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AFFAIRS

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

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SYDNEY

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**SENATE STANDING COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS**

Thursday, 23 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 Brandis, Kirk, Ludwig, Parry and Payne

Terms of reference for the inquiry:

Anti-Money Laundering and Counter-Terrorism Bill 2006

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Committee met at 9.03 am

CHAIR (Senator Payne)—Good morning, ladies and gentlemen. This is the third public hearing of the inquiry by the Senate Standing Committee on Legal and Constitutional Affairs 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. It follows our hearing yesterday in Sydney and our hearing last week in Melbourne.

The inquiry was referred to the committee by the Senate on 8 November 2006 for report by 28 November 2006. The committee has previously held an inquiry and reported on the exposure draft of the bill. The bill incorporates a number of amendments as a result of consultations undertaken in relation to the exposure draft of the bill and evidence received during the Senate inquiry. This inquiry is concentrating on changes made to the bill since the report on the exposure draft was tabled on 13 April 2006 and other outstanding issues. The committee has 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 does prefer all evidence to be given in public but, under the Senate's resolutions, witnesses do have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera. 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 the answer be given in camera. Such a request may of course also be made at any other time.

[9.05 am]

ALTHAUS, Mr Christopher William, Chief Executive, Australian Mobile Telecommunications Association

DIONISOPOULOS, Mr George, Regulatory Manager, Security, AAPT, representing Australian Mobile Telecommunications Association

MILL, Ms Emma, Legal Counsel, Telstra Corporation Ltd, representing Australian Mobile Telecommunications Association

MULHERN, Ms Carmel, General Counsel, Telstra Corporation Ltd, representing Australian Mobile Telecommunications Association

CHAIR—Good morning. Thank you very much for attending today. We have a submission from the Australian Mobile Telecommunications Association, which the committee has numbered 4. Mr Althaus, do you need to make any amendments or alterations to that submission?

Mr Althaus—No.

CHAIR—Okay. We would like to ask you to make an opening statement, and we will go to questions from members of the committee after that.

Mr Althaus—Thank you, Chair. AMTA has noted in our submission that this is the peak organisation for the mobile telecommunications sector. As such, we are engaged with the government on a wide range of security issues and we are well aware of the challenge facing government in bringing legislative settings to bear that maximise the security of the nation. We understand that this particular bill is looking to increase the efficacy of legislation around anti money laundering and terrorism financing. We understand that and we are very willing to participate in the process. We are already engaged in a number of ways. We see our responsibility in the telco sector to be an active and proactive partner with government in these regards. However, we are somewhat caught in this particular piece of legislation in a way that we see as being perhaps unintended. We say that because we look at the comments by the Attorney where there was a very clear articulation of a two-tranche process involved with this legislation: one tranche looking at the financial sector and the second tranche looking at a raft of other elements.

We seem to have been caught in the first tranche. We contend that in providing mobile telephony services we are not a financial institution and nor do we offer competition in the financial sector, as has been suggested. We also note Minister Ellison's comments with regard to minimising the impact on legitimate business activities. If we put those two comments together from the ministers we are left with a situation where AMTA is participating strongly—at the 11th hour, I have to say, because we were not in any way part of the main stream of consultation on this bill. We look at our product range and at the services that we deliver and it is patently obvious to us, and we are trying to make it obvious to everybody, that we are a very, very low-risk entity in this area of money laundering and counter-terrorism.

I say that because several elements of the bill refer to things that can be construed to apply to the products that we provide. I bring one example forward, which is the provision of prepaid telephony products, where subscribers purchase prepaid amounts of phone credit, if you like, and then consume that over a period of time. The key point to make here is that this particular type of product seems to be caught in this legislation, and yet it is very low value, so one wonders how a money-laundering approach could be construed using prepaid mobile telephony products. There are very small amounts of money involved.

Having looked at our exposure and at the intent of this bill, we are led to the conclusion that the regulatory settings that may arise here would have quite an impost on the industry. We contend that the net gain of the aims of the bill would be marginal at best, simply because we have examined all of the aspects of the products that we provide and cannot see, in the first tranche of this bill from a financial point of view, that our products could be managed in a money-laundering context.

The other concern that we would like to highlight is the fact that we are already subject to a raft of security related legislation within the telecommunications sector. We have a concern that linkages to and relevance across the legislation that we are already subject to may not have been fully taken into account here, particularly because, as I said at the outset, we see ourselves as somewhat of a bit player. We are not sure that we should be covered by this bill; it seems somewhat unintended for us. Nevertheless, we want to participate, but we need to be aware of the other legal structures that we are already caught by.

In summary, we definitely are not questioning the bill in its intent. Our concern is with its scope and how it relates to the services that we provide. Certainly, we have not had a lot of exposure to the current tranche, but when we were aware that we were going to be caught we jumped to it and were actively involved and have been so since. At the end of the day, our concerns would be allayed if in fact the bill were to exempt telecommunications services, particularly those that we are describing. Having said that, we are looking at a range of issues within the bill, and there are some examples in our submission of where there are some inconsistencies and where our industry is still a little confused and perhaps concerned that our capture by this legislation is unintended and will bring impacts on the industry that will ultimately be well out of proportion to the net gain associated with the aims of the bill. I will close there and hand to my colleagues to perhaps cover an example or two from our submission, if that is all right, Chair.

CHAIR—That is fine. I just want to make sure we have enough time to ask you questions as well, because, as you say, there are some consequences here which were not previously part of the committee's exploration either.

Ms Mulhern—Perhaps we can help the committee by giving some examples that are set out in our submission where we do not think the intention of the legislation is to capture these types of products but where we think we are caught—for example, where providers of mobile phones issue a debit card when they sell a prepaid mobile phone and calling card. Because that may be an article that allows the customer to debit their account for the cost of phone calls, is that caught as a debit card under the bill? We think in the current drafting it would be. What we would suggest is that the bill be amended to reflect what is in the explanatory

memorandum, which says that it is intended to capture an account held with an ADI or bank that has a debit card facility attached to the account.

Senator LUDWIG—Isn't that too narrow in the sense that it would then limit it only to that? There are other organisations that might fall outside that other than yours.

Ms Mulhern—If the wording of our submission is taken up, we would say that the definition would be broader—

Senator LUDWIG—I know.

Ms Mulhern—It would include ADI, a bank, a building society, a credit union, and any other person in the rules.

Senator LUDWIG—What about a department store with a stored-value card?

Ms Mulhern—I think the same arguments would probably apply and you would have to work out whether they would be caught by the rules, picked up in the rules.

Senator LUDWIG—The other question is the reverse of that: would an amendment to the rules be more appropriate to deal with your circumstance rather than an amendment to the legislation or do you think you require an amendment to the bill rather than to the rules? There are plenty of places for exemptions under the bill—fortunately or unfortunately, as the case may be.

Ms Mulhern—That is right. I think in relation to telecommunications companies because, unlike, say, a store credit card, we already have obligations under the telecommunications service provider identity checks for prepaid public mobile telecommunications services determination, which requires us to get certain information about the identity of prepaid mobile users, so that in itself is something—

Senator LUDWIG—What is the compliance rate in that like?

Mr Althaus—Quite reasonable. We are engaged in a process—

Senator LUDWIG—What do you call reasonable?

Mr Althaus—It is hellishly difficult to estimate. There are 8.5 million prepaid services in the market at the minute. As we speak, we are reviewing and amending the processes that the industry uses to monitor identification, record and provide it ultimately at the request of law enforcement agencies. Needless to say, law enforcement agencies are very dissatisfied: they would like prepaids to go away because they find the anonymity they provide quite abhorrent to law enforcement activities. Our experiences in industry are that those products are incredibly popular and that people are generally willing to supply relevant identification when they buy those products.

CHAIR—Ms Mulhern, did you want to continue?

Ms Mulhern—I am conscious of the time. Do you want me to refer to a couple more examples or would we like to go to questions?

CHAIR—If you can be brief, that is fine.

Ms Mulhern—Another area where there is considerable uncertainty is in the area of trade promotions and other games. AMTA members often have trade promotions—for example, if

you buy a prepaid mobile this month, you might go into the draw to win a DVD player—or there might also be games to promote its business that are lotteries. Some involve skills; some are a mix of chance and skill. We welcome the amendments to the July draft bill that amended the definition of game to exclude lotteries but, unfortunately, there is no definition of lotteries in the bill. Because there are differing definitions of lottery under state legislation and common law, we are recommending in our submission that that be tightened up so that it is clear what is caught and what is not caught.

On that point, we should limit the gambling services to circumstances where the amount of the bet winnings or value of the game is greater than \$1,000. That seems to be consistent with the international recommendation about only looking at transactions over €15,000 and only applying to casinos in this area. Also, customers pay to enter, so we cannot see why the bill would apply if there is no opportunity for somebody to launder money in that they are not actually paying to participate in a lottery. They are probably the main concepts.

CHAIR—Mr Althaus, I think you said since it has come to your attention that your industry may be included in the application of this legislation that you have been in communication with the Attorney-General's Department over matters of concern.

Mr Althaus—Indeed.

CHAIR—Can you give us some idea of how that consultation is going?

Mr Althaus—It has been quite useful and productive. I do not think we have made any particular substantial gains in that consultation because at the end of day we still feel, and our advice is, that we are captured under this first tranche of this legislation. We have received advice from the department that recognises the issues that we are raising. Indeed, the latest draft of the bill has picked some of those things up. But there is still a way to go. We are still stuck on this fundamental point of a low-value, low-risk environment here for mobile telephony services under a bill which could layer a number of process structures on the industry to comply with this, for not much gain at the end of the day.

CHAIR—We can ask them later as well, but is it your understanding from your interaction with the department that there was always an intention to include your industry in the legislation?

Mr Althaus—No, I do not believe that is the case. I think we have come along and said: 'Look, we're captured. Did you intend to do that?' The response has been equivocal. I do not think they have said, 'No, we didn't intend to get you,' but nor have they said: 'Yes, of course. You were front and centre.'

CHAIR—You make reference to the costs on the industry. Have you done a calculation about the financial impact this may have on your industry?

Mr Althaus—We are in the process of looking at that. It is very difficult. Again, we are trying to come to grips with just what elements would apply and what layers of process would be required to be put in place. When you are talking about relatively low-value products but enormous numbers of them, and increasing numbers of them, you are looking at the per unit or per subscriber cost of entering into substantive checking of identity et cetera and you also have to bring to bear employee training in this legislation and so on. In the prepaid context,

we have 8.5 million of those products in the market, ranging from \$10 to \$150. There is a substantial workload just integrating this bill with that market opportunity. While we have not done a number calculation, we can see by definition that it is going to be quite a substantial impost.

CHAIR—Just to give me a mental picture of what we are talking about here, if a newsagency or a 24-hour general store sells a \$20 or \$10 stored-value mobile phone card, as far as you are concerned are we talking about a need to comply with the legislation to sell that card?

Mr Althaus—I believe so, yes.

CHAIR—Internationally, where similar legislation has been put in place, say in Britain or the United States, can you make any comment on what has been required of your industry in that regard?

Ms Mill—From the material I have read, I am not aware of particular telecommunications companies being specifically regulated by anti-money-laundering or counter-terrorism financing legislation at this point. That is from the material I have read, and I cannot say I have read all material relating to that question.

CHAIR—There has not been a horror-struck alert running through the international telecommunications industry where laws have been implemented in Britain or the United States, for example, saying: ‘Oh my gosh! This is what’s happened to us. It’s a nightmare.’

Ms Mill—Not that I am aware of.

CHAIR—Because they have not been caught?

Ms Mulhern—This is only surmising, but from reading the US and the UK legislation in relation to this it seems that, in most cases, there has been a monetary threshold that we would not be caught by. In the telecommunications industry, most of the issues we are talking about do not involve large amounts of money. In the instance of transferring money between prepaid accounts, that can only be used for telecommunications services so you are not using a large amount of money, it is not even being transferred out of the country and it is not being used for anything other than another telecommunications service. So I think for all those reasons it has not had any impact overseas.

Senator LUDWIG—Can’t you trade in those cards? If you look at the calling cards and the pin numbers, you can transfer significant amounts of cash between overseas and here by trading the cards. You pack up and send a box of cards, but it is the pin number that activates a calling card. So you ring up and say, ‘Of those calling cards I’ve sent you, I’m going to fax through a range of pin numbers.’ You have then effectively transferred overseas a significant monetary value in calling cards and pins. In other words, you can use it as currency. I suspect that is partly why you say a threshold should be available. We will be hearing from AUSTRAC later, and I suspect they are also concerned that if you have got a value and a way to activate the value it does not matter sometimes the end use because you can still use it as a trading commodity. You can trade it for cash. What is the maximum that you can put on a mobile phone?

Mr Althaus—You are talking a couple of hundred dollars.

Senator LUDWIG—That can be traded, can't it? You may not trade it, but it certainly can be traded. You can trade it for goods or cash. That would be right, wouldn't it?

Mr Althaus—It is a thing of value. It cannot be altered insofar as it will only give rise to your ability to use telecommunication services. If you ignore the fact that you cannot change its character and you go into a barter situation where it is traded in exchange for cash or something else—

Senator LUDWIG—And you have got a barter card as well, so you use that to trade for another commodity.

Mr Althaus—I guess the theory of that stands, but in this context I guess if you are looking for high risk and movement of large sums of money, particularly via the financial sector, then this bill is on the case. To draw us in—low value, low risk—I would imagine there would be substantial difficulties in going down the path you have described, but I guess it is possible.

Senator LUDWIG—Well, if I thought about it I suspect it is more than possible!

Mr Althaus—Whether the sort of regulatory regime that is being proposed here, where you end up using a sledgehammer to crack the nut in terms of the level of risk and probability—

Senator LUDWIG—I accept that. It was a question to challenge you at the first instance on whether you should be or should not be under the legislation. Once you are under the legislation, it is a question of the extent that you have reporting obligations and what designated services are captured by it and whether there are any general exemptions or limits. That is the question. Your view seems to be that you do not want to be captured by the legislation at all. I am simply challenging whether the telecommunications area may be captured by the legislation. It is a question of whether you are captured and to what extent. That is all I was trying to ascertain from you. So if we accept—you may not—that you are captured by the legislation, what is the minimum you are looking at that will allow a reasonable business to operate? You can take that on notice and come back to the committee if you want.

