sheets and bilingual information, and then, after we have done the initial roll-out, we would be concentrating more on compliance and audit. So we would be expecting that roughly $400,000 by that final year would perhaps be covering off on those extra complaints.

Senator KIRK—So have you done any planning in relation to how you will use those funds as yet, or it is too early?

Ms Curtis—Not at this stage. Once we know that everything is passed and royal assent has been received—and it is two years from that date—and those sorts of things, we will be able to plan. But obviously it ramps up in 2007-08, and so I would expect the bulk of the activity for education would occur in that financial year.

Senator KIRK—I also wanted to ask about the PIA. As I understand, it has only recently become available, as has the government's response to that. When did your office become aware of the PIA?

Ms Curtis—I will ask my colleague to answer that question.

Mr Solomon—We were aware when the Attorney-General's Department started the process. They did have some discussion early with us, in the context of us producing the guidelines for PIAs, and we just wanted to have a discussion about what methodology and that sort of thing they might use. We did not have any other interaction until the end of the process when the PIA had been completed and the government had prepared its response, so we did not see anything in between those two points. We have only recently become aware that it has been made public on the Attorney-General's website.

Senator KIRK—Is that the way things normally work when you are involved in a PIA? Is it usual for there to be just those initial discussions, or do you usually get to make a submission on these matters?

Ms Curtis—We do not undertake privacy impact assessments. We recommend up, and we prefer that agencies get an independent person to do it for them. We might give some examples of people who could undertake it for them. But we do not generally help design a PIA, unless we are specifically asked or have been specifically funded to do so.

Senator KIRK—So it would be more that you would make suggestions as to methodology and the like?

Ms Curtis—Yes. But we recently produced a privacy impact assessment guide for government departments and agencies. That was launched in August, though it had been around as a draft for a bit over 12 months. The department used the process that we had articulated in that document as the basis for undertaking the PIA.

Senator PARRY—Could I just follow up there, Senator Kirk? Do you not do the privacy impact assessments for funding reasons or for reasons of possible future conflicts of interest?

Ms Curtis—There are probably a number of reasons. The possibility of future conflicts of interest is one. But, also, with a privacy impact assessment you have really got to understand completely the ins and outs of the project that you are undertaking, and it is very intensive—a lot of effort needs to go into it. So I do not have the resources to undertake every PIA that would need to be undertaken by every government department and agency.

CHAIR—Ms Curtis, also in the submission of the Australian Privacy Foundation is an observation at point 28 about whether the record-keeping requirements under the bill are in fact proportionate. I know in the consideration of the information privacy principles in legislation previously that this has been a matter which has come before us. As I understand it, the reporting entities will be required to retain detailed records, including customer ID, for seven years. There have been some concerns raised around that by the APF. What is the commissioner's view on that?

Ms Curtis—In general our view is that information should be kept for as long as it is necessary for the particular purpose for which it is collected. So you need to think very carefully about what you are going to do with it and so how long you would need it for. Seven years is a long time, and we think that perhaps that could be a little excessive.

CHAIR—I am just checking whether there are any other issues. You have taken that matter on notice for Senator Ludwig.

Ms Curtis—I think there are two issues on notice.

CHAIR—We think there are three, so we will clarify those with you so that we are all singing from the same song sheet there. There being no further questions from my colleagues, Ms Curtis and Mr Solomon, thank you both very much for appearing this afternoon and thank you also for your submission.

[3.08 pm]

BURKE, Mr Anthony John, Director, Australian Bankers Association

MOYES, Mr Joshua, Senior Adviser, Policy and Public Affairs, Abacus-Australian Mutuals

CHAIR—I welcome Mr Burke and Mr Moyes from the Australian Bankers Association and Abacus-Australian Mutuals to this hearing. The Australian Bankers Association has lodged a submission with the committee which we have numbered 16. Abacus-Australia Mutuals has lodged a submission with the committee which we have numbered 17. Do you need to make any amendments or alterations to either of those?

Mr Burke—No.

Mr Moyes—No.

CHAIR—I will ask you both to make brief separate opening statements and then at the conclusion of those we will go to questions.

Mr Burke—Firstly, we welcome the opportunity to appear before the committee and we would like to acknowledge the considerable amount of work which has occurred between the last time we appeared before the committee and now—from the exposure draft to the bill. There has been a substantial amount of consultation and an enormous amount of work on both sides to achieve the result we have. We do believe that there are some issues which need to be resolved, but in the scheme of things it is a relatively small set of issues.

In my opening remarks I will focus on the top five content issues we have. But, firstly, I wish to touch on a couple of points we made in our covering letter. They are consistent with the recommendations the committee made in the exposure draft. The first is:

… the committee believes it is imperative that the complete set of Rules be released for comment prior to the final version of the bill being introduced into Parliament.

We supported that recommendation at that time; we continue to support it. Unfortunately, that has not been achieved. The committee also said:

The committee also encourages the adoption of a realistic and workable timeframe for implementation of the new regime to allow business to undertake appropriate system changes.

As a result of consultation, we have arrived at a phased implementation. However, it incorporates a prosecution-free period, the details of which still need some explaining.

Coming back to the first point about the rules, we believe that it would be appropriate, if the rules necessary are not available by the time of royal assent, that either the prosecution-free period be extended in the case concerned or that there be an overall delay of commencement. We have been discussing with the department and AUSTRAC in recent weeks what we believe to be the absolutely necessary outstanding rules. There are still some which are required, and there is not a great deal of time between now and, let us say, 1 January, if that were to be the date of royal assent.

I now want to move on to content issues. We raised a number of these in our submission, which are all important. From our point of view, the most important ones are the following. Firstly, the ‘commence to provide’ definition in proposed section 5. This is a really

fundamental concept. We believe that the language which appears in the EM should really be in the bill. In fact, we would recommend that the locution 'Steps taken preparatory to the provision of a designated service are not considered to be part of commencing to provide the service' be put into the bill.

This is a serious issue. If that position does not succeed then there will be significant systems changes required from current operating practice. Current operating practice allows for a number of things to occur and for funds to be blocked until those steps occur. We believe that the preparatory steps should not be included in the determination of the point at which commencing to provide starts. Some examples are where a customer attends a branch but lacks sufficient identification, where they contact the bank via an electronic channel or where they are in a remote area—all of which would present difficulties if the commence to provide approach currently in the bill were to continue.