Mr Althaus—I think there has been a view around the industry.

Ms Mill—This is in relation to the specific point we raised about issuing a debit card, calling cards, and what sort of limit?

Senator LUDWIG—Yes, that is right.

Ms Mill—In previous submissions we may have raised the issue of a limit.

Senator LUDWIG—I could not recall whether it was \$1,000 or thereabouts.

Ms Mulhern—It was \$1,000, yes.

Senator LUDWIG—What about the question I asked earlier: is there a limit on how much you can put on a prepaid mobile phone?

Mr Althaus—Yes, there is insofar as, at this point in time, there are no products in the market beyond a couple of hundred dollars.

Ms Mill—It is possible to store amounts above the amount of the voucher you might buy to load onto your prepaid phone. Discussions within our particular company have talked about figures around \$1,000 or so. It would be quite strange to have someone who had credit on their phone above that amount; it would be unique.

Mr Althaus—But it could be done.

Ms Mill—I am not sure about that.

Mr Althaus—We could take that on notice and provide that to you.

Senator LUDWIG—Yes. There are a number of questions. It is not only the card—you can go and buy the voucher, effectively, so you could buy multiple vouchers or \$2,000 worth of vouchers. Is there a limit to the storage? That might be an extreme example, but I am just trying to understand how the industry works.

Mr Althaus—We will come back to you, Senator.

Senator LUDWIG—Is that registered anywhere? If it is an anonymous phone and it is bought at a retail outlet, do you know how much is on that anonymous phone and who has that phone? I suppose that you do not, by definition.

Ms Mill—No.

Senator LUDWIG—Currently there is an industry working group coming back with some of this material. When is it due to report about requirements at the point of sale?

Mr Althaus—The process is with the Communications and Media Authority. We are aiming to bring a view by the end of this year. The authority has a determination that it is reviewing, and our current processes are looking at a raft of reforms that will improve ID systems for prepaid product. Ultimately, one of things that we are confronted with is: what can we do now in the short term and what is going to be the longer term situation that relies on greater access and a more complete ability to check against a database? We have been talking to Minister Hockey's department about the document verification systems and so on and the smartcard arrangements that have been developed, given that he has made the offer that other industries can come into that environment. So there is a longer term agenda that we are looking at, but right now the process run by ACMA is due to conclude at the end of this year.

Senator PARRY—Senator Ludwig has asked all of the key questions in relation to your concerns. Can you redeem a debit card for cash?

Ms Mill—Prepaid or calling cards?

Senator PARRY—Yes. Can you cash them in at any stage for any reasons?

Mr Althaus—Once you have purchased that card, which contains telephony credit, the credit is yours to use in a certain time frame. You cannot then go back and say: 'I don't want to use it anymore. I want that outstanding proportion of my credit refunded to me as cash.' So the answer is no.

Ms Mill—And similarly for calling cards also.

Senator KIRK—I was interested in following up on some of questions that I think Senator Payne referred to in relation to the regulatory approach in other jurisdictions. I think you mentioned the United States and the United Kingdom. I am interested also in the FATF recommendations, essentially how they would apply to this type of situation and whether or not the sorts of products that we have been discussing come under their regulatory purview.

Ms Mill—Just to clarify your question, are you asking how we see our products caught within the FATF regulations?

Senator KIRK—I am taking these FATF recommendations as kind of a standard or universal type of approach and I am wondering how this compares with this legislation that we are looking at and how your products, if they were under those recommendations, would be regulated.

Ms Mill—There are a few areas where it appears that the Australian proposed legislation goes slightly beyond what the FATF recommendations would do if they applied. A particular example is in relation to the gambling services. The FATF recommendations only apply to casinos, but clearly the gambling services defined in table 3 of item 6 of the bill go very broadly beyond that and are not casino specific. It could actually potentially apply to most businesses in Australia.

Senator KIRK—I was thinking more of the calling cards and the prepaid mobile phone accounts. That seems to be an area of contention.

Ms Mill—In relation to the remittance arrangements or the arrangements that we have that could be designated remittance arrangements in relation to prepaid accounts and calling card accounts, the FATF recommendations referred to the transfer of money or value from one location to another. There is also an Asia-Pacific working group on anti money laundering which refers to these arrangements. In relation to these arrangements, they intend to only include those arrangements where the value or money is transferred from one country to another. That is a specific example I can think of where the FATF recommendations and other international commentary in this area has that sort of requirement that is not picked up in this particular bill.

Senator KIRK—I was looking at the section where you talk about your request for exemption and you set out the various categories. This is in your submission at page 4.

Ms Mill—Is that in the submission to AUSTRAC?

Senator KIRK—It is attached to what I have here.

Ms Mill—It must be.

Senator KIRK—It is in the small print. It is what I have been reading this morning. You say here:

... the application of the Bill to the telecommunications industry is not consistent with the FATF Recommendations which only impose customer due diligence and suspect transaction reporting requirements on “financial institutions” and “designated non-financial businesses”.

I assume from that you are saying that is kind of a universal or worldwide standard to which we should be seeking to adhere. If that were the case, this legislation seems to go quite a lot further.

Ms Mill—Yes, certainly, because we do not consider that the telecommunications companies which are members of AMTA would be non-financial institutions as per the FATF recommendations.

Ms Mulhern—Further on those FATF recommendations, another key thing that is different to the Australian bill is that they have those exemptions for not having to do customer due diligence for transactions under €15,000. So here it is a much higher threshold. You will see in our submissions that in a couple of areas we are looking at a \$1,000 threshold, which we think is very reasonable but still much less than what is happening in the international arena, from what we can see.

Senator KIRK—I guess this goes to the question Senator Payne raised that if somebody just goes into a 24-hour shop and buys one of these cards then how on earth are you meant to do any sort of due diligence in relation to that. You cannot.

Ms Mulhern—And yet in the way that it is structured at the moment we think that they would be caught.

Mr Althaus—In addition, the dynamics of the market in terms of the sheer volume of numbers just amplifies that whole scenario.

Senator LUDWIG—If the legislation were to cover you and there were no exemptions, what would the impact be? Is it the retailing section that we would be looking at? What would they be required to do in a broad sense, as you understand it?

Mr Althaus—Our estimation from looking at the draft right now is that it would go throughout the organisation because there would be a quite considerable need for the revision of systems and the enhancement of systems. That would apply at the retail end, obviously, where you are interacting with the person buying the product, but that will then cascade back into the organisation in terms of processes, in monitoring the data that you collect from them and also in staff awareness and training on the bill et cetera. So there are multiple layers coming back from the retail sector into the organisation. I stress the fact that the industry does not shy away from being proactive in these contexts, but here we are very strongly of the view that the net benefit ultimately from all of that activity in terms of the aims of the bill is going to be marginal.

Senator LUDWIG—So they would have to comply to the extent of requiring identification at the point of sale. Would that also include using it to top up a card?

Mr Althaus—We have not addressed that specifically. Again, we can look at the processes involved in topping up. I would say that, once the product was purchased, the top-up could take place without retracing your steps through the process.

Ms Mill—My understanding is that there are currently no systems in place to monitor the topping up activities of prepaid customers.

Senator LUDWIG—You would then have to have suspicious matters reporting in place, plus AML-CTF training programs in place for staff at the retail outlets as well.

Mr Althaus—Yes.

CHAIR—I thank you for appearing today and for your submissions. There is at least one matter you have taken on notice for Senator Ludwig, and there may be others. You may also wish to cast an eye across the evidence that will be given later today in relation to our discussions with the Attorney-General's Department and AUSTRAC. If you wish to respond to matters arising out of that evidence then please do. The difficulty the committee have is that we are required to table this report next Tuesday, so we are operating within a very tight time frame.

[9.42 am]

CARRILINE, Mr Andrew, General Manager, Risk and Enterprise Services, Westpac Banking Corporation

SMITH, Mr Andrew, Head of Portfolio and Strategic Risk, Westpac Banking Corporation

CHAIR—Welcome. Westpac has lodged a submission with the committee, which we have numbered 26. Do you need to make any amendments or alterations to that submission?

Mr Carriline—No.

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

Mr Carriline—Westpac would like to thank the committee for the opportunity to make a presentation to it. We commend the government for the consultation process that has been undertaken as part of this legislative process. We think that, overall, the legislation is very much heading in the right direction. We are very comfortable with the risk based regime which now underpins the legislation and we believe that with a couple of minor tweaks—which we will get to, and which other submissions have dealt with—we can state quite confidently that the Australian legislation will be consistent with the FATF recommendations. Westpac has also contributed to the submissions from the ABA and IFSA and we do not intend to refer to those submissions other than indirectly.

We have three primary issues that we would like to bring to the attention of the committee. The first relates to customer identification standards and safe harbour provisions. The second relates to the process for ongoing rule development. The third is a smaller issue which relates to overseas permanent establishments. I will turn to the first, which is probably our most significant issue, although perhaps one which is directed more at the overall policy of the legislation than specifically at Westpac. We do have considerable concerns with the safe harbour provisions of the legislation. It is a matter essentially for the rules but, because we think it goes to the heart of the policy of the legislation, we believe it is incumbent to raise it with this committee. We see two issues. Customer identification in and of itself is part of the risk assessment process and the current legislation allows for that current risk assessment to be diminished. The second issue is that there are two elements to customer identification: one is to identify that a person exists and the second is to confirm that the person is who they say they are. We think that the safe harbour provisions do not allow for both of those objectives to be achieved.

Essentially, the issue we have is that the safe harbour provisions will allow a reporting entity to legitimately classify a customer relationship as one which is low or medium risk. It then allows, through the legislation, the reporting entity to entrench a level of customer identification, which we believe is materially less than what currently exists today. We think that the customer identification standards as proposed by this legislation will materially reduce the level of confidence that financial institutions, in our case, have in the veracity of a customer identity. Institutions may well choose to make a higher level of customer identification, even though that is not required by the legislation. We think that the policy

implications of this are so significant that it is incumbent upon Westpac to raise it for the benefit of discussion with this committee.

Overall, we think that there is a fatal flaw in the legislation because of that, and it manifests itself both in the document verification and the electronic verification procedures, which are allowed under the safe harbour. I will just give one or two specific examples. The overseas experience would suggest that 98 per cent to 99 per cent of customers fall within the low- to medium-risk range. That must by definition include cash products in the Australian context. Under the safe harbour provisions, you can legitimately identify with a photo driver's licence. A photo driver's licence constitutes 40 points under the current 100-point check, and that will give you a legitimate form of identification to open a cash account under this legislation. We do not think, in circumstances where identity theft and identity fraud are increasing materially, that that is satisfactory. Indeed, Westpac's worst example of identity theft that we have experienced to date, or indeed that our customers have experienced, started from that very form of identification, which was a photo driver's licence upon which the culprit then built a whole series of other identity credentials.

Westpac very much supports electronic verification on the other hand and building a strong electronic verification process. In time, we will support it absolutely. Our position at the moment, though, is that the forms of electronic verification that are available only go to prove that a person exists and we do not believe they are sufficiently robust to prove that an applicant is in fact the person they say they are. Going back to my original comment: we meet the first test but not the second. In circumstances where identity theft and identity fraud are things that we are very much trying to reduce or indeed eliminate, we think that the opportunity for non face-to-face identification, where we cannot absolutely guarantee that the person is who they say they are, again, potentially exposes a fairly material flaw in the legislation.

In summary, we think that the safe harbour provisions will allow an increase in identity theft or identity fraud rather than diminish it. We do not think the provisions are consistent with the approach that appears to be being adopted by Minister Hockey with his access card identification and we also think that the safe harbour imposes an artificial restraint on the risk based approach which manifests itself in the rest of the legislation. Our recommendation, therefore, would be for AUSTRAC to simply delete the safe harbour provision from the rules and allow reporting entities to determine the appropriate level of identification on an appropriate risk based approach, in consultation with the regulator.

I will go through our second and third points briefly. The second point, relating to the rule development and implementation timetable has been covered, I believe, by other submissions. We would just like to support that and confirm for the benefit of the committee that, from an organisational viewpoint, there is material expense which has been and will be incurred in Westpac in systems and process development. It is very hard to do that systems and process development when the full extent of the rules is not known. We would seek the assistance of the committee to support an approach which allows the commencement date to occur after we have visibility on all of the applicable or material rules.

We do support the prosecution-free period or the amnesty and believe that that is entirely appropriate under this legislation. We would ask for assistance—that that amnesty also be

reflected in an amnesty under other pieces of legislation—so that our directors are not subject to Corporations Law sanctions, for example, for breaches of legislation, notwithstanding the amnesty that exists under this legislation.

On our last point, there are some exclusions in the legislation to its application to overseas permanent establishments, but material parts of the legislation will apply to our New Zealand operations. The New Zealand government has indicated an intention to introduce legislation. In circumstances where we do not know what that legislation is, we would ask for the exclusion of our overseas permanent establishments from the operation of the legislation until such time as the New Zealand legislation is introduced, and then we will happily be subject to that legislation. They are our three major points. I am happy to take any questions.

CHAIR—Thank you very much, Mr Carriline.

Senator LUDWIG—Safe harbour provisions appear in a range of legislation both here and overseas. Why do you say, in terms of money laundering, that there should not be safe harbour provisions? I know you have argued for it, but the point you make, if I can reduce it, is that it will provide a level of protection that is less than what is currently available under the legislation, if it remains. Therefore, the potential for money laundering increases along with the exposure of your organisation to penalties and provisions and compliance regimes. Is that the nub of your argument?

Mr Carriline—Certainly the first part of that statement is the nub of our position. We would say that if you were following a risk based approach then there is no need for safe harbour. What we would then go on to say, though, is that if the government determined that safe harbour was appropriate then we do not see any policy reason as to why the standards should be less than what exists today.

Senator LUDWIG—I understand. Are you familiar with whether the UK legislation has safe harbour provisions?

Mr Smith—I understand they do not. What they tend to rely on is industry guidance standards. The industry guidance standards are not dissimilar to what we have here, but obviously industry is at risk in terms of what approach it takes for identification.

Senator LUDWIG—And then, of course, we do not have the guidelines developed to the extent that we can look at which parts of industry they might apply to. The Australian Bankers Association favours the retention of the safe harbour and a range of other submitters, from memory, also favour the retention of it. Do you say that it provides an unacceptable risk to your organisation or is it more broadly a risk to the scheme?

Mr Carriline—It is more broadly a risk to the scheme. We absolutely acknowledge that we do not have the full support of all of the ABA members and that is the main reason we are submitting separately. It is probable, although we have not got to that level of development, that Westpac would maintain a standard of identification that is materially higher than what the safe harbour standards allow. There could be some flow-on effect if other organisations are using lower standards, but our primary position is that this is a policy impediment or defect rather than something that impacts on Westpac specifically.

Senator LUDWIG—On the EV—electronic verification—your argument effectively is that there is no way of being sure that you both have the person and know who the person is.

Mr Carriline—Correct.

Senator LUDWIG—The bill will allow a certain amount of electronic verification because there are entities which do not have shopfronts, so to speak. What happens to those under your regime if there is no electronic verification?

Mr Smith—We support electronic verification. The issue comes down to how it is conducted. Particularly looking at the UK, they tend to have a closing loop or something else which gives you a link back to the person. For example, you may send a letter to an address or make a telephone call—something to give you more confidence that they are the person they purport to be, as opposed to the fact that they simply exist. We support the concept of electronic verification; it is just that we think the way it has been outlined in the safe harbour as it stands potentially weakens the identification regime.

Senator LUDWIG—So there should be some contact. If you live at a particular residential address, you can enter a pin number from a letter you received at that residential address which confirms that you are at least living at that residence. That still does not tell you that it is the person, does it? It only tells you that a person exists.

Mr Smith—I think that is right. The question comes down to a balance of probabilities, because we are talking about a risk basis. It comes down to where you set your threshold. The issue for us is that we think it is something that ought to evolve through industry. I think it is evolving quite well in the UK, through industry standards policing it. We believe that is where it ought to occur, rather than people necessarily being given a safe harbour or a basis to operate on which we think is substandard.

Senator LUDWIG—So we only need a requirement to change the rules, not the bill, to remove safe harbour provisions?

Mr Carriline—That is our understanding.

Senator LUDWIG—We still have not seen the final addition of the rules yet, have we?

Mr Smith—My understanding is that the rules relating to customer identification are finalised.

Senator LUDWIG—All right.

Senator BRANDIS—Mr Carriline, have you raised this issue with government?

Mr Carriline—We have. We have raised this in our submissions, and the ABA discussions have been quite robust. As I indicated, we do not have the support of all of the ABA.

Senator BRANDIS—You indicated that and I will pursue this with the government witnesses who will be here later on today. What is the essence of the objection from government to what you say?

Mr Carriline—I do not know that we have had a response.

Mr Smith—No, we have not heard back.

Senator BRANDIS—Why does the rest of the ABA not agree with your position?

Mr Carriline—I am not aware of what the rest of the ABA's position is. I think it is a case of relative importance, isn't it?

Mr Smith—I think it is partly relative importance. The other thing is that there have been a number of proposals to potentially change these provisions, so different people have had different views about what is appropriate. Our feeling was: 'Let's just take them out of here and allow that debate to occur over the course of time, as it will do, and let natural forces take hold.'

Mr Carriline—There is also the case, I assume, that a number of the ABA members will make their own determination of the appropriate level of identification and will not have to rely on the safe harbour provisions. That could happen.

Senator BRANDIS—It seems to me, at least from a superficial view, that what you say is very sensible, particularly from a public policy perspective, in that there should be uniform rather than inconsistent standards established by the Commonwealth in relation to the question of proof of identity. I appreciate that it is subject to variation in particular circumstances but, to the extent to which it is efficient to do so, I would have thought that there ought to be a common standard across different areas which impinge on the question of identity. When you point out, as you do, that the proposed identity card that Mr Hockey has been promoting establishes a higher standard than what this legislation is expected to prescribe, that seems to me to be very likely to create confusion. That is your point or an aspect of your point, is it not?

Mr Carriline—That is an aspect of our point. Our primary point is that it is a piece of risk based legislation and we would prefer to allow reporting entities to determine the appropriate level of identification for the relationship rather than having any standard prescribed or imposed on us. Our view is that it will not take very long for industry to settle on a level of standards, in consultation with stakeholders, that is generally acceptable, and those stakeholders obviously include the regulator. If you were going to go to a prescribed or a uniform standard, and we would very much like the opportunity to participate in those discussions, as long as there is full industry participation then, clearly, a uniform set of standards is a preferred outcome to a set of standards that are not uniform.

Senator BRANDIS—Indeed.

Senator LUDWIG—The United States have safe harbour provisions for suspicious matter reporting. Are you opposed more generically to safe harbour provisions or only in respect of customer identification?

Mr Smith—Only in respect of identification.

Senator LUDWIG—There is other legislation with safe harbour provisions that you would have to apply. I suspect there would be safe harbour provisions under ASIC, Corporations Law or other areas. Is this risk based approach with rules that provide a safe harbour for customer identification the area you most object to?

Mr Smith—That is correct.

CHAIR—It seems to me that the question of electronic verification is canvassed across a range of submissions in quite different ways. I do not know if you have had a chance to see

the submission from Abacus Australian Mutuals, who appeared yesterday with the ABA. Abacus Australian Mutuals have concerns. Baycorp Advantage have concerns which go to something as basic as suggesting that in fact the bill should expressly contemplate matters of electronic verification and that one cannot be expected to undertake significant systems changes and investment in that process based on rules that could be changed and for which there is no set consultation or engagement process. Could you comment on that.

Mr Smith—My opening remark would be that I think the nature of the legislation sets an overall standard and the rules will drive the operational outcomes for everyone. I suppose we would look at that and say, ‘I think that is the regime we have signed up for.’ I think that is how you effect a risk based system. That would be my comment on that.

It probably goes to the divergence of opinion on how it is that one would establish identification, and I think it really comes down to your position in the industry as much as anything. From our perspective, we are very focused on the issue of ensuring that the standards we adopt are standards which suit not only the regime addressing money laundering and terrorist finance but also the fraud perspective. At the end of the day, we are also quite concerned that enforcement can occur, which means that, if there is no really strong underlying identification, there are obviously risks in terms of being able to actually enforce. The legislation is about trying to catch the money launderers to stop money laundering and terrorist financing occurring. So, if the identification is not sound, obviously the ability to enforce is going to be weakened significantly. We have not had a chance to look at a number of the submissions, given the time frames, but I think generally a lot of the opinions there do tend to reflect people’s positions in the chain of ID.

Mr Carriline—I will just add to that. We have been very happy and very pleased with the level of engagement we have had from both Attorney-General’s and AUSTRAC over the last six to eight months in the development of both the rules and the legislation. It is very important not to forget, in the context of this legislation, that the reporting entities are not the offenders. We actually have an aligned interest with government and therefore a process of consultative development of the rules under this risk based approach, to my mind and to Westpac’s mind, is the one which is going to lead to the most useful set of rules to prevent or reduce money laundering and the financing of terrorism. It is unlike a number of other different pieces of legislation. So Westpac’s position is not nearly as strong on whether the provisions go into the rules or the legislation. What we are most concerned to ensure is that we keep up the consultative engagement and do not lose sight of the actual aim that we are trying to achieve.

CHAIR—I think, Mr Carriline, that overwhelmingly witnesses—except perhaps our previous witnesses—have commented favourably on the consultation process and their engagement. Just in terms of implementation, though, you make some observations in your submission about when the final rules become available and how implementation should be staggered through that process.

Mr Carriline—Yes.

CHAIR—That seems to me to effectively reflect the ABA position as well?

Mr Carriline—Yes, it does.

CHAIR—As there is nothing further, I thank you both very much for appearing today and for your submission to the committee.

Mr Carriline—Thank you for the opportunity.

Proceedings suspended from 10.08 am to 10.26 am

GANOPOLSKY, Ms Olga, Legal Counsel, Baycorp Advantage

SHADBOLT, Mr Colin, Business Strategy and Partnerships Adviser, Baycorp Advantage

WALKER, Mr Matthew, Senior Adviser, External Relations and Compliance, Baycorp Advantage

CHAIR—Welcome. Baycorp Advantage has lodged a submission with the committee, which we have numbered No. 22. Do you need to make any amendments or alterations to that submission?

Mr Shadbolt—No, we do not.

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

Mr Shadbolt—Thank you. We would like to thank the committee for the opportunity to appear before it and welcome the opportunity to discuss aspects of the bill. Baycorp Advantage is Australia's and New Zealand's largest repository of credit data and the most expert user of electronic data support. It supplies business intelligence with a particular expertise in analytics, ID and fraud. The bill imposes expanded verification and know-your-customer requirements on a wider range of entities than are currently captured under the FTRA. Electronic verification is acknowledged as best practice in world terms and is already in use in the US, the UK and Europe to meet their AML and CTF obligations. It provides efficiencies in cost and accuracy and supports competition through the growth of new online channels.

Senator Ellison has stated that the government's intention is to support best practice. Baycorp is concerned that this intent will be obstructed by drafting deficiencies in the current bill. In particular, and as outlined in our submission to the committee, we still have a number of concerns with the bill. The key amongst these are the lack of inclusion of electronic verification as an appropriate means for entities to meet obligations under the bill; concerns around conflict with part 3A of the Privacy Act; removal from the earlier draft of accreditation provisions, which enable service providers to assist reporting entities in meeting their AML obligations; and, as currently drafted, the consequential amendments permit data sets such as the electoral roll to be used only for some of the verification obligations under the bill. Thank you.

CHAIR—Thank you very much, Mr Shadbolt. We have been discussing electronic verification with a number of witnesses. Westpac summed it up very well earlier this morning when they said it probably depends where you are in the line across the broad of the industry as to what your view is on this matter.

Mr Shadbolt—Yes.

CHAIR—You have indicated in your submission and then in your comments that, I guess to put it colloquially, you would suggest that the bill needs to up the ante slightly on electronic verification. It is going to ask an organisation like yours to make a significant undertaking in terms of your business practices and systems and therefore financially. If you are going to do

that, you would want to see it in legislation and not just a optimistically hope it is in the rules, stays in the rules and is not subject to change by AUSTRAC if they feel like it

Mr Shadbolt—That is right. It is also not just for Baycorp; it is for entities that hope to operate under an EV environment that have significant lead times to implement systems and get them in the IT queue, which can take up to 18 months.

CHAIR—What other organisations would you include in that?

Mr Shadbolt—It is other organisations that operate in non-branch environments—people like ING, Citi and even some of the new channels through Westpac and so on. It is also superannuation funds and anyone who provides services to individuals in remote areas, which are impeded by physical representation and verification.

CHAIR—Have you seen or had a chance to look at the Abacus Australian Mutuals submission on this matter?

Mr Shadbolt—Yes, we have.

CHAIR—What is your view of the comments they make?

Mr Shadbolt—There are a range of comments in there.

CHAIR—On EV in particular.

Mr Shadbolt—My comment would be that EV is essential to the operation in the Australian financial system and that to our mind it does require inclusion in the bill.

CHAIR—Do you think that, through the way it is being approached and where it fits into this package at the moment—bearing in mind that we have not seen the final rules across all of this—it is achieving world's best practice?

Mr Shadbolt—I would suggest that as it is structured in the rules at the moment it is a lessening of the obligation that currently exists under the FTRA. I would argue about whether it does in fact meet the FATF recommendations.

CHAIR—Thank you for that.

Senator KIRK—I wondered about the extent to which your group has been consulted in relation to the drafting of both the bill and the rules.

Mr Shadbolt—In terms of consultation, we have spoken to the Attorney-General's Department a number of times. The unfortunate thing is that AUSTRAC is responsible for the drafting of the rules. As Baycorp are not an entity that is going to be captured, nor are we an industry body, we have not been consulted by AUSTRAC at all and cannot appear at any of the subcommittees.

Senator KIRK—So you did receive approaches from A-G's at an initial stage.

Mr Shadbolt—We approached them. We provided a submission on the earlier draft bill and rules and spoke to Attorney-General's.

Senator KIRK—Are you aware of whether or not any other credit data organisations such as your own have been involved in the process, whether through contact with A-G's or AUSTRAC?

Mr Shadbolt—No, I am not aware.

Senator KIRK—How far down the track is Baycorp in the process of establishing EV procedures and processes?

Mr Shadbolt—There are currently a series of EV solutions in the marketplace. However, to tailor them to AML and CTF obligations can take up to 10 to 12 months. In order for us to make that commitment for our clients to understand that there is a solution coming, again, we look for inclusion in the bill.

Senator KIRK—So at this stage you have not really been able to make very much progress because you are not quite sure what the end result is going to be. Is that fair to say?

Mr Shadbolt—That is right, yes. Again, as we have discussed, there is significant lead time and financial expense to build something. It is quite risky for any entity to base that decision on a draft set of rules that have been circulated for comment.

Senator KIRK—What sort of financial amount are you looking at?

Mr Shadbolt—From our perspective it could be \$2 million to \$3 million of investment. However, again, there are financial expenses on entities that we look to take it up to.

Senator KIRK—You say that you believe that the legislation is contrary to part IIIA of the Privacy Act. Could you give us a bit of information on how you see that there are inconsistencies between the two.

Ms Ganopolsky—Briefly speaking, just by way of an introduction about the Privacy Act, it is, as you know, legislation specifically dedicated to privacy. It has three limbs to it. One of those limbs is specifically dedicated to credit reporting—part IIIA. It is a very distinct piece of regulation. Unlike the NPPs that are general broadbrush principles designed to be applied in a technology neutral environment and to reflect some of the new generic philosophical approaches to privacy, the credit reporting provisions of the act date back to the 1990s.