Secondly, the designated business group is a really significant concept for us. The outcome we are seeking to achieve here is for the group to be able to rely on centralised functions. We believe that not only does that have benefits from an efficient management and a cost management point of view but it also allows sharing of knowledge, which will achieve a better outcome in assessment of risk. The definition as it stands is not complete, and we believe that it must be completed while still allowing suitable flexibility—either by an amendment to the bill or by an expeditious conclusion of rules satisfying the concerns that we have raised.

Thirdly, there are the thresholds for walk-in customers. The position there is about existing systems and also competitive neutrality. The bill provides for thresholds in relation to money orders, for example, but not in relation to other transactions for walk-in or occasional customers as determined by the FATF. We believe the FATF approach should be taken—for example, bank cheques and money orders.

Fourthly, there is proposed section 161, the risk management audit. We believe it is unnecessary given the other powers available to AUSTRAC in the bills, such as section 165 risk assessments and in part 14 under 'Information-gathering powers' as well as the reporting obligations in proposed section 47. It is also inconsistent with the approach we negotiated long and hard in terms of moving to a purposive obligation rather than an outcome obligation. The approach now taken, for example, in proposed section 84(2) of the bill is that the primary purpose of part A of the AML program is to:

(i) identify; and

(ii) mitigate; and

(iii) manage;

... risk ...

That is a purposive obligation, whereas we think proposed section 161 goes back in time to an outcome obligation, and, as we have said, we see it as an unnecessary power.

Finally, item 5 relates to the proposed section 229 AUSTRAC rules. We believe there needs to be, either by inclusion in the legislation or by issue of a ministerial direction, an appropriate and formal framework for ongoing rules development and consultation. We described a

particular approach in our separate letter appended to the submission. Further, we believe that the Legislative Instruments Act approach is not adequate here because the act does not specify the form of consultation. The nature of the consultation required is exceedingly detailed and technical and has high impact on the industry. The Legislative Instruments Act does not make invalid rules if there has been no consultation.

That has to do with the rules in general. An example of what we believe to be, again, the relatively small number of rules that need to be determined before royal assent is the use of another reporting entity's applicable customer ID procedures, at proposed section 38. We believe there was a principle established that the second entity in this case of reliance should not have to judge or know what the first entity's process is. We believe that the principle should not be limited to a DBG and should allow commercial agreements to be created for the sharing and holding of identification. We believe that this is a very key rule and that it must be finalised. And there are others.

Mr Moyes—Abacus-Australian Mutuals appreciates the opportunity to present to the committee today. Just for your information, since we saw you last, we are the main association for credit unions and building societies. We are the result of a merger between the Credit Union Industry Association and the Australian Association of Permanent Building Societies in July of this year. Our submission highlights three particular issues of interest to the mutual ADI sector but it should also be read in conjunction with the ABA submission, which we support.

The first issue we identified relates to identification. The bill requires that a reporting entity carry out a procedure to verify a customer's identity prior to providing a service. There are two particular issues as a consequence of this that are of concern to us. The first relates to the fact that the acceptable referee method, which will not be FATF compliant, will disappear within 12 months of assent. This is a particular concern for many of our members who rely on acceptable referees as a non-face-to-face identification method. Some of our members that rely on this kind of method include those that service the teaching profession or the defence forces and others that work in regional parts of the country.

We are particularly concerned that the bill does not provide for an alternative, viable electronic non-face-to-face ID method. In this situation, our members would be forced to look to agents or other reporting entities to undertake a face-to-face identification on their behalf. We think this creates a competitive advantage for those reporting entities that have a significant branch network and, obviously, a disadvantage for those that do not. The second concern we have is a tension that we see between the bill at large requiring reporting entities to undertake broader and more detailed identification requirements but not necessarily making that task any simpler. The draft rule, for example, allows us the use of reliable and independent electronic data when collecting KYC information for low- or medium-risk customers.

The Attorney-General's Department has suggested that the electoral roll, the *White Pages* or credit reports might be a possible source in these circumstances. We are not entirely confident that that would be the result in practice. There might be barriers, for example, to credit reports in terms of the Privacy Act. The ability to verify core government issued documents, such as passports, birth certificates or drivers licences, remains somewhat limited.

Our second issue relates to privacy and public awareness. The AML bill will require our members to collect and store personal and behavioural information on transaction activity or suspicious matters for all of our customers. The community, credit unions and building societies support this idea in principle as a deterrent and a method of detecting money laundering and terror financing, but this acceptance will be tested when individual relationships start to emerge—so when this applies to over-the-counter service. In this context, we emphasise the importance of a government funded public awareness campaign, which is something that we have called for for some time. We believe this campaign should focus on explaining why financial institutions are asking individual customers for more information about their personal affairs.

The third issue, and one that seems a common one, relates to rules and guidelines. We note that the bill creates high-level obligations, but generally it is the rules and the guidelines that will provide the detail. We also note that industry, and particularly the ABA, is seeking to formalise the process for the ongoing consultation and development of rules and guidelines, and we support that process. But at this stage a final set of rules is not available. This makes it difficult for our members to understand the full implications of this regime. We accept that some rules will not immediately be required. We also accept that some, as released in July this year, will stay largely as they are. But, without the complete picture, assessing the impact and determining the scope of the obligations and the capability of our members to comply is a little difficult. The implementation period also does not factor in rules development, which erodes our members' ability to take full advantage of the transition timetable.

Similarly, with the guidelines, most of these remain unseen. Something that Abacus has called for for some time is information about money-laundering and terror-financing risk, and in particular AUSTRAC's views and expectations about what proportionate responses might be to those types of risks. We believe it would be unfortunate if our members had to wait until AUSTRAC's first round of audits to find out what the regulator's position was. These are the key issues that Abacus has identified, as I say, in addition to those that we support in the ABA's submission. I am happy to accept any questions.

CHAIR—Thank you very much, Mr Moyes and Mr Burke. We will go to questions and start with Senator Ludwig.

Senator LUDWIG—Looking at provision No. 20 in your table and, more generally, the 23 issues in total that you have raised, I take it you have raised those with the AGD and have yet to receive a response?

Mr Burke—The answer is yes. They are clause 161 issues.

Senator LUDWIG—Yes. And that really goes to the heart of what you have been arguing for, as I understand it: that it is risk based. Just expand on why you say it is 'appropriate action' to identify and mitigate. Is the concern you have clause 161(1)(b), which is 'mitigate', or all—identify, mitigate and manage?

Mr Burke—In relation to 161, yes, it is (b) which is of most concern.

Senator LUDWIG—I wonder if you could expand on that a bit.

Mr Burke—The point I was attempting to make in my opening remarks is that we started a long time ago with an outcome focused obligation—clause 74 in the first exposure draft. What that meant in simple terms was that an organisation could have the most perfect AML program or system available, but still money laundering occurs. So the interpretation is that you have failed to mitigate risk, because money laundering has still occurred. Whereas we felt very strongly that the obligation was better phrased as a purposive obligation—that you act with the purpose of, rather than attempting to guarantee an outcome which is infeasible.

Senator LUDWIG—And your solution to that is to delete clause 161 from the bill?

Mr Burke—And retain 162.

Senator LUDWIG—And 162 gives the outcome that you say would suffice?

Mr Burke—We believe 162 already provides a substantive power to the AUSTRAC CEO.

Senator LUDWIG—I see. Thank you. That is helpful to understand that there are the two external audits, one dealing with risk management et cetera that you will get audited on. The other broader issue was raised in one of the submissions. I think Westpac indicated that the safe harbour provisions should be removed. Does the ABA have a view about that?

Mr Burke—There is, I have to say, some difference of opinion between ABA members on that matter. There is not a consistent view. I think it is fair to say there is a degree of support for the Westpac position, but there is not unanimous support for the Westpac position.

Senator LUDWIG—What about the ABA's position? Do you want the retention of the safe harbour provisions?

Mr Burke—Our position is that we are comfortable with the bill as it stands.

Senator LUDWIG—One issue that has been raised and that seems to be a theme running through much of the discussion deals with the bill commencing with the rules not having been finalised. What sort of cost would that generate, if any? That is in the sense that there is a promise or—perhaps nothing as high as a promise—an expectation that the rules will be provided before the amnesty period ends and that you will be able to adjust your business systems to meet the rules and the requirements under the legislation. But the period will narrow, of course, if the rules are late. Is the period that is currently provided for sufficient, or is there some leeway in that to enable businesses or the banks that you represent to adjust their systems accordingly? Is the current provision generous enough that it allows a bit of latitude or is it a tight time frame?

Mr Burke—I think there are two answers to the question. Firstly, we have always argued for three years; the three years has never been an ambit claim. We have argued that some of the obligations, in particular those relating to ongoing CDD, will require very substantial systems changes and process changes and will take the full three years to implement. So we do not think there is any fat in the three years. Secondly, it is the case that many of the systems changes are interlinked. So, while—as I indicated in the covering letter—a particular provision might not come into force for two years, the systems necessary to support that change in business processes need to be modified now to comply with other parts of the bill. To go back subsequently and change it again would add a substantial cost. We have not sized

what the delta might be if, let us say, the process were to be delayed by three months, if that is the outcome, but it would be substantial.

Senator LUDWIG—The requirements under which there is an obligation to report suspicious matters are of a very broad nature. Has your organisation looked at how to advise and assist your personnel to deal with that section in a sensible way? It does not indicate what offences might fall under that or what conduct is required to report that suspicion; it seems to be a broad provision. It also relates to a range of state and Commonwealth offences which are not limited to predicate offences under money laundering. How would you explain the breadth of those requirements to your staff? Do you think they are too broad?

Mr Burke—We think some more work needs to be done in that area. The principle that we have been trying to have adopted in a range of areas is that we do not want front-line staff to make decisions they need not make. We do not want front-line staff to make decisions, for example, about who is or is not a PEP. So, in relation to reporting, the approach that we have argued for is that the report itself be lodged by a responsible officer and that the front-line person not have that obligation. You are right to point out that there are at the moment a series of exposures there—and we believe more work needs to be done.

Senator LUDWIG—The other area is that, under the legislation, in part 1, clause 6, there is a provision that the regulations may amend an item of a table in this section, which then means that the regulations can amend the table by adding to or subtracting from a designated service, so that you will then have to turn to the regulations to follow through if there has been a finetuning of the legislation at some point. Is that a satisfactory process? What that will mean, of course, is that it will not come back before parliament; it will then be dealt with by regulation and, at the moment, if the regulation can be made, it will be operative from the date of—

Mr Burke—Yes.

Senator LUDWIG—And then businesses: there is no requirement to consult directly about that. I noticed in your submission more broadly that you provided a framework of consultation. Does that add to the concern? In other words, does that proposed section highlight this issue for you: that regulations can be made which may require a significant business impost, but which you might not have the lead time to be able to do—and this might be post the amnesty period as well—and you could then find yourself hurrying to catch up?

Mr Burke—There are two concerns there. Firstly, there is a concern that the scope of the legislation could be substantially changed by that means; the breadth and reach of the legislation could be changed. We are not aware, at the moment, of there being any possibilities for designated services which might be added. But having that open end in the legislation is a concern.

Secondly, there is the issue of process. There are two points there. Firstly, it had been our understanding that the place for regulation was going to be very limited indeed—that regulations, it was said, were going to apply to very technical matters such as possibly noncompliant countries, whereas a regulation to add designated services is a more serious matter indeed. Secondly, we argue that the approach that we have suggested in relation to

consultation on the rules should be adopted for any addition to designated services by the mechanism of the bill.

Senator LUDWIG—On the other areas, of factoring and forfeiting: do any of your members undertake those roles?

Mr Burke—Yes, they do.

Senator LUDWIG—Have you looked at the definition of factoring?

Mr Burke—I have not.

Senator LUDWIG—I cannot find one. What concerns me on factoring, if there is not a definition, is this: is it a common term? Is what it means sufficiently clear to you that it does not require a definition?

Mr Burke—It is clear to me, Senator; it may not be clear to all. I have to say that this is not a matter I have looked at. It is a common term in the industry. I believe that there is a received and understood meaning to the term.

Senator LUDWIG—And that would be imported into this legislation, we hope.