They are very prescriptive for a number of good reasons. They set out exactly who a credit provider is, what can be contained in the credit report, what can be disclosed and what cannot be disclosed. They are very specific rules, quite different to the structure and climate you find in the IPPs and the MPPs. Significantly, part IIIA of the Privacy Act sets up a system of sanctions for noncompliance. Obviously, those sanctions are very targeted at credit reporting entities like us. In essence, they regulate a very specific space with definitions that are specific to the Privacy Act.

When you start looking at this piece of proposed legislation, what you see are exceptions to the Privacy Act and how that should operate. Those exceptions do not meet the requirements of credit reporting head on. They do not deal with the definitions, the sanctions or the different provisions that are made in respect of use of this as disclosure of information—and this piece of legislation is very much about disclosure. Specifically, there are assumptions within the proposed legislation that enable certain aspects of credit reporting information to be amalgamated as part of the report. That too does not address the fact that information is in effect protected under the privacy legislation. I am happy to take you through the specific sections of that. They are addressed in our submission. That is the holistic approach.

The inconsistency works on a number of levels. Firstly, it reduces certainty. That has already been addressed in terms of how you manage data flow if you do not have certainty of what you can and cannot do. That cuts across both the consumer and our own processes of compliance with our core legal requirements. We think it would be much better to have complete certainty and avoid any arguments or doubt as to what can be provided and not provided and at what points in time. The proposed amendments we suggest would deliver that.

Senator KIRK—It says in your submission that you are suggesting a potential amendment to proposed section 240(2). Am I looking at the right part of the submission? It says:

Notwithstanding Part IIIA of the Privacy Act 1988, a credit reporting agency may provide personal information contained in a credit information file to a reporting entity or an accredited person, and may use such information, for the purposes of this Act.

Ms Ganopolsky—That is correct.

Senator KIRK—How do you think that would clarify the situation?

Ms Ganopolsky—That would provide an express authority to do that and that would leave absolutely no room for argument from any of the various stakeholders, including consumers, who will know exactly how information flows in the system.

Senator KIRK—So that section would remove the inconsistencies that you referred us to?

Ms Ganopolsky—It would avoid any arguments about potential inconsistencies. You could argue in different ways depending on different legal interpretation principles but I think it would be best avoided given that it does have such core compliance obligations and such core expectations of consumers about what can and cannot happen.

Senator PARRY—I want to go to the EV—electronic verification—system. I suppose the biggest concern is identity fraud. If you wanted to rely solely on EV, what are the systems? Is it a matter of just multiple cross-referencing of electronically stored information about people? Is that how you would do that?

Mr Shadbolt—It is in fact a little more complex, if I can say that.

Senator PARRY—Good. I was hoping it would be. Could you explain it in simple terms?

Mr Shadbolt—Absolutely. We have done some work to look at how we might map a solution. Would it be useful to—

CHAIR—Table that?

Mr Shadbolt—And ask that it be commercial in confidence?

CHAIR—No, in that case, do not table it. If you table it, it becomes a public document. You might want to provide it to the committee on a confidential basis at the conclusion of your evidence.

Mr Shadbolt—Thank you. Back to your question, Senator Parry.

Senator PARRY—I am even more intrigued now!

Mr Shadbolt—There are two components to electronic verification. The first one is to increase the assurance that an identity is valid. That is through a system of looking at some

document verification, even by the proposed document verification service. It will say, 'Yes, a valid document was issued to Joe Blow.' The second component is that the person who is claiming that identity is in fact eligible to claim it. That is a little bit more interesting. That is where the analytics and smarts really come into play. The first component would look to verify and cross-reference against a series of data sources. These might be the electoral roll, the integrated public number directory, a credit file, a database of known fraud events and so on.

Senator PARRY—You are saying it could be; you are not saying it will be in every case. If, for example, someone sets up a fraudulent identification and then that becomes a part of the information network and is electronically stored, that can be perpetuated. So the EV is not going to solve the original problem, is it?

Mr Shadbolt—That is where the smarts come into play. We are able to develop profiles of what a fraud event looks like. The process for someone to build a fraudulent identity might follow X, Y and Z steps. Identifying those as they come about is hopefully one way of knocking out frauds.

Senator PARRY—This would most likely be used for capturing amateur fraudulent identities rather than being a sophisticated system to set up identify fraud. The thrust of the bill is for the more sophisticated forms of fraud.

Mr Shadbolt—Sure. There are patterns of behaviour. There is neural development occurring. It looks at patterns of behaviour around fraud and endeavours to, rather than just saying that this is a document so it is okay, look at this, this and this and what has occurred as being endemic to a fraud. It is looking at the characteristics of what a fraud looks like—and there is a series of those—rather than just looking at the individual document or the individual.

Senator PARRY—The more robust form of valid identification would be the electoral roll. You have also put in your submission—it is towards the end of it—about IP and D, which you referred to a moment ago. How does that assist? I presume this is simply about a telephone number and an address in a locality. Why is that critical? Are you saying that the amendments to the Telecommunications Act 1997 are going to make it harder for you to access that information?

Mr Shadbolt—Yes. The explanatory memorandum which came out with the revisions to the Telecommunications Act specified that one of the prohibitive uses would concern identity verification for the IP and D. That would of course make this quite challenging.

Senator PARRY—So that would be a supplemental form of EV, by having access to that. It is not totally reliant as you could have a fraudulent telephone location and address.

Mr Shadbolt—Yes. The value is in the aggregation of those data sets. As stand-alone entities, each only provides a certain level of confidence. But if I can combine with that a phone directory and compare that to a database that may have telephone numbers that have been used in frauds, that would give me a level of assurance. If I can then couple with that an electoral roll, that gives me an increased level of assurance. By being able to hit a series of databases on births, deaths and marriages information and on drivers licence information, I

can increase my certainty all the time that there is a valid individual. When I overlay that with the analytics around what frauds look like, that increases significantly the certainty.

Senator PARRY—You use the word ‘smarts’. Is this something that is available only to your organisation? Are other organisations capable of doing the same thing?

Mr Shadbolt—Any organisation that has an analytical capability would be able to develop a certain level.

Senator PARRY—For example, yesterday we had evidence from American Express. They indicated not having at branch locations the EV critical to this. So would theirs be an organisation—and I did not ask this question of them—that would be able to instantly jump into this sort of technological identification process?

Mr Shadbolt—They are one of our clients. We look to provide solutions to them in this space.

Senator PARRY—Without being rude, I ask this: do you stand to financially gain by people having EV? It is important that we get that on the record. We need to know if there is self-interest here. Do you stand to financially gain significantly if EV becomes the way of identification verification?

Mr Shadbolt—We have not developed business cases around it, but we are in the business of the provision of analytics and identification verification, as are a number of other organisations.

Senator PARRY—But you would be the main player in the Australian market?

Mr Shadbolt—I could not comment on that. I know overseas entities already have product offerings in Australia and are looking to Australianise overseas offerings.

Senator PARRY—Do you operate outside Australia?

Mr Shadbolt—We operate in New Zealand.

Senator PARRY—Thank you very much, Mr Shadbolt.

Senator LUDWIG—What you are actually seeking is greater access to the electoral roll as well and a relaxation of the Privacy Act to provide for that. What guarantees do we have that they would not be used for broader purposes outside of the legislation?

Mr Shadbolt—Obviously, the legislation is there to prevent that. But again in our discussions with the Australian Electoral Commission we have offered that we would enter into undertakings with them as to exactly how the roll could and could not be used. We have looked at it with any government agency that had a database we were able to access.

Senator LUDWIG—As to access for the purposes of this act, what would those purposes be? It is quite broad under this legislation. If you look at the range between suspicious matter reporting right through, you see that. The amendment you seek is for the purposes of this act but what specific work do you see that you would need it for? It could not be for all purposes of the act, because there are many purposes, quite frankly. You are looking at a particular area—you are looking at electronic verification for RE reporting entities to provide in terms of designated services. That is extraordinarily broad. If you look at the requirements under the

act, I am sure that you could fit any request, practically, under that sort of broad request, in my view. So what narrower frame are you really looking for?

Ms Ganopolsky—It may be that one alternative would be to make it specific to identity verification—

Senator LUDWIG—Yes.

Ms Ganopolsky—to relate back to—

Senator LUDWIG—Otherwise it does not have a connection with what you were talking about earlier in terms of electronic verification.

Ms Ganopolsky—That would be one way.

Senator LUDWIG—Maybe you could have look at it and come back to us. If you look at the suggestion, it says:

Notwithstanding Part IIIA of the Privacy Act 1988, a credit reporting agency may provide personal information—

and, of course, there is the ‘may’—

contained in a credit information file to a reporting entity or an accredited person, and may use such information—

you like the use of the word ‘may’—

for the purposes of this Act.

Is that your ambit claim?

Ms Ganopolsky—Would you like to see a submission setting out

Senator LUDWIG—If you want us to take it seriously—

Ms Ganopolsky—some more targeted functions under that?

Senator LUDWIG—Yes.

Ms Ganopolsky—We are certainly happy to provide that.

Senator LUDWIG—What it provides you with is the ability to enter the market with at least a product that can provide one leg of electronic verification, which might be helpful to those participants in the market who do not have a shopfront and who require a third party to do electronic or other customer identification procedures. How many other credit reporting agencies are there, broadly, in Australia?

Mr Shadbolt—There is Dunn and Bradstreet that we are aware of. I think they would probably be the other main player in the space.

Senator LUDWIG—And how much of the market would you have—provided that is not commercial-in-confidence?

Mr Shadbolt—We have a significant portion of the market.

Senator LUDWIG—So when you use the words ‘commercial credit reporting agency’, we are really only talking about two, effectively?

Ms Ganopolsky—It is hard to be very certain, certainly from my point of view. If that is the definition contained in the core piece of legislation that governs how credit reporting takes place under the Privacy Act, it would be very hard to be enormously precise as to who is providing these sorts of services. Obviously, the larger players are much more visible, but we can certainly do a bit more research on that and provide you with additional submissions on the point.

Senator LUDWIG—Are you required to be registered? What oversight of your business do you have? What this will allow is a credit reporting agency to have access to information and use for electronic verification, which then also provides for access to or at least a relationship with a reporting entity using part of your information for customer identification procedures. What regulation more broadly would you come under? You would come under this legislation, but what other legislation—corporations power plus ASIC? Are there any others?

Mr Shadbolt—We are a publicly listed company, so we meet the requirements of the ASX.

CHAIR—I am not sure how much of the propositions you put forward in relation to the Privacy Act we have really explored, given the view that most Australians have about the protection of their personal information and the operation of the Privacy Act in that regard. I think you are saying that you want an express legislative provision in this bill in relation to certainty for yourselves—and, I suppose, other operators in the area—about what you are permitted to use or to disclose. Can you address that for the committee please.

Ms Ganopolsky—The certainty argument is actually not just for us. Obviously, from a business point of view and from a legal point of view, certainty is a very desirable platform, but there is also certainty for consumers. If I may speak about the privacy regime generally, to put a context around what we are saying, it might assist the committee. The Privacy Act works on the basis of consumer complaints, so, while it reflects a right to privacy, it is a completely complaint driven jurisdiction, be it under credit reporting or under national privacy principles. Many of those complaints arise out of inquiries and complaints about what can and cannot happen. It is very possible that we as a service provider, but also the regulators in the space, would get an enormous number of additional complaints about what happens to the flow of personal information within the finance sector and how that impacts on each individual in various consumer credit circumstances, which would range from credit card applications to mortgages. So one of the things that would be very desirable is to make it expressly clear for everyone who has any dealings in that space, be it as a consumer, as a commercial organisation which is putting information into or receiving information from the database or for us as complaints handlers and potential respondents to complaints in the federal Office of the Privacy Commissioner's regime for complaints handling—it would be enormously useful to see it in black and white—that these sorts of functions are exempt or authorised for the purposes of the Privacy Act. That would remove a lot of doubt.

We also say that because, when you look at some of the work that is done around privacy and privacy expectations, one of the very consistent themes that comes across—to the extent that you can study people's expectations, and there are a number of studies that have attempted to do this—is that people want certainty. They want to know how the information is used. They do not necessarily mind providing it, but they want to know how it is used. For

example, I refer to a study that was commissioned by the federal Office of the Privacy Commissioner back in 2004. The study returned a result as high as 84 per cent of respondents who rated knowledge of where the information was going to go and how it was going to be handled as one of the key reasons why they would choose to transact. So it seems to me that certainty and transparency would be met by having a very express—like a ‘might’—provision which then meets those needs at all of the stakeholder levels. Once again, we are happy to provide the additional information to the committee about the research and how it has been put together.

The other interesting factor which is relevant to this—and it relates partly to what my colleague Mr Shadbolt was saying—is that the vast majority of respondents who were questioned as part of the 2004 study responded that, when they were asked to show identification as evidence of identity, they did not consider it as an invasion of privacy. So they see that interaction of basically presenting your identity as quite different to privacy per se.

Senator BRANDIS—Presumably they would see it as answering an inquiry that was made.

Ms Ganopolsky—Absolutely. But that links once again to certainty about what the purpose of the inquiry is and where it sits. We think that this is a substantial piece of legislation to do with financial behaviours, so certainty there would actually meet those situations. Once again, for my comments about how the study was conducted and the statistics of its structures and polls, I am happy to make a formal reference available to the committee on that. Once again it is that element of certainty. We say that there are legal arguments to argue about authority in a variety of ways, but we here are looking at proposed amendments to a piece of legislation that would further those needs very efficiently.

CHAIR—Has your organisation pursued these issues with the Privacy Commissioner?

Ms Ganopolsky—My understanding is yes, it has been raised as part of the ongoing discussion and the relationship the organisation has.

CHAIR—Do you know what response you received?

Ms Ganopolsky—No, I am not aware of it. I could follow that up.