Mr Burke—Yes.

Senator LUDWIG—And what about forfeiting? There is a definition of forfeiting in the bill, though it seems to alternate between using an 'a' or an 'e'. Is there a common usage? Should it be 'forfeating' with an 'a' or 'forfeiting' with an 'e'?

Mr Burke—I have seen both.

Senator LUDWIG—There is both in the one phrase in this legislation. Is there no difference between the two?

Mr Burke—No.

Senator LUDWIG—It is just whether you are old English or new English?

Mr Burke—I think so. I think 'a' is probably the more traditional spelling.

Senator LUDWIG—The broader question is this. It is not defined in clause 5, in the definitions. You then have to skip ahead to find where it is mentioned. Have you looked at how usable the legislation is, in terms of finding the definitions all in one place and having the framework—that is, a table structure—and being able to utilise it? Of course you are familiar with it now, but there will also be businesses and banks that will have to implement it and deal with it.

Mr Burke—Yes. We do have the benefit of familiarity. But it is a complex piece of legislation. It is lengthy. It introduces new terms and new concepts. I suspect some work will need to be done to support the legislation, to have it understood.

CHAIR—I have one question on the e-verification point you make in your submission, Mr Moyes. You make a passing reference to the consultation process on this issue. I wonder if you can expand on that—whether you have strenuously advanced this case to the Attorney-General's Department and what has been the result of that?

Mr Moyes—My understanding is that at the roundtable sessions in 2005 e-verification was one of the topical matters that certainly we put forward and I believe other industry participants did as well. It is a matter that Abacus has put in its various submissions, both to the exposure drafts as well as to AUSTRAC, and it is a matter where there were perhaps vague commitments in terms of there being appropriate time to consider alternatives. Certainly we do have the ability under the implementation time frame for the acceptable referee to continue at least for the next 12 months. But at this stage we do not have any firm decisions about what those alternatives might be or about access to, for example, document verification systems the government itself might be looking to pilot and develop. In short, we have put the case forward. We have been partially successful and partially unsuccessful.

CHAIR—Thank you for clarifying that part of the process for me, Mr Moyes.

Senator PARRY—My question is also to Mr Moyes. I notice in your submission—and you mentioned it in you opening statement—that you are the peak industry body for all the credit unions in Australia.

Mr Moyes—No, not for all credit unions. We are the main body. I can actually give you the numbers, if you like.

Senator PARRY—Percentage wise, if you could.

Mr Moyes—Probably about 80 to 85 per cent.

Senator PARRY—And building societies?

Mr Moyes—We are the representative of eight of the nine mutual building societies.

Senator PARRY—Do you have any connection or affiliation with the Australian Friendly Societies Association?

Mr Moyes—No, we are not affiliated or connected.

Senator PARRY—Are you familiar with their submission?

Mr Moyes—I have read their submission.

Senator PARRY—Do you have any comment to offer on their submission?

Mr Moyes—I do not have any particular comments on their submission.

Senator PARRY—Okay. Thank you. Going on to identification issues, what is the simplest outcome you would be seeking with the acceptable referee issue?

Mr Moyes—I suppose a lot of this comes back to how we can educate our membership through reference to rules and guidelines about how they can go about identifying their customers other that in a face-to-face manner. The bill itself does not expressly provide for this, so I suppose it is more about ancillary support for that kind of identification. It might be a greater attention to access to credit reports, which is most likely a topic the ALRC will be looking at in its review of the Privacy Act. Those are the kinds of things that I suppose we need to advance in finding out how our members could look to an alternative to non-face-to-face identification. As I said, there are some methods under the low- and medium-risk customers in terms of what might be a reliable source of electronic data, but at the same time we just want to highlight that there are some barriers for those members that do rely on this

form of identification. It is something that they will have to grapple with over not just the next12 months but further on from that.

Senator PARRY—And appreciating the obvious need for the strengthening of this provision, because identification is a critical issue, do you have any concrete suggestions? I accept what you say in relation to practice.

Mr Moyes—I suppose the concrete suggestion is that we would like a viable electronic verification tool. Unfortunately, that means looking to remove some barriers that might otherwise be there today. In that context, it is things like access to credit reports and access to document verification systems of government. We do not see the access card as being a panacea, but we do see perhaps greater forms of verification through the motor registry offices or Medicare. Those kinds of things might be ways of providing alternatives to understanding whether a document is in fact what it is purporting to be.

Senator PARRY—Thank you. Finally, Mr Moyes, if the bill stood as it is printed today without any further amendment or adjustment, could your members live with and be able to work within the framework of the bill?

Mr Moyes—Many of our members do not rely on the acceptable referee, so it certainly would not be an issue for them. Those that do would have to look to perhaps Australia Post or other kinds of agents or other reporting entities to help in this process. There may be additional guidance that comes in terms of the rules and the guidelines in the future as well. They would certainly comply with the regime as the law stood, and they would have to avail themselves of those avenues that are there in terms of identification, even if that meant perhaps additional costs to achieve that.

Senator PARRY—Thank you. Mr Burke, I have just one question. It is a very broad ranging question again. If the bill stood as printed, do you think that members of your organisation and the banking fraternity would accept the bill and work within it?

Mr Burke—The ABA and other members of industry of course support the bill. We recognise Australia's need to meet international obligations and we have supported the process. We do believe, however, that there are still some issues which need to be resolved and, if they are not, there will be significant operational impact.

Senator KIRK—Thank you, gentlemen, for your submission. I want to go to something which has not really been covered so far and that is the issue that was raised in the ABA's submission on the accountability of AUSTRAC and its powers. I have read through your submission and it seems to me that the two main accountability mechanisms that you suggest are the advisory council, which I think you called the AML council, and then a merits review of some of AUSTRAC's decisions. Can you give us some more detail on that, firstly. Secondly, it seems from this letter that I have read that you have raised this with the Attorney-General's Department. I am interested to know what kind of feedback you have got from them.