CHAIR—Thank you. You very generously suggest that you think the Privacy Commissioner should be funded with additional resources to deal specifically with guidance and assistance for small businesses. There is mention of that in the Attorney-General’s second reading speech as well as a broader commitment to just over \$13 million for a public education and awareness campaign in relation to obligations under this legislation. Do you think that addresses the concerns that you have raised?

Ms Ganopolsky—It partly does, but once again you have to look at the structure of how the complaints handling mechanisms work and how people’s rights to privacy are enforced under the current regime. Because it is a complaints-driven model, this in effect creates a number of very important exceptions to how privacy operates. That in itself would generate additional work, as a basket of work, in its own right quite distinct from small business and quite distinct from generic education campaigns. That is how we see it. That is based partly on

experience with the legislative change and complaints, particularly in the early stages of what occurs, as well as consumer expectations and how they seek to enforce those rights.

Senator LUDWIG—I want to ask you about access to the Integrated Public Number Database, which seems to be an afterthought in 2.7. You then say, in a broad way, ‘for the purposes of complying with this act’. You do not have to comply with this act, so could that be misconstrued?

Ms Ganopolsky—There are two things. One is that the Integrated Public Number Database issues were not explored as fully as they would be because that legislation—

Senator LUDWIG—I know, it has been hard.

Ms Ganopolsky—This submission was not focused on that, but for completeness it was raised given that there is an obvious overlap.

Senator LUDWIG—As a place you would like to find information, I guess.

Ms Ganopolsky—We are certainly happy to provide you with an alternative wording to be more targeted about how it applies to an organisation like ours, but it does seem, once again from a structural point of view, that—

CHAIR—So it is not your personal compliance or your organisation’s compliance, it is compliance in the broad.

Ms Ganopolsky—Yes, in a broad sense.

Senator LUDWIG—Yes, because you will not have access to it. The way the legislation is currently structured—it obviously has not passed, but if it passes in the form that it is currently in, Baycorp does not have access to it.

Ms Ganopolsky—That is right.

Senator LUDWIG—As I understand your submission, you are suggesting that it would be helpful to use for electronic verification. Is that the point you make?

Ms Ganopolsky—If the two relate, yes it would, but for broader compliance for other stakeholders within that regulatory framework.

Senator LUDWIG—What is the second part of the list that you mentioned for broader compliance?

Ms Ganopolsky—There are two issues here: one relates to credit reporting agencies like ours, which is our area of expertise in business, and the other to circumstances within the financial market and regulation that occurs more broadly within our consumer group. We thought that was a relevant issue structurally, not just for ourselves but for our consumer groups more generally.

Senator LUDWIG—For you to be able to identify customer identification procedures.

Ms Ganopolsky—Yes.

Mr Shadbolt—In our provision of service to reporting entities.

Ms Ganopolsky—It could also relate to know-your-customer rules, when you look at the more detailed provisions and match those down the track. While they do not necessarily relate

to our core business, there is a great area of overlap in personal information that flows in the system.

Senator LUDWIG—You could understand that that would be opposed by privacy groups, I would think. I cannot speak for them, but I imagine they would find it difficult to accept that you could have access to an independent public number database and that you would then be able to secure that information in a way and isolate it only for use for REs.

Mr Shadbolt—The purpose behind access to it would be for the provision of identity verification services.

CHAIR—Mr Shadbolt, I thank you and your colleagues very much for attending today and for your submission. I must say you have enthusiastically taken a number of things on notice for the committee. We have a very tight reporting timetable, so your assistance in coming back to us is a matter of priority—urgency, if you like—and would be helpful to the committee.

[11.01 am]

RAY, Mr Ross QC, President Elect, Law Council of Australia

CHAIR—Welcome. The Law Council has lodged a submission with the committee, which we have numbered 25. Do you need to make any amendments or alterations to that?

Mr Ray—No.

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

Mr Ray—The statement provided to you by the Law Council has annexed to it the two earlier statements that were provided, and I do not propose to go over those. The fundamental point raised by the Law Council is this: it is our understanding that the bill is directed at the business sectors—the financial gambling and bullion dealing sectors—and it is not the intention of the first tranche of the legislation to specifically cover legal practice. A couple of issues have been raised and a number of lawyers in Australia have been concerned by the potential impact on legal practitioners of the first tranche—by what they think is probably an incidental consequence. That is the provision of a designated service—that the designated service may in fact capture some aspects of legal practice when it is not intended to do so. We give an example of that very briefly on page 4 of our submission to you, where we highlight that items 31 and 32 of table 1 refer to designated services. Item 31 says:

Accepting money or property from a transferor entity to be transferred under a designated remittance arrangement.

Item 32 says:

Making money or property available to an ultimate transferee entity as a result of transfer under a designated remittance arrangement.

It is thought that in many circumstances the common practice of conveyancing, which was particularly the sole work of many significant legal practices, experiences that very fact: accepting money or property from a transferor and making money or property available to an ultimate transferee in the course of a normal conveyancing process. It was therefore an incidental capture of that transaction that was thought to be unnecessarily captured by the proposed legislation.

Also, it would not be thought to be appropriate to simply potentially capture just routine trust account activities. We highlight that because the Australian legal profession is extremely regulated. We have new acts in Victoria, Queensland and New South Wales. The Victorian act is some 560 pages long. So the profession is thoroughly regulated in relation to trust account transfers et cetera. We are concerned, therefore, that there is that incidental capture of issues. We know that rules can be created to deal with these sorts of exceptions. We raise the issue that there is no provision, under the rule-making power, to have a class exemption, and that is a matter of some concern. It is also the preference that if it is not intended to capture legal practice the definition should be tightened up to make that position clear.

The other thing I should perhaps briefly speak to is that the legal profession around the world has entrenched the concept of ‘client privilege’. It is described differently in different jurisdictions. It is sometimes referred to as ‘professional secrecy’ in some European

jurisdictions and that is perhaps an unhelpful title. It is a privilege that vests in the client, for very good reason. But it is reinforced around the world that it underpins access to justice and a range of other things. We are concerned that no legislation should erode that fundamental principle.

I recently attended in Amsterdam a meeting of the FATF implementation and evaluation committee, at which there were lawyers and regulators from around the world. I learnt a great deal at that meeting. My predominant practice has not been involved in that sort of financial world, but that has raised a number of very significant issues that we would like to bring to your attention. It is probably not relevant before this tranche legislation, but it will be relevant before the next tranche, which will more directly impact on the legal profession.

CHAIR—I feel sure we will have an opportunity to do that.

Mr Ray—I look forward to that. Our contribution to this tranche is very small indeed. Some interesting issues arose from the FATF conversation and findings. It highlighted the difficulty of definition, which the regulators have struggled with, the nature and structure of the self-regulating organisations and precisely how you define the conduct that is to come under the legislation. I am happy to go into that in due course, but I will not do so now.

CHAIR—Thank you. We thank the Law Council for its submission. Your submission for today's hearing, as distinct from the previous material that you have kindly provided to the committee, indicates that you have been talking to the department about whether or not it is intended that legal practitioners be captured in this iteration of the legislation. But there seems to be some continuing question over what the answer to that question is.

Mr Ray—Yes, that is right.

CHAIR—So you have not been able to get clarity on that matter from the department?

Mr Ray—No. I do not believe there is clarity. I certainly have not spoken to people, and it is my understanding that others at the Law Council have not done so. We have not obtained a clear declaration as to whether it is intended that lawyers should be affected by this tranche of legislation. If it is intended then it should be clearly stated. If it is not intended then, again, the definition can be clearly stated, and if there is any incidental capture, such as in conveyancing—I would not care to imagine how many conveyances go on every day in Australia—it would be of a significant proportion.

There is a difficulty, philosophically, with leaving the definition of some significant issues to a rule-making power. Historically, legislation should be clear, and there is confusion that regrettably leads to litigation or imprecise prosecution for misconduct when conduct can be blurred and poorly described in rules. Also, rules can be changed from time to time, so clear knowledge of the law becomes a complex and difficult issue. So it is desirable that it be clarified in the legislation itself.

Senator LUDWIG—The designated service under the table can also be changed by regulation under this legislation, which creates even more confusion, I suspect.

Mr Ray—It has got the potential. When you are dealing with such important issues, it is important that those issues are properly defined. Sometimes in such a complex area it is hard to get that firm definition.

CHAIR—In relation to the class exemption question, has the Law Council had a specific response from either the Attorney-General's Department or AUSTRAC about whether they are prepared to contemplate a class exemption?

Mr Ray—Not to my knowledge.

Senator BRANDIS—I have got a degree of sympathy with what you say, Mr Ray, but would you nevertheless acknowledge, given the whole point of this legislation is to create a regime to regulate or prohibit and enforce the prohibition against money laundering, that one of the ways in which that can be done is through a solicitor's trust account?

Mr Ray—Yes.

Senator BRANDIS—So if that be so, although there may be large areas of overreach here—obviously, conveyancing transactions are a good example which perhaps could be excluded categorically—I cannot see how the legislation could operate effectively if there was a class exclusion of lawyers entirely.

Mr Ray—It is not sought to exclude all lawyers for all conduct. The logic behind the lawyers' concern is the maintenance of client privilege. Client privilege underpins the fundamental access to justice that is recognised in every jurisdiction around the world and it is the basis of the Canadian constitutional challenge to the legislation. It is the same reason why the Americans have not embraced it yet and it is the same reason why there is a challenge in Belgium to the very legislation. You have raised the real issue of concern—

Senator BRANDIS—I am sorry to jump in but you are approaching this, quite appropriately, at at least two levels, it seems to me: the practical level of what it means for legal practice potentially and the philosophical level. Just for the moment, before we go into a principles discussion, just dealing with the practical level: anybody could see how unreasonably burdensome it would be to impose these reporting obligations in relation to all categories of routine transactions, such as conveyancing and other routine transactions, with which solicitors are concerned. It does not seem particularly to apply to barristers.

Mr Ray—Arguably, if you are giving advice in tax work, this particular tranche of the legislation would not. But it is possible if you are giving financial advice on structuring a trust or a company or giving tax advice it may then capture barristers, and that gives rise to some other interesting issues I would like to engage with you on in a minute.

Senator BRANDIS—Indeed, but I am thinking for the moment just about the large volume of routine transactions which seem to me, if you are right, to be the plainest case of overreach here. It seems to me to be a different thing to say that there are practical or necessitous reasons why the legislation should not apply to lawyers at all. Indeed, the very circumstances in which one would expect to see the operation of legislation like this attracted would be in the non-routine, irregular circumstances, would it not?

Mr Ray—Yes, and in those circumstances one can look at the sort of client due diligence that is required under the 40 plus nine recommendations coming out of FATF. There is client due diligence, the extra due diligence if you have a PEP that you are looking at and then also the nature of the transaction. We are saying that you should not have an automatic application to such matters as the conveyancing. Then you look at the proper definition of legal practice

to see whether such conduct is properly brought in under FATF and the recommendations. The issue you raise is: philosophically, should you have an exemption for people in a profession? The answer to that is that the profession could be misused, potentially, by people to launder money. It gives rise to the sort of legislation that exists in England. There has been an overreach in England that led last year, for example, to 10½ thousand suspicious transaction reports in one year.

That has swamped both the profession and the regulators and has led to significant complaint in circumstances where a degree of suspicion is raised, a report is made and you must then immediately withdraw from representing the person who has retained you. There are questions about nondisclosure of your reporting and therefore issues of deceiving the client, actively keeping the client on, when you have ethical duties to no longer act for a person if you suspect that a criminal offence has occurred. You raise all sorts of philosophical issues, but one of the fundamentals is that if there is a breach, if there is a suspicious transaction, if you have done your client due diligence and there is a problem, the lawyer should cease to act and in that way would no longer be a facility for the money laundering that you talk of.

Senator BRANDIS—But this legislation super adds reporting obligations that are not part of the existing law in the circumstances you have just indicated, doesn't it?

Mr Ray—The \$10,000 cash transaction or above is clearly an obligation that remains and should remain, but there are real tensions within the profession about the issues that you raise. Legal privilege does not apply if there is an advice given for an illegal purpose.

Senator BRANDIS—But one can contemplate circumstances, can't one, in which a solicitor's trust account was being used for money laundering. If the circumstances were sufficient to put the solicitor on notice or on inquiry as to the circumstance of the transaction, that of itself would not at that point involve a solicitor in an illegality so as to attract that exclusion.

Mr Ray—If the solicitor has that suspicion, the solicitor will then refuse to act.

Senator BRANDIS—But at the moment they are not obliged to report.

Mr Ray—That is right.

Senator BRANDIS—And that is the lacuna or the policy need—I suppose that is a better way of putting it—which this legislation seeks to address.

Mr Ray—It is, but then you have to deal with the tension that that creates.

Senator BRANDIS—The issues that you have already described. I understand.

Mr Ray—It goes slightly beyond that in that you go from being a confidential adviser to being an informer. All of the common law here, in England and in America states that it is essential that people get proper advice. They can only do so and courts can only be properly assisted if clients are open with their legal representatives. The problem is that you then have a situation where the legal representative changes from adviser to informer and witness. It is perhaps even potentially worse than that: you become an agent of misleading because there is a question of disclosure about your product.

Senator BRANDIS—I understand why you say that, Mr Ray, but it seems to me that there is a more modest category in which the solicitor is not an adviser but a passive facilitator of a transaction in circumstances sufficient to put the solicitor on his inquiry.

Mr Ray—Yes.

Senator BRANDIS—I am not immediately outraged by the thought that a solicitor who is a passive facilitator in circumstances where he is sufficiently put on his inquiry should have imposed upon him a reporting obligation.

Mr Ray—Yes, and that raises a number of the sorts of issues that were raised at the conference last week that we would be very happy to engage you on in the future. It has a number of philosophical issues involved in it together with the difficulty of adequate reporting and what conduct you are seeking to regulate. Philosophically, it is accepted in a number of countries, and for the very reasons you raise, that there is the need to have an element of reporting in those circumstances.

Senator BRANDIS—Indeed. And it does not, with respect, greatly assist that matter to assume that every engagement between a solicitor and a client to which the operation of this legislation may be attracted bears the character of giving advice so that the legislation will invariably prejudice or impinge upon the adviser's role. It may, but some species of transactions may be the very transactions which are the mischief sort to be addressed here. It is not going to impinge on the adviser's role, is it?

Mr Ray—What will impinge upon it is the erosion of the confidence between—the communication.

Senator BRANDIS—That is a different matter. There is confidentiality of advice, but then there is confidentiality of other aspects of the relationship.

Mr Ray—Yes.

Senator BRANDIS—Obviously, the extent to which it may apply to a solicitor or a lawyer-client relationship involves a policy choice that the mischief the legislation addresses warrants an attenuation in some circumstances of the confidentiality of that relationship. Your position is basically a blanket one: we must not do this at all.

Mr Ray—The Law Council is concerned about any erosion to that fundamental relationship.

Senator BRANDIS—And the Law Council is properly concerned about that. But it is one thing to say, 'Because this bears upon or potentially attenuates a traditional established relationship we should be concerned about it.' It is another thing to say, 'We should not consider whether in certain circumstances there might not be a policy justified case for attenuating the relationship.' That is what I am seeking to draw you out on.

Mr Ray—You have raised the very issue that is so complex: 'in certain circumstances'. It is the definition of that that is so vital.

Senator BRANDIS—Do you propose in any of your earlier submissions some more definitional certainty which is a bit more sophisticated than just a blanket exclusion of lawyers?

Mr Ray—We have not. It is only recently that we have had the benefit of attending overseas and having a number of issues raised. Indeed, of the eight issues raised before the FATF evaluation and implementation committee, three are to be referred to a plenary session for more work to be done by the international community. Those three would cover the sorts of issues you have raised. If I can assist you: they do not challenge the issue of the need to keep the professional privilege/professional secrecy; it is a question of adequately defining the conduct that would then, in the light of your policy, be the subject of disclosure.

Senator BRANDIS—Quite.

Mr Ray—That caused two days of international debate about the efficacy of standards—for example, how it works in Switzerland, where it is a very black and white analysis of a transfer of money. That is a simplistic interpretation. Other jurisdictions are far more open in their interpretation of what becomes a reportable transaction, and that could be said of the Netherlands. There are different models there and different complaints coming both from regulators and from professionals.

Senator BRANDIS—But the Law Council does not come to this committee to propound a particular model.

Mr Ray—It has not because that is not the subject of this first tranche of the legislation. In the light of what we have seen and heard in the last two weeks, we would appreciate the opportunity to engage with you and to raise those models and the difficulties that are attached to them.

CHAIR—Duly noted.

Senator LUDWIG—Many of my questions have been covered by Senator Brandis, thankfully. Solicitors do more than simply provide legal advice. My recollection is that they can also buy and sell moveable assets; manage client moneys, securities or other assets; open or manage bank accounts or a security service provider account; secure capital necessary for the creation of operational management of companies; create, operate or manage a legal person or business organisation; and buy and sell business entities. There is a range of things that they can do. You say, as a blanket, that all should be excluded from this legislation?

Mr Ray—That is the primary position, yes. But it is recognised that, within that, the logic behind the legislation—that is, the professional being alert to client identification and verification of who you are dealing with, the nature of the transaction being embarked upon and the person you are dealing with and whether they are a PEP—is that these are all issues where a person can be capable of utilising legal facilities to achieve a money-laundering or a terror-financing transfer of funds. It is recognised. The points that you raised, though, are points or issues where solicitors, in the course of their work, do the very things that are referred to in other legislation and in the recommendations—that is, any solicitor in this city will obviously want to know whom they are dealing with. They need to check out the client identification. It is pointless dealing with somebody who has no identity integrity. They want to know the nature of the transaction. It is an inherent part of a professional approach to a conveyance or to property or to setting up a corporate structure.

All of the issues that are involved here are also involved in good practice management. The real issue that comes about is: where do you draw the line and where do you have a reporting

obligation that goes beyond professional duty? It is already regulated. In fact, one would say it is almost professionally overregulated. That gives rise to the very difficult point of definition that we raised with Senator Brandis a moment ago: how do you describe a transaction and when does it assume the position of a suspicious transaction requiring reporting?

Senator LUDWIG—I think the legislation provides a certain amount of certainty for that if they are a reportable entity conducting designated services under the bill, irrespective of whether it might be the solicitor, financial planner, bank or ADI. But what you are seeking—and this is the difficulty I have—is a carve-out for solicitors by simple virtue of their practice. But their practice may not be in the traditional sense that you or I might recognise it; it might be further towards financial planning or the creating, operating or managing of legal persons or business organisations or the buying and selling of business entities. By that very nature, I expect you would agree, you would certainly want that to be regulated to the extent that money laundering would be difficult to do through that, and if there were suspicious matters arising then suspicious matter reporting would be made and that the reporting entity—that is, that solicitor—would then undertake the obligations of ensuring that they have an AML/CTF program and proper customer identification programs in place. AUSTRAC would then ask for compliance reports and the like. Otherwise, you would just set up a business structure under the name of the solicitor to allow all of this activity to go on to avoid AML/CTF legislation. I am not suggesting that anyone would do that or the solicitor would be compliant with that, but there is the potential for businesses to restructure accordingly.

Mr Ray—Of course. If a person in the financial sector or the gambling sector or building sector incidentally happened to be a solicitor, I am not suggesting they should have protection from the logic of this legislation. But what we are saying is that in the conduct of legal practice there is already a very high level of regulation and testing.

The real issue that you raise is the same issue that Senator Brandis raised, which is: how do you define the conduct that is then on the fringe that exposes that person to potentially being involved in transactions that may be suspicious and may need to be reported? I suspect, again, we are leading away from this particular tranche to the future tranche of the legislation. One of the issues raised was, for example, whether a party can rely upon the due diligence testing done by another party—so, if a solicitor refers a client to a barrister, can the barrister rely on the due diligence testing done? At the moment, under the FATF recommendations, and indeed under some legislation that has been introduced, the answer is no, you cannot—the ultimate responsibility always rests with the person making the decision.

Assuming the existence of the legislation, that third-party reporting needs to be reviewed because, for example, barristers are not equipped to do the due diligence testing that solicitors, with all their resources, are. If the client is retained by the original party who has done the due diligence testing—let us say a large firm here in Sydney—that large firm briefs a member of the Sydney bar. It is unnecessary, and perhaps unrealistic, to expect that barrister to then do supplementary or additional due diligence testing. Indeed, FATF in Amsterdam said it is not the purpose of their recommendation to have costly, cumbersome, time-consuming overlays of testing when it will not produce an outcome. That is an example where the legislation should recognise, if you are introducing customer due diligence, there should be a

provision to enable an acceptance by a third party of certified due diligence procedures, and that is a matter of commonsense administration.

Accepting the existence of the structure, there are a number of other issues that should be looked at. One of the issues strongly raised overseas by both regulators and the profession is the existence of the self-regulating organisations, so the existence of professional organisations that propose an overlay of administration. Let us take the Australian situation. Were you to introduce this to the legal profession, AUSTRAC would not be the immediate and constant regulator of the structure for the legal profession. The professional regulating bodies in each state—because the Law Council is not a regulating body; it is a representative body, so it would need to be the state bodies—should play the role of the self-regulating organisation. That has been found to be very effective and to provide a more dynamic relationship with the profession.

One of the things a regulator should do is not only to educate but to ensure that there is appropriate support for the body that they are supervising. To have a self-regulating organisation constituted predominantly of lawyers provides that degree of knowledge and understanding of the regulation of the structure. It has been found overseas to be very effective. So we warn against the introduction of AUSTRAC as the primary regulator for the profession when there are already highly organised, professional structures such as the Law Society of New South Wales. I think they have somewhere in the order of 35 investigators already who go around and investigate trust accounts. There is a degree of knowledge of the profession so that, were you to introduce the legislation, we would urge in the future that there be consideration given to such as structure.

Senator LUDWIG—Perhaps I can bring in just one example.

Mr Ray—Sure.

Senator LUDWIG—Do solicitors engage in wire transfers on behalf of clients?

Mr Ray—I would speculate that they do. I have not been a solicitor for 29 years. We used to send them out with a horse and a saddlebag!

Senator LUDWIG—Assuming there are legal entities—

Mr Ray—A valid assumption, I suspect.

Senator LUDWIG—that undertake wire transfers on behalf of clients for a range of purposes that might relate to the practice, wire transfers are required under a special recommendation—I think it is No. 7—to be treated very carefully because of the nature of the wire transfer to be reported. If they were under the umbrella of a lawyer then you say that should not be reported. That is the difficulty I have. In terms of terrorism and the fight against terrorism, wire transfers are a special case. They are considered to be something that we should look at very carefully, as AUSTRAC might say.

Mr Ray—And properly so.

Senator LUDWIG—Therefore, that is one example of where I have trouble with your argument.

Mr Ray—The blanket cover, as you refer to it, is not a blanket cover therefore logically for all conduct of all people who happen incidentally to be lawyers. It logically must be properly defined as a cover for the conduct of mainstream legal practice, and if you are then involving—

Senator LUDWIG—But if this was within a mainstream legal practice you would then say that wire transfers should not be reportable. And I would still have difficulty with that proposition because of the nature of wire transfers, the reason why wire transfers are reportable.

Mr Ray—Yes, I understand that. And were you to then depart from the philosophy that we raised, you would need to adequately define the areas where your concern is validly raised and how you deal with it in the legislation, so that you are not encroaching on the client privilege area and the protection that is properly afforded there and that you are raising issues that are properly suspect and therefore subject to definition and reporting. Although I said at the outset I was not going to do it, I have been led down the path very willingly into the second tranche of the legislation that will more directly affect lawyers, and properly so, because it does give rise to all of these complex issues where there is a very real tension in the philosophy of the legislation and the underpinning philosophy of judicial systems in countries around the world. What we would like to do—and I am not confident I know the time line for the second tranche of the legislation—

Senator LUDWIG—I am not either.

Mr Ray—Madam Chair, are you able to assist us with that?

Senator BRANDIS—We are the last to learn.

CHAIR—Yes; if we are very lucky it will be our Christmas present.

Mr Ray—Well, that has been helpful!

CHAIR—The committee aims to assist.

Mr Ray—The Law Council would like to engage with you on that topic because there are real policy issues that we understand and are sympathetic to but there are very real underpinning issues that I have just had the benefit of hearing about from jurisdictions around the world. We are very happy to pass on to you the eight issues that were raised, for example, at the FATF conference and the three that go on to definition.

Senator LUDWIG—I was going to ask if notes were available from that meeting. I do not know if FATF have put them on the web yet. They usually put plenary sessions and things of that nature in a reduced form on the web.

CHAIR—There is no urgency attached to that, I am confident about that much. Mr Ray, in due course, when that either becomes appropriate for the Law Council or the information is available through FATF that would be helpful.

Mr Ray—Yes.

Senator BRANDIS—When you do that, could I suggest it be put on the basis of the practical and functional reasons rather than broader reasons, lest it be misrepresented as being lawyers special pleading.

CHAIR—Or perhaps both, Senator Brandis. I do not think we should exclude the opportunity for the Law Council to present it in the manner which they see fit.

Senator BRANDIS—Indeed.

Senator LUDWIG—I wasn't sure I didn't identify it as lawyers special pleading!

Mr Ray—The Law Council is, as always, grateful for the help of the Senate. We would not hide behind special pleadings and I am grateful, again, for your guidance. What we will do, though, is to engage with you and raise the very definitional issues that have created problems offshore, so that we can avoid those and we can still hopefully produce effective legislation.

Senator BRANDIS—It sounds to me, in view of the discussions of which you and your body have been a part, as if you have participated in a very, very sophisticated and detailed process of which the parliament would be greatly benefited to have your advice.

Mr Ray—Not to mislead you, of the eight issues raised by all of the regulators and lawyers around the world that met in Amsterdam, FATF say that they do not have unlimited resources—and that is totally understandable—and they are refining the eight issues down to three for reference to the plenary session for further investigation. They have sought feedback from the international profession as to which are the three most urgent issues. Recommendations have been made, and I cannot therefore define for you with certainty what they will accept, but we will participate with you and provide you with as much assistance as we can.

CHAIR—We will bear that in mind, Mr Ray. Might I say that the committee's engagement with the council is not restricted to a formal legislative inquiry process. It is entirely possible, if the Law Council was so minded, that we could have discussions outside that. Perhaps we can pursue that together.

Mr Ray—We are very grateful for that.

CHAIR—I am not sure when you take up high office, but in due course—

Mr Ray—I will delay that as long as possible, I think.

CHAIR—I think it is rather inevitable, isn't it?

Mr Ray—One lawyer who attended in Amsterdam—in fact the only other Australian lawyer who attended—is a partner of Allens Arthur Robinson here in Sydney. She was due to appear before you yesterday afternoon—

CHAIR—It did not happen, for a range of reasons.

Mr Ray—I understand. It might be sensible in the light of your offer that we provide you with some material, particularly with the next tranche of legislation in mind. Perhaps once we provide you with that material we would be very happy to informally speak to you in the future to try to assist in the definitions.

CHAIR—All right.

Mr Ray—We do raise our concerns about the existing incidental capture of lawyers with this first tranche, though.

CHAIR—We are, however, tediously restricted to this tranche of the legislation for the purposes of this inquiry. Are there any further questions on that matter?

Senator LUDWIG—No, thank you, Chair.

Mr Ray—Do you have any recommendation therefore in relation to the issue you raised with us about the rule-making power, about whether there can be a class exemption and whether we have sought feedback from anyone about that? Are you suggesting that we should do so?

CHAIR—Happily for us, Mr Ray, we are in a position to see what AUSTRAC and the Attorney-General's Department think of that in a matter of minutes. So why don't you watch this space, as it were? I am not sure what the committee's mind is on that matter, so if the Law Council wishes to pursue it, then of course it is open to you.