Mr Burke—Perhaps I should touch on that letter initially. We have been in discussions with AUSTRAC and the department for more than two months now on this matter, so what is in this letter has been the result of a series of discussions. We have modified the proposal to meet some concerns. We modified the language in order to meet some specific concerns. At

this stage, we believe that we have had a favourable hearing and negotiations are considering this approach. We believe that it is a sound and practical approach which is based on processes that we have established over the last 18 months. We have had effective consultative structures in place and this proposal does not seek to change much. We are asking for the change essentially of the council and for this approach to be formalised in the legislation and, if that were not to occur, then by some appropriate ministerial direction to establish this on an ongoing basis. We pulled together a structure that has been allowing us to handle consultation on the bill and the rules. We now need a permanent structure to do that same job. Let us assume that over the course of the three years we achieve the position we have sought, which is to have those rules available now, there will be a need for further rules development. There will be a need for finetuning and following the experience of implementation. We believe that there is a substantial amount of work yet to occur and that this approach will satisfy that need. That is point one.

Senator KIRK—Without this there appears to not really be any accountability measures whatsoever.

Mr Burke—No. The bill does give AUSTRAC very broad powers. AUSTRAC is substantially changing in nature. AUSTRAC has been staffing up, re-organising and gearing itself for this new job, but it is a big change from its previous role and it does have substantial new powers. We think it is appropriate that there be some balance to that.

Senator KIRK—In the discussions you have had, has there been any suggestion that perhaps there might be changes made to this legislation or additional legislation proposed to stand side by side with this legislation or consequential amendments in order to incorporate these mechanisms? That seems like a sensible idea.

Mr Burke—I do not think we have confirmed the mechanism. Each of the three options has been discussed—an amendment to the bill, a consequential bill or some other mechanism—but we have not arrived at a position on that between us.

CHAIR—Mr Moyes, I was just re-reading the committee's last discussion of EV issues when the previous incarnations of advocates came before the committee. There were other witnesses on that occasion as well. Basically, the department said at the time that they understood the need for an effective electronic verification system—particularly in contexts such as yours and that of other providers of financial services—but, under the risk based approach, they were not going to dictate it. So it would be up to the sector of industry to develop their own and then run the mill of the AUSTRAC auditor function. Has Abacus looked at that as a proposition and decided what it is able to do?

Mr Moyes—We are certainly aware that organisations like Baycorp and others are exploring how best to provide electronic verification, and we are in general discussions with those kinds of organisations. Abacus as an organisation is not in a position to facilitate that on behalf of those members. The difficulty for our individual members relying on acceptable referees is that they do not feel that there is support in the bill as it is written now, notwithstanding the fact that it is a risk based approach that gives them support that they can put forward, like acceptable refereeing.

CHAIR—Although they will never know if they do not try.

Mr Moyes—That is true, but at the same time we are in a position where we do not know what the regulator's position or response will be. What we are looking for is some guidance in terms of how we might go about doing identification; not prescriptive guidance from the regulator, perhaps, but guidance that says, 'These are the kinds of best practice', or, 'These are the kinds of tools or sources you can look to with confidence to do something like electronic verification.' With barriers that we see, say in terms of the Privacy Act, or barriers in terms of access to validating government documents, that is not a clear path at this point.

CHAIR—When you say 'barriers in terms of validating government documents', do you mean in terms of making sure that you have a legitimate drivers licence in front of you or a legitimate Medicare card or whatever it might be?

Mr Moyes—Absolutely, yes.

CHAIR—We can all pursue that further.

Senator LUDWIG—The bill contains a number of thresholds across a range of places where you can get $10,000 for reporting matters and for other types of provision of services. Have you had a look at that, in terms of the impact in the banking industry and whether those thresholds are adequate? There are especially questions of transfer where there does not appear to be a threshold and whether there should be more uniformity placed on the thresholds across a range of like services. Then, for services which might be for banks, if I wanted to do a money order or a cheque of a small amount, there are the questions of whether it would be more applicable to have a threshold in those areas as well, and whether or not if I wanted to simply change coins of $400 or $500—if I were from a business and you provided that service—I would have to go through a range of know-your-customer requirements before you would undertake that work. There is a broad sweep in that question, but feel free to answer whichever part you can.

Mr Burke—I will tackle it first, Senator. I think you made three points there, and we would agree with all three. Firstly, we think there should be more consistency so that there are not multiple thresholds for bank officers and officers of other institutions to be thinking about. That is a consistency point. Secondly, we believe that there should be uniformity with the FATF position on the thresholds. And, thirdly, we believe there is a competitive neutrality argument there, which is the position that any particular class of instrument should be the same across any financial institution. The way the bill is at the moment, that is not the case.

Senator LUDWIG—Does that then impact upon banks more adversely than other institutions?

Mr Burke—On a volume basis, the answer is simply yes.

Senator LUDWIG—Which means that, in a range of activities, there is no minimum for banks to have to undertake know-your-customer requirements or due diligence?

Mr Burke—The result could be that banks will simply choose not to compete for particular customers.

Senator LUDWIG—And not provide that service?

Mr Burke—Yes.

Senator LUDWIG—The other one was the interesting one you raised on point 6, which was the signatories that define people as customers.

CHAIR—The signatories?

Senator LUDWIG—To accounts. Do I understand that your argument is that they should not be treated as customers for other purposes in the bill?

Mr Burke—Yes.

Senator LUDWIG—If you are an account holder, though, and you were a signatory to that account, could you then access the account and deal with it?

Mr Burke—Yes.

Senator LUDWIG—So why would the bill not apply in more broad terms? You could transfer money, make wire transfers and do a range of activities with that account. I am curious as to why you do not think that should apply. Or do I have that wrong?

Mr Burke—The explanation I have here—and this is operational detail on it—is:

Records of signatories are not usually maintained in the same manner as account holders. Account holder details are stored in customer information files, however, signatory details are maintained on documentation which accompanies the account record, but is not always machine readable.

That is a process issue. Further:

Signatories are currently identified as per the provisions of the FTRA and this should continue. However, there is no good reason to define a signatory as a 'customer' under the AML/CTF Bill, which means that not only do signatories need to be identified, but they need to be treated in the same manner as account holders—

for example, as a key point, for ongoing due diligence purposes.

Senator LUDWIG—Yes, but, if you were a signatory to an account, you could access electronic funds transfer. You could do a range of things. To take a more transparent example, you might be a small syndicate in a boat or something. In accessing the account, one might be the primary account holder and the remainder signatories to the account. But that might not prevent them from accessing it and undertaking all the activities of a primary account holder. I am curious as to why you say there should be a different requirement.