Mr Ray—Of course.

Senator LUDWIG—Just on one last matter—really—

Mr Ray—I have learnt that that is often a very dangerous time.

Senator LUDWIG—The law society in the UK have obviously embraced this a little more willingly than you appear to have at this point.

Mr Ray—Yes, they were led astray at an early time.

Senator LUDWIG—They have a pilot money-laundering guidance program in place. They comply with the anti-money-laundering legislation that is currently in place in the UK. I do recognise that the UK are a little more advanced than we are at this point, but they are also captured by the broader issue which is now before us. Your submission is effectively not to follow the UK position to the extent that they are currently at.

Mr Ray—That is right. Were you to follow their legislation and structure slavishly, you would fall into error, because there was not one professional that I spoke to who did not complain bitterly about the difficulties of the existing system. For example, on client due diligence, a major firm over there has had a client for some 250 years. The suggestion is of imposing strict regimes of client due diligence on the Bank of England. There might be some people you would want to check out closely but, realistically, there has to be legislation that is thoughtful, constructive and realistic. If you have a new client coming in, for example, then, yes, of course solicitors do a due diligence test, and they should—it is good practice management. But to slavishly impose an artificial level of due diligence testing on a client that has been established for over a century and with whom you have dealt for over a century is absurd.

We need to have legislation that is responsive to the reality of the conduct of legal practice. Were the legislation to be imposed accepting the philosophy that Senator Brandis raised, yes, have the legislation, but have it properly defined and have it realistically workable, so that it does not impose an extraordinary and non-productive burden on professional people. There are already great difficulties in the management of the profession because of state differences in the legal profession acts. Regrettably, each state has regarded itself as being in a better position to introduce better legislation and, with what was thought to be uniform practice legislation, that has led to minor state differences that make the management of national

practices very difficult. If you have a firm that has branches in New South Wales, Queensland and Victoria, practice management obligations, cost disclosure obligations et cetera vary. That is just a layer of administration that is non-productive.

Senator BRANDIS—Not for want of any trying by the Commonwealth Attorney-General, Mr Ray.

Mr Ray—I applaud the attempts of the Commonwealth Attorney-General. It is just a regrettable reality that those in control of the role in each state firmly believe that they have the answers. That has led to degrees of inconsistency. That is difficult. That point is only made to urge that any legislation should perhaps be drafted with significant feedback from the professions so that it is effective and workable. We are very willing to work with you to achieve that goal.

Senator LUDWIG—But if you look at the Bowman and Fels case in the UK, where they have effectively now settled the point—at least as far as they are able to—in practical terms it means that those conducting litigation, including preparatory stages, pre-action or diversion from the court system, such as settlements, negotiations, out-of-court settlements, ADR and tribunal representations, are not involved in what they would call the section 328 arrangements and therefore do not need to make authorised disclosures. Is that sufficient?

Mr Ray—I do not believe it is. Let us again take the English example that you raise. Cautious and responsible professionals respond to the overlay, the scheme that is forced upon them. And then you have the 10½ thousand reports by people who say, ‘Here is a suspicious transaction; let us do it.’ You find a significant degree of overreporting, and it is a reflection of a very difficult system. In that situation, if you are advising and acting on behalf of a client and you have a suspicion, you then make the report and you cease to act, but you cannot tell them why you are ceasing to act because there are whistleblower restrictions on it. There is this artificial circumstance where you have to suddenly say: ‘I’ve got to leave the room; I can’t act for you. I’m awfully sorry.’ There is a degree of artificiality.

Senator LUDWIG—Isn’t that going to be created in a range of circumstances? In the UK, they address it in part by simply providing a number of standard responses. Solicitors are not so inept that they could not provide a range of circumstances to say why they couldn’t act.

Mr Ray—You mean they could deceive their client in a range of different ways, Senator?

Senator LUDWIG—I was not suggesting that, but they might be able to say they can no longer—

Mr Ray—If you are not obliged to disclose it, you have to create a false story or not deal with it at all. And there is also no protection from civil litigation. Let us say I am acting on behalf of a client and there is a suspicious transaction. There is no proof of any wrongdoing, but there is a suspicion. I then say, ‘This is very troubling.’ I make the report. It is ill-founded. The transaction that I was to be involved in fails. There is a civil claim by the person that was your client, and with the client confidentiality, then a civil claim against the lawyer who walked out in the middle of the circumstance for no explanation or perhaps misled them. It is a very complex area.

Senator LUDWIG—I am not disputing that. We have received a range of submissions that deal with some of these very issues, because it is not only solicitors that will have to deal with it; it will be clients of banks, clients of a range of services. There may be services that are derivatives-market driven and you cease to act, and if you cease to act at that point then a loss or an opportunity loss might be occasioned and a civil action might then arise from that as well. These are not new matters that only solicitors face; these are matters across the board.

Mr Ray—A degree of statutory protection to enforce—

Senator LUDWIG—For some.

Mr Ray—For some.

Senator BRANDIS—Arising out of this, Mr Ray, you talk about suspicion. What if there is a belief? Can you remind us what the law is at the moment about the circumstances in which a solicitor who has a belief that his client is engaged in the commission of a crime has some obligations, if any, to alert the authorities of that matter, or does he have none?

Mr Ray—Immediately that person should cease to act.

Senator BRANDIS—I understand that. Does the solicitor have any further obligation?

Mr Ray—No.

Senator BRANDIS—Let us take it one step further. What if the solicitor becomes aware of facts which lead him to the conclusion that the client is engaged in a crime so he properly ceases to act: is it currently the law that in those circumstances he has no further obligations?

Mr Ray—That is the law that he has no further obligations. The information he has gained at that time has been information gained in the course of the client relationship. Were he to continue acting, the solicitor would then become a co-actor, joint conspirator—

Senator BRANDIS—I understand that.

Mr Ray—and be a party to the crime and would immediately then, obviously, be in deep trouble. The moment he detects that there is a problem he then has a duty to withdraw and, obviously, privilege would cease from the moment he became aware that there was a criminal offence.

Senator BRANDIS—But there is no legal or ethical obligation to take it further and report any nature of the concern to the authorities.

Mr Ray—That is right.

Senator BRANDIS—Because it is protected by the pre-existing privilege.

Mr Ray—Because that is the genesis—he would not have learnt that information had it not been for that relationship.

CHAIR—That concludes questions, so I thank the Law Council very much for their submission. Thank you very much for attending today and for your time with the committee. We have noted several times on the record the Law Council's interest in pursuing matters in relation to development of tranche 2 with the committee.

Mr Ray—Thank you.

CHAIR—We understand that. It is clear to all of us and, as that comes forward, we will be in contact with your organisation. You have also indicated that in relation to your consultations in Amsterdam earlier this month there is perhaps some information you can provide the committee with in due course.

Mr Ray—Yes, I would be happy to do so.

CHAIR—Thank you very much and thank you for appearing today.

[11.56 am]

BLACKBURN, Ms Joanne Sheryl, First Assistant Secretary, Attorney-General's Department

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

ATKINS, Ms Jane Elizabeth, General Manager, Regulatory Policy, AUSTRAC

JENSEN, Mr Neil, Director, AUSTRAC

CHAIR—Thank you all very much for coming. In terms of responses to questions on notice, we have a document from the department and a document from AUSTRAC. The department's is numbered 30 and AUSTRAC's is numbered 37. Do you need to make any changes to either of those documents?

Ms Atkins—No.

Ms Blackburn—No.

Mr Gray—No.

CHAIR—Before we begin, I do remind senators that, under the Senate's procedures for the protection of witnesses, representatives of departments should not be asked for opinions on matters of policy and, if necessary, they must be given the opportunity to refer those matters to the appropriate minister. I would also particularly like to thank the department for their attendance both yesterday and today and AUSTRAC for their attendance today. It is always helpful to the committee when you have the chance to hear the proceedings that go before your appearance and it assists us very much in targeting our questions when you appear before us. So we are very grateful for your time and that of your officers in that regard. Would either agency like to make an opening statement?

Ms Blackburn—I have a short opening statement in which I have tried to address some of the issues that, it seems to us, are troubling the committee, as a way of taking it forward. As you know, we have attended these sessions and we, too, have found both the submissions and the sessions very interesting and very helpful for our continuing development of this legislation. Some submissions have raised technical drafting issues and these will be considered by the department and by AUSTRAC in consultation with the drafters. I do want to make some comments about some issues which have certainly been a theme through the hearings on this bill.

The government settled a draft indicative set of the rules with industry and that has been available on the AUSTRAC web site since July 2006. The rules do need some redrafting to align them with redrafted provisions of the bill as it has been introduced. The draft indicative set of rules does provide prospective reporting entities and customers with a good understanding of the detail of the key obligations. They are, in many respects, finalised rules which were drafted, negotiated and settled with industry between the department and AUSTRAC. In that context, there was a comment earlier today about consultation that had been undertaken with the department but not with AUSTRAC. It is very important to put on

the record that any consultation with either agency on the rules is effective consultation on the rules because the rules are the product of a completely collaborative approach between the Attorney-General's Department, AUSTRAC and industry.

In that context, I will make some brief comments about the safe harbour provisions. They were extensively negotiated with industry. They do not of themselves impose any standard on industry. They are there because industry asked for a safety net rather than take a fully risk-based approach to their own obligations. The question of uniform standard of identification would in fact raise some significant inconsistency with a risk-based approach that says different products and different customers present different risks with different requirements.

The bill is also structured to enable further rules to be made where there is a need. The need to make rules could arise from a number of sources, either because industry or law enforcement experience with the bill shows that there are activities which are having unintended consequences. There are also cases where the experience in implementing the bill will show that activities are being structured in a way to avoid the operation of the bill. In the majority of cases, no rules are currently contemplated because no need for those rules has been identified, either by the government or by industry. In consultation with industry and AUSTRAC we have identified all of those rules which we believe need to be in place immediately after royal assent. These cover reportable details for cross-border movements of physical currency and bearer negotiable instruments and registrable details for providers of designated remittance services. These rules are finalised.

The rules relating to those provisions which are intended to come into effect six months after royal assent are those set out in chapter 7 of the draft indicative rules made available on 13 July. Rules relating to those provisions which come into effect 12 months after royal assent will be finalised by 31 March 2007, and rules relating to those provisions which come into effect 24 months after royal assent will be finalised later in 2007. To date neither AUSTRAC nor AGD has received any clear evidence from industry that it cannot implement the system changes required for the earlier commencement date because of the absence of the rules for the provisions which do not commence for two years after royal assent.

I will turn briefly to the privacy issues. As the committee is aware, in response to earlier recommendations of this committee the privacy impact assessment was undertaken. That report made 96 recommendations, 30 of which have been accepted and implemented in the bill as introduced. This left 66 recommendations, but these were based on four fundamental contentions. The first was that the package suffers from a lack of transparency because operational detail is in rules and not in the bill. We cannot determine the difference in transparency from the inclusion in the rules or the regulations. The rules are, and are intended to be, a transparent process. They are also of course disallowable instruments and subject to parliamentary scrutiny. The second point made in the privacy impact assessment was that the legislation should be more prescriptive. The suggestion is that discretion implied in the risk-based approach as to the amount and type of personal information which could be collected is problematic. There is a balancing to be made between those things and the bill currently reflects the position that has been taken on that balance between the level of prescription and the level of discretion. Further, some of the prescriptive detail which was included in that

report would in our assessment have made the legislation quite impractical in some respects and possibly unworkable.

The third proposal was a recommendation that the existing privacy protections should extend beyond those that are presently included in the Privacy Act. As the committee would appreciate, this legislative package is not an appropriate forum for making significant amendments to the obligations in the Privacy Act, particularly as the ALRC is currently carrying out a review of the legislation.

Finally, 16 of the unaccepted recommendations related to the disclosure of personal information and protections against its misuse. We have some concern that these recommendations were based on a misconception of the purpose and use of AUSTRAC information, which in the end is of intelligence value only. That information does not of itself support a prosecution and can at best only lead to further investigation by authorised agencies in accordance with the rules which govern the conduct of those agencies.

The final issue I would like to mention briefly is the question of consultation. As the committee has heard and acknowledged, there has been extensive and ongoing consultation over the period of time leading to the position we are presently in. There is a full expectation on the part of the government, the Attorney-General's Department, AUSTRAC and industry that those consultation arrangements will continue through the implementation period and that those consultation arrangements will—what is the word?—evolve as the need develops through that process, as they have done over the past three years. Those consultation arrangements include a ministerial level component as well as an officials level component, as well as several layers of technical components for that work, and we fully expect those to continue.

We have taken on notice from the last two days of the committee hearings a number of detailed questions about drafting issues, and we will do our very best to provide the answers to the committee on those questions by the end of tomorrow to facilitate the conclusion of your report. Thank you very much.

CHAIR—Thanks, Ms Blackburn.

Mr Jensen—I concur with Ms Blackburn's comments. Just to iterate the relationship between AUSTRAC, the department and industry, it has been an extensive and invigorating consultation process within industry from the high level of the ministerial advisory group to rolling up our sleeves and thrashing out issues across the table in working groups, down to drafting sessions on rules in our focus groups. So it has been very extensive, particularly with the wider financial services industry.

Ms Blackburn has mentioned the rules that we now have in place and have had on our website since 13 July. Obviously any changes to the bill may lead to consequential changes to rules, but most of those have been finalised to this point in time, up to the rules that will be required at the six-month date and up to the 12-month date as well. There are a few that still need to be finalised in that regard. Guidelines are also being worked on at this present time. We have a lot of work to do there. They flow on, again, from the bill and the consequential rules that come out, but we will be continuing to work on that over a period of time, and the consultation process will continue down to the level of the guidelines with industry.