Mr Burke—It is more a case that institutions will need to take a risk based approach. They will need to have an AML program, the purpose of which is to identify the amount of risk. At this point, rather than it being a case where signatories as a matter of course are deemed to be customers in all instances for all purposes, there should be more flexibility. That is another way to express it.

Senator LUDWIG—I see. I am trying to get an understanding of how important (2) is. I am sure you will say it is very important in relation to the designated business group.

Mr Burke—It is very important, Senator.

Senator LUDWIG—Yes, thank you for that. What impost will it create if it does not change and it is read the way—

Mr Burke—There is an uncertainty issue. Institutions will now go about setting up their AML programs. It would be exceedingly costly and inefficient if it were the case that because of a change in the conditions, say, the particular entity could not be included within a DBG, which had been planned to be included in the first instance. So there is a certainty point there. There is a need to ensure that flexibility is maintained so that the reporting entity can add another entity to a DBG at a later point in time.

Senator LUDWIG—So there are two parts. One is creating certainty so you confidently know who is within the designated business group and you can then provide an AML/CTF program that matches that. The second element is that once you know who is within the designated business group then you can—I will just stop there for a moment. Why would you not simply reproduce it with a different name, if you got it to that point?

Mr Burke—The former is, I think, the more important point. An example would be—and I am not suggesting that this is being countenanced by anybody—to take a major bank which has a wealth management arm. Wealth management businesses are very different from retail banks, different in a whole range of aspects. If it were determined by the regulator at a later point in time, 'We have determined that wealth management businesses are so different and they carry with them very different classes of risk; we are no longer happy to treat them as part of your DBG,' that would be an exceedingly disastrous outcome.

Senator LUDWIG—And they could do that by changing the table in clause 6 by regulation?

Mr Burke—Yes. They could say: 'Here's a condition such that the wealth management businesses can no longer be included.'

Senator LUDWIG—Thank you. That is helpful to understand it. So it is critical to have certainty in business when you are dealing with this type of bill, not only for cost implications but also in dealing with your clients and the like.

Mr Burke—Indeed.

CHAIR—Thank you. As there are no further questions, Mr Moyes and Mr Burke, thank you both very much for appearing this afternoon and for the submissions from your organisations.

[3.56 pm]

KNIGHT, Mr Brett, Head of Compliance, American Express Australia Ltd

LORIGAN, Mr Colm, General Counsel, American Express Australia Ltd

MEGALE, Ms Luisa, Head of Public Affairs, American Express Australia Ltd

CHAIR—I welcome our witnesses from American Express Australia Ltd. To the best of my knowledge, I do not think American Express has provided a submission at this stage to the inquiry, so what I will invite you to do is to make an opening statement, then we will go to questions from members of the committee.

Mr Lorigan—Thank you for the opportunity to address the committee on the issue of the final draft of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006. American Express fully supports the need for this bill. As a global organisation operating in more than 110 countries we have extensive experience in compliance with anti-money-laundering laws, including the US Patriot Act and the various national laws based on the directives of the European Union. We have been highly engaged in the debate surrounding and the consultation process which supported the shaping of this bill. The approach by all parties has been highly nuanced and collaborative, and the bill in its current form has benefited greatly from these inputs.

We are—with just three exceptions, which we will talk about—generally comfortable with the bill that is now before parliament. We consider that the bill satisfies the financial action task force requirements and that it is generally consistent with the types of regulatory regimes we have to comply with in other jurisdictions. We particularly welcome the government's decision to permit a risk based approach to money-laundering prevention on the part of reporting entities and to allow customer procedures to include electronic verification as a method for conducting customer due diligence. However, there are three areas where we still see either gaps or issues of competitive neutrality with the bill, and we would like to raise these with the committee.

The first point relates to the de minimis exception for certain stored value products, namely stored value cards, postal orders and money orders. These are only designated services, which means subject to regulation, for transactions of $1,000 or more. For travellers cheques, on the other hand—they are also stored value products with largely similar characteristics and risk profile to these other products—there is no $1,000 threshold. In our view, this anomaly unfairly discriminates against travellers cheques, which, in our submission, should be similarly treated under the bill. That is the first point we want to raise.

Our second point concerns competitive neutrality regarding the three-year provision of credit history rule for electronic verification. This rule discriminates against all those financial service providers, including American Express, who do not have physical branch networks through which to conduct face-to-face verification if the credit applicant does not have a three-year credit or transaction history. The operational expense of implementing face-to-face customer identification checks would be considerable for our business—not to mention the unfair competitive advantage this rule hands to traditional bricks-and-mortar financial services institutions. American Express would like to see a reconsideration of the three-year credit history or transaction history rule.

This rule also appears to be in conflict with existing privacy legislation in that imposing this rule drastically restricts the number of credit applications which can be verified by electronic verification. The reason for this is that section 18F of the Privacy Act requires Baycorp and the other credit-reporting agencies to delete most information from credit information files after five years. What this means is that, regardless of how old you are or how long-established in your financial relationships you are, unless you have applied for credit—and that could mean a loan, a card, car finance, mobile phone contract—or defaulted on an existing obligation within the last five years you are unlikely to show up on an inquiry to Baycorp. The period for retention is a bit longer—it is seven years for court judgements or bankruptcy—but the same principles apply. If a credit provider notifies Baycorp that it is no longer providing credit to an individual, Baycorp has to erase that reference within 14 days. The result of this is that it is very easy to drop off Baycorp's record even though you are an active and responsible financial transactor.

This is a case where anti-money-laundering and privacy law requirements are in conflict. The privacy law record deletion requirements effectively negate the government's policy decision to allow identification by means of electronic verification. We submit that this should be a matter of concern to you as legislators. A potential solution to this could be a reduction in the time period from three years to 18 months or to investigate the ability to conduct electronic verification through other means such as verification through more than one centrally held database. Another option would be an appropriate amendment of the privacy legislation to allow Baycorp and the reporting agencies to hold information for longer.

The third point that we want to raise is what we see as another drafting anomaly in the area of designated business groups. We do welcome the changes made to this area of the bill, specifically clauses 123 and 207, which now allow affiliated reporting entities within the same group to share data. However there is one anomaly which we want to draw to your attention. The committee will recall that in division 9 of part 15 of the bill, as part of the extensive provisions relating to enforcement, clause 202 and the following clauses empower AUSTRAC and the federal law enforcement agencies to serve notices to reporting entities to produce information required for the purposes of the act. Under clause 207 it is an offence to disclose the existence or contents of such a notice. However clause 207(3) allows a reporting entity to share information about a notice with any other member of the same designated business group, which is a sensible provision.

In contrast to that, clause 123 creates the offence of tipping off under which it is forbidden to disclose the existence or contents of a suspicious matter report. Here again there is an exception for disclosure within designated business groups but with one important difference: in this case disclosure can only be made to another reporting entity within the same business group. The other provision, in clause 207, allowed disclosure to another member of the same designated business group but in this case it is only to another reporting entity within that group. For practical purposes this means that, in a group like American Express, we could only share information between our related companies in Australia and not with any of our overseas affiliates.

The reason why we think this is impractical and unreasonable for international groups is that if, for example, an Australian reporting entity makes a suspicious matter report to

AUSTRAC which involves, for example, a person or entity on the US sanctions lists, it would be unreasonable not to allow us to share that information with our US parent and international affiliates to help them identify possible suspicious activity elsewhere and possibly to fulfil reporting obligations that we have in other countries. This is an easy anomaly to fix, if the wording of clause 123 is aligned with that of clause 207. It is a matter of just changing a few words and the anomaly can be removed very easily.

Those are the three matters we wanted to mention. I will conclude by mentioning once more that, with the exception of these three matters, American Express is generally comfortable with the bill and with the consultation process. We thank the committee for the opportunity to be heard at this session. My colleagues and I are now available to answer any questions you may have.

CHAIR—Thank you very much, Mr Lorigan, and thank you for those observations. Are you generally comfortable with the drafting of the rules and the process which is under way in relation to that as well?

Mr Lorigan—I think it is a little early to say. We would like to say that we are comfortable with the rules, but the rules are at this point, I think, a moving target, so I cannot give you quite the same level of comfort as we can with the provisions of the proposed act. I am sure this is not the first time you are hearing this.

CHAIR—No. But you did not mention it, so I just wanted to seek your view on that.

Mr Lorigan—My colleague Brett Knight is an expert in this area. He might like to add some observations here.

Mr Knight—There have been very good working groups in coalition with the industry and AUSTRAC and the government on the bill itself, and some debate and discussion around the rules, but I do not think there has been a very formal structured process put into place as we talked about the implementation of the bill or how the rules will move forward. So I think it is worthy to note that there needs to be a more structured formal process for industry to engage in and participate in the formation of those rules.

CHAIR—Mr Lorigan, on the issue you raise in relation to travellers cheques in the context of stored value products: has American Express raised that with the Attorney-General's Department and AUSTRAC, and what was their response?

Mr Lorigan—Indeed, we have certainly raised this previously. I believe we may have raised this at an earlier session, at the earlier inquiry of this committee this year. I believe this has also been raised with AUSTRAC or with Attorney-General's in the meantime.

CHAIR—Have they responded in any way as yet?

Mr Lorigan—I think they thanked us for our contribution.

CHAIR—Yes, absolutely.

Mr Knight—But we have not heard—

Mr Lorigan—But the matter remains, from our point of view—

CHAIR—On the table.

Mr Lorigan—unresolved, hence our mentioning it today.

CHAIR—Thank you for clarifying that for me. Mr Knight, on the last occasion, we discussed aspects of electronic verification with you at some length. Other than the issue that Mr Lorigan has raised today, are you more comfortable with where things are in relation to electronic verification now?

Mr Knight—I am comfortable with the way the EV rule is structured in the sense that it is giving us general guidelines that we need to collect the name, date of birth and address of the customer, which seems appropriate for this type of legislation. Our concern clearly is around the requirements around the three-year credit rule. This came up new in the last release of the rules. We have done some assessment against that, and apparently approximately 35 to 40 per cent of our customer base would be negatively impacted by that minimum requirement, meaning that 25 to 30 per cent of a sample pool that we looked at would be unable to be verified by EVs. You can appreciate that, for a company with our size and volumes, that would be a tremendous burden for us. So we have recommended as an industry, back to AUSTRAC, that that length of time be reassessed, and we believe that by reducing that to 18 months the robustness and soundness remains and that that still allows the EV process to move forward.

CHAIR—I think you were in the room for part of the evidence given by the previous witnesses from Abacus-Australian Mutuals. One of the issues they raised around EV was the difficulty of knowing whether the documentation being produced by the customer is a valid document—that is, a drivers licence, a Medicare card or whatever it might be. Indeed, they cite my colleague the Minister for Human Services and his observations on the capacity one has to purchase a false Medicare card or a false drivers licence. Do you have concerns in the same area?

Mr Knight—I can tell you of our experience in other jurisdictions. For example, in the United States, when we implemented EV we were able to identify, or avoid, multimillions of dollars in fraud. So we have found that using EV as a tool, because we are cross-checking many databases that are difficult for criminals to corrupt or gain access to, has made it a much more effective process for conducting customer due diligence. I think it is clear, and you see it in the papers on quite a regular basis, that people are able to purchase phoney customer ID documents. That is why we strongly support EV. We think it is a very viable and effective process.

CHAIR—I understand that, and we spent some time commenting on that in the report on the previous occasion—because we had heard your message, as it were.

Senator LUDWIG—I wanted to get an understanding of the stored-value products that American Express retails that this legislation would have an impact on.

Mr Lorigan—The traditional traveller's cheque is really our only stored-value product.

Senator LUDWIG—Yes. I just wanted to know if that is the major instrument that you have. That has to be reported, whereas if you store value in a gift card, or a David Jones or a Myer account, the limit is about $1,000—we will get to that some time tomorrow as well. Does your business do wire transfers?

Mr Lorigan—We do have an international payments system, yes.

Senator LUDWIG—And that is a zero. You are required to report those?

Mr Lorigan—Yes.

Senator LUDWIG—You argue for competitive neutrality, but have you looked at how the varying amounts impact on your business? They can range from zero for traveller's cheques and wire transfers. If you use stored-value cards or if you branched into a new business, there are a range of overseas products. Have you looked at what that amount would be then? Is it $1,000; is it $2,000?

Mr Lorigan—Do you mean if there were to be a threshold for traveller's cheques?

Senator LUDWIG—Yes.

Mr Lorigan—I think we would be comfortable if it were set at $1,000. If there were a transaction threshold after which it became a designated service, then we would feel we were on a par with the other products that had been given similar relief, if you like. I hope that has addressed your question.

Senator LUDWIG—Yes.

Senator PARRY—Can I just ask a question on the back of that. Are traveller's cheques a product for which there is diminishing demand or increasing demand? My understanding is that demand is diminishing.

Mr Lorigan—Perhaps I can answer that anecdotally. When I joined the company, and that was more than 25 years ago, people were saying, 'Oh, traveller's cheques are on the way out and the credit card is the way of the future.' But here we are 25 years later and traveller's cheques are still sold in very large numbers. The product does have features which have become maybe less attractive over time, but it is still very strong. Many billions of traveller's cheques are still in circulation, so they do continue to have attractions in meeting the needs of certain buyers.

Ms Megale—I could just add to that. Probably one reason is that there is a lot of travel now happening to non-traditional destinations that do not have robust credit card or EFTPOS acceptance. So traveller's cheques are still very popular for those sorts of destinations.

Senator PARRY—Thank you.

Senator LUDWIG—I understood the submissions that you made—and I think you, Mr Knight, provided a bit more information—about the difficulty of face-to-face electronic verification. How much business would be transacted in that way? I am trying to gauge the scale of electronic verification usage. Are there examples from America or overseas? What percentage of your business would you expect to be conducted in that way? Why do you want a credit history rule of 18 months instead of three years—does that pick up the majority of your work?

Mr Knight—I cannot speak to exact numbers, but I know that in the US using EV we are able to verify 90 to 95 per cent of our customer base. So, certainly, we have to have a secondary method for conducting customer due diligence if they do not pass our threshold standards. We have found that reducing the credit history to 18 months brings our approval

rates up to about 85 to 90 per cent here in the Australian market. Clearly, we would still have to have a secondary process in place to conduct customer due diligence, whether that is via the post office or a third party, but it would increase the EV rates enough that it would be an effective process for us.

Senator LUDWIG—What if that was not provided, if it was left at three years? What would the processing rate be at that point?

Mr Knight—There would be about a 35 to 40 per cent decline in passing EV. About 40 per cent of our business would be negatively impacted.

Senator LUDWIG—You would then have to find a third-party provider.

Mr Lorigan—Or do it ourselves, which we currently do not.

Senator LUDWIG—So you would have to open shopfronts?

Mr Knight—Or use a post office or a representative office like Travelscene, for example. We have a representative agreement with them.

Senator LUDWIG—Have you looked at the cost to your business operation of either providing an alternative third-party verification process or opening up shopfronts?

Mr Knight—My recollection is that it is about $7 million to $8 million. It is very substantial.

Senator LUDWIG—Yes.

Senator PARRY—Mr Lorigan, thank you for a very succinct and clear verbal submission; it was very good.

Mr Lorigan—Thank you.

Senator PARRY—You mentioned globalisation; it is good to hear three distinct accents at the table today. I suppose you are living the dream. I should declare that I have an American Express card as well. You mentioned that there is conflict with section 18F of the Privacy Act. Would you step through that again? I have written here that it is because of a five-year deletion for Baycorp.

Mr Lorigan—Section 18 of the Privacy Act generally regulates the operations of credit reporting agencies. Baycorp is one name that comes up. They are not the only one, but they are the best known. Their activities are very strictly regulated from a privacy point of view because of the particular sensitivity around the accumulation in one place of a lot of credit information about individuals. Section 18 regulates very strictly the type of credit information that an agency can accumulate. Section 18 also regulates the disclosure of information, the use that may be put to it and how long it can be kept for.

Senator PARRY—Which is five years.

Mr Lorigan—It is five years. If this information automatically drops off from Baycorp within a five-year period, you can find that you are not on their records. At any one time, Baycorp has records of not more than about 20 per cent of the population. This is as far as we know because this is what they tell us. If you are a settled person—perhaps of mature age like me—you have your banking relationships, credit cards, car and mobile phone and if you do

not like change that much and you just leave things as they are for some time you will just drop off Baycorp—you will cease to exist. I think this has an impact which was not entirely considered when the three-year transaction history rule was devised. This is why we say that the privacy legislation is somewhat in opposition to the objectives of the anti-money-laundering bill.

Senator PARRY—A second aspect in the same area is competitive neutrality. You indicated that face-to-face contact would be too difficult for entities like American Express because you do not have branches. When people apply for a credit card or a service with American Express—apart from the hassles as you walk into airports—

CHAIR—He means the gentle entreaties, I think!

Senator PARRY—Yes—there is no face-to-face contact; it is currently all done through correspondence. If I were to apply for an American Express card, it would all be correspondence based.

Mr Lorigan—Basically, yes. It is done remotely.

Senator PARRY—So the bill will not affect the application of American Express cards.

Mr Lorigan—It will affect the way we process applications because, at the moment, the current FTRA does not require us to do a physical inspection of documents but, under the new act, we definitely will have to do that in all cases where we cannot do electronic verification. So being able to do electronic verification in a very, very high percentage of cases is very important for us. As the percentage of cases where we cannot do this rises, so the adverse impact on our business and the eventual costs we would have to incur to set up a parallel ID process, which we do not have at the moment, is going to be a burden and a cost to us. That is our concern.

Senator PARRY—You have made that very clear.

Mr Lorigan—Thank you.

CHAIR—Thank you, Mr Lorigan, Mr Knight and Ms Megale for attending this afternoon and for assisting the committee. As my colleagues will see, due to the ruthless efficiency of our questioning today, we are running ahead of time. Our next witness is not due for some time, so we will suspend until she arrives.

Proceedings suspended from 4.21 pm to 5.02 pm

CHAIR—Given that our final witness for the day has indicated at 5.02 pm that they are unable to attend the committee's hearing this afternoon, with no notice, the committee will adjourn and will reconvene tomorrow morning.

Committee adjourned at 5.02 pm