Consultation into the future, again, is something that we have worked on quite extensively in the past 17 years that the organisation has been in operation and more extensively over the last couple of years, and that process will continue on into the future. I think working also with other regulators is a very important part of our future role. We have set up consultation approaches already with APRA and ASIC in particular, and we will certainly be developing those a lot further as well. Many of the organisations, particularly those from the financial services sector, which have appeared before this inquiry and put in submissions to you have been involved in the process of drafting of the rules. Through that process we have tried to gain a balance across industry and then across industry in the requirements that need to be set in place under the financial action task force recommendations, and I think we have done a pretty good job of getting to that point. Thank you.

CHAIR—Thanks very much. There is one general question that I would like to pose. The committee, as you noted, Ms Blackburn, has been quite cognisant of the consultation process and pleased to see its evolution, to use your word, and development in the months even since the exposure draft. It was obviously running a long time before that. It seems to me, from what those who have been prepared to put it on paper have put to us through their submissions, that there is a distance between your understanding of where things are at in relation to rules and their finality or otherwise, and the understanding of some very key players in the process who were still putting on paper to us as at last Friday's close of submissions, 'We have very, very significant concerns about the fact that we don't believe that we can do this properly because we don't have final rules.' You have been quite emphatic in your representation about where you think they are and where AUSTRAC thinks they are. How do you think that distance has developed?

Ms Blackburn—It is a very interesting question.

CHAIR—I am full of them!

Ms Blackburn—We met in Canberra on Monday of last week with Mr Burke from the ABA in light of the submission that he was making to the committee and the correspondence he is engaging in with the government. We took Mr Burke through a very extensive table that he had provided to us articulating all of the concerns raised by his members about the need for rules, where the rules were going to be made and what was the stage of those rules. The position that I have articulated to you here this morning is exactly the same position that I put to Mr Burke last Monday. Ms Atkins was also involved in that conversation. We confirmed that in writing to Mr Burke, as I recollect, on Tuesday, and the only change to the position we put to Mr Burke last Monday was in relation to one particular set of specific rules, which was finalised yesterday.

We are in some ways at a bit of a loss to understand the gap that appears to exist. I believe that the activity that has been undertaken by a number of organisations has involved that time-honoured task of a global search of the word 'rules' in the bill, which, as you would appreciate, generates quite a long list of provisions. We had not focused on many of those provisions because they are deliberately inserted into the bill for an activity that we have in our language been describing as 'future proofing'. What is set out in the specific requirements of the act is what we understand to be the way the industry operates today, our understanding of the current operation and the foreseeable way in which those services could be structured

or delivered. The inclusion in many of the provisions of the ability to designate further things by rules is a very deliberate insertion of an ability in the future to respond to—as I mentioned in my opening statement—unintended consequences or deliberate structuring and creation by industry of products which technically fall outside the definitions of the legislation.

That is my explanation of why at this very late stage I think we have that bit of a gap. All of our conversations to date on rules have focused on those rules which we all know need to be available either on commencement or with sufficient lead time for the commencement of the operative provisions. We probably had not done the global search and the long list of those where, as I mentioned, there is no current intention on the part of AUSTRAC, AGD or the government to make rules because no current need has been identified.

CHAIR—Although there are observations from some parties that for the purposes of business certainty they are very, very keen to have rules.

Ms Blackburn—They are very keen to have rules. We spent a very extensive period of time negotiating the rules up to the draft, which was published in July. Work on the rules has continued since that time. It would be a wrong conclusion to think that no work has been done since July—extensive amounts of work have been done since July. However, both AUSTRAC and AGD have been reluctant to put more rules out there while we still have uncertainty about the text of the bill, as that would generate only more uncertainty and confusion. We were quite deliberately waiting until the text of the bill was finalised for introduction. It is also true that AUSTRAC has done an extensive amount of work that we have not been able to release to industry yet, because at the moment the Attorney-General's Department has devoted its resources to the passage of the bill. We are quite confident that, as soon as we are able to bring those resources from the passage of the bill to the rules, we can meet the time lines set out in the opening statement.

CHAIR—You understand, I assume, the position in which the committee therefore finds itself. We have your evidence and we have their submissions and their evidence, and they are not really meeting in the middle. I do not think it is necessary to revise what you have just said, but that to some extent is the position in which the committee finds itself.

Ms Blackburn—I draw your attention to one interesting thing which I noted in the submissions. My recollection is that there were quite a number of comments made by organisations that they must have the rules six months ahead of the commencement. I hope that is my accurate conclusion from the reading.

CHAIR—Some want them more than six months ahead of it.

Senator LUDWIG—They want sufficient time to be able to ensure that they can comply. It might mean system changes, and they might require investments of money, time, effort and training which might extend to six months plus.

Ms Blackburn—I think that may well be the case for some industries. We have a staged implementation timetable which has a 12-month period from royal assent to the commencement of the first substantive new obligations under this bill. At this stage, we have committed to those rules being available by 31 March.

Mr Jensen—I fully agree again with what Ms Blackburn has said. It seems to me that, from reading the submissions of those who made the statement that they did not have the rules, they did not specify which rules they were looking for. This makes it a little difficult because the rules—

Senator BRANDIS—If they did not have the rules, they probably did not know.

Mr Jensen—The rules are all referenced in the legislation. The rules are also available on our website, and the bulk of them have been there since 13 July.

CHAIR—To the extent that they are developed.

Mr Jensen—Yes. The bulk of them that are developed in agreement with industry are those that will be necessarily required to implement the legislation.

Senator BRANDIS—You see my point, though. Their concern is not what they know about but what they do not know about—what Mr Rumsfeld might have called ‘the known unknown’.

Ms Blackburn—Your point is certainly well taken. Indeed, in the discussions we had with the Australian Bankers Association that I mentioned earlier, we went through with them and in writing confirmed to them those rules which are either in preparation—the time line for those rules—or a clear statement of the provisions under which, at this point in time, no rules are intended to be produced. In response to the concerns that have been raised, AUSTRAC has been preparing a table which attempts to do that across all of the rules. It is quite an extensive document. We are hoping to be able to provide that to the committee.

CHAIR—Ms Atkins?

Ms Atkins—Yes, indeed, tomorrow. I think we would be prepared to put that sort of information up on our website as well.

CHAIR—Thank you for that and for assisting the committee in that discussion.

Senator LUDWIG—In terms of the structure of the bill, there are a range of exemptions and another list of exemptions that go through. Is that necessary? You set up a way that the bill is going to work and at the end of the relevant sections you can provide another way, and there is no transparency as to what those exemptions might be, at least for the committee—or for anyone else, for that matter—until you develop them. It is a novel way of providing a bill, in my view, because it creates a degree of uncertainty as to how it will operate and then you will have to turn to regs in an ad hoc way. I do not want you to meet CASA’s requirements for regulation-making ability either over the next couple of years.

Ms Blackburn—I think there are two comments I would make in response to that. First, as I am sure the committee would be aware, sometimes the way in which a bill is drafted and the way in which it is presented is a matter which is for the expertise of the parliamentary drafters. However, the collection of that range of provisions—I am looking at clause 39—

Senator LUDWIG—Clause 39 is a good example.

Ms Blackburn—I think, again, the general comment is that that provision is inserted to specifically enable us to deal with the issues that will inevitably arise through the implementation of this bill as to whether a service was intended to be covered and whether a

service provided in a particular way should be covered, and those exemptions are part of the flexibility I was describing earlier, which is essential in a risk based system.

Senator LUDWIG—But if I did a search on exemptions I would find clauses 39, 42, 44—and it goes on and on. This is a bill which will be used by business. Ostensibly businesses want certainty. Even if it is bad news, they still want certainty. I have concerns as to whether the framework that you are implementing does provide the level of certainty that business requires. Business is going to have to spend significant amounts of money—in the multimillions—to comply with the legislation, and I am sure we all want them to comply. Where they get hesitant is where there is uncertainty—in other words, where the bill itself provides exemptions in this way which are undefined, unknown and yet to be finalised as well, and in fact there are some which we may not even know.

Business do not want to be put through, I suspect—I am not speaking for business, but I imagine they would not—a process of continuous change. They are into continuous improvement but not continuous system changes. You say that it is a requirement to do it this way—you are at the mercy of the drafters—but the ABA did set out a way of at least trying to mitigate it a little bit and perhaps identified a way to mitigate the management of the process by saying, ‘Why don’t you then engage with a consultative process or a consultative council and at least feed it through the process so that we can identify the issue, work out and manage when it is going to be implemented and deal with it in that way?’ I know I have crossed a number of questions in this, but have you considered any or all of that?

Ms Blackburn—Thank you for your comments on that. It gives me the opportunity to clarify that the way this bill operates is from the perspective that if your activities are covered within the definition of designated services then, prima facie, you have to comply with this legislation. The exemption provisions will primarily operate to alleviate the operation of the bill and its impacts on businesses and business services that would otherwise be encompassed by the legislation. Indeed, the specific inclusion in clause 39(7) was inserted into the bill because we believe we have reached a considerable level of certainty about the application of this legislation to one particular sector of the industry.

The operation of clause 39 and similar provisions is indeed meant to be a primary mechanism for alleviating the impact of this legislation on organisations which would otherwise, on its face, be required to fully comply with the legislation. The conversations we have had with industry to date have been very much conducted on the basis that, if they are covered by the operative provisions of this bill, that is the premise from which they should operate unless they are then able to put forward to AUSTRAC or to the government a clearly articulated case as to why one or more or parts of this legislation should not apply to that particular service or the delivery of that particular service in certain conditions.

Senator LUDWIG—I think that is understood. The difficulty arises if you take clause 47, for example, which is on compliance reports. It says:

Different reporting entities

(8) AML/CTF Rules made for the purposes of this section may make different provision with respect to different reporting entities ...

How narrow can that go, in the sense that you can have ADIs and credit unions provided with different rules? You might have ADIs in between ADIs and they might be confidential to those parties.

Ms Blackburn—I would see that as one of the natural outcomes of a risk based system. What you are articulating is the conflict that struggles through this legislation: the balance between demands for a very flexible risk based approach to allowing individual businesses to assess their risks and to have their responses to those risks compared to increasing or extensive levels of prescription of one size fits all. It seems to me that the structure of the bill—which you quite rightly note creates a level of uncertainty—is the inevitable consequence of constructing a fundamentally risk based approach to addressing this problem, which is the approach taken in the international standards and is the approach strongly endorsed by industry.

Senator LUDWIG—And therefore in terms of competitive neutrality amongst ADIs, if you look at the way 47(8) could operate then it could stress them a little because you could then have situations where some could have different compliance reporting arrangements or different exemptions as the case may be. Therefore, the competitive neutrality which they seem to have at least spoken to this committee about may not exist.

Ms Blackburn—It is clearly possible that you could have those different requirements, which are based upon the assessment of the particular risk for the particular organisation. I think AUSTRAC should comment on how they see those matters going.

Ms Atkins—We would not see ourselves going down to that level. This particular provision is really about being able to have different compliance reporting perhaps for different industry sectors. You might have different compliance reports for the gaming sector from those you would have for the financial sector. You might take it down to parts of the financial sector, but I find it difficult to see a circumstance where we would have different compliance reporting rules for different ADIs, such as one for each bank. But I agree that it is possible under that.

Senator LUDWIG—I am only looking for certainty.

Ms Atkins—I absolutely agree that it is possible under that, but I cannot see it happening. You mentioned confidentiality. They are rules, so they would be public.

Senator LUDWIG—If you look at 49(1)—I will do this while I am on this point and then stop for another five minutes—why would you not include section 47 in there, along with sections 41, 43 and 45?

CHAIR—This is in division 6?

Senator LUDWIG—Yes, clause 49(1).

CHAIR—It says:

(1) If a reporting entity communicates information to the AUSTRAC CEO under section 41, 43 or 45, then:

So you are asking why clause 47 is not included in that.

Senator LUDWIG—Yes.

Ms Atkins—Those three types of reports are reports about transactions or suspect matters.

Senator LUDWIG—I know what they are for.

CHAIR—Senator Ludwig, if I understand you correctly, your question is: why are compliance reports not included as well as suspect transaction reports?

Senator LUDWIG—Yes, why would they not be? In the sense that further information is being given to AUSTRAC, the clause says that if a reporting entity communicates information to AUSTRAC then you may, by written notice given to the reporting entity, require the reporting entity to give further information. So if someone gives you a compliance report—and it might be insufficient, inaccurate or poor—you say, ‘Thanks very much.’ That would have satisfied the legal onus under the legislation, whereas in the other area you have said, ‘Give me more detail.’

Ms Blackburn—Instinctively, just taking the provisions at face value, as Ms Atkins has mentioned, the other provisions are about the individual transaction reports. The report under section 47 is meant to be in the nature, as I understand it, of an annual report.

Senator LUDWIG—I understand what it is, but it still has the question mark around it. I have used section 41 out of those as an example where you do actually have a provision to ask for further information. On this same basis—in other words, using it in a generic way or in a general sense—you do not have the provision under compliance reports to ask for additional information.

Ms Blackburn—The report to AUSTRAC under section 47 is a report to the regulator responsible for compliance with this act that the authority has in fact met its obligations under this act. This is quite different from the provision of transaction reports, which can then generate interest in further information from an investigating agency. The compliance report under section 47 to the regulator is a report about the organisation’s compliance with their obligations.

Senator LUDWIG—I accept that.

Ms Blackburn—So that is the distinction I would draw. The regulator has separate powers if it needs to obtain further information from a reporting entity.

CHAIR—In relation to the compliance report?

Ms Blackburn—In relation to the compliance report.

CHAIR—Where are those powers?

Ms Atkins—There are general information gathering powers in part 14. They do not refer specifically to section 47.

Senator LUDWIG—No, they do not.

Ms Atkins—But in relation to compliance we would use our part 13 and part 14 powers if we needed to take things further after seeing a compliance report. I guess compliance reporting could just as easily have been in those parts of the bill, but all the reports were put together.

Ms Blackburn—I would equally suggest that industry might be terribly troubled at the idea that, on the basis of a compliance report to AUSTRAC, further information could be required from them by the Commissioner of the Australian Federal Police.

Senator LUDWIG—You never know.

Senator PARRY—I want to turn to clause 41: ‘Reports of suspicious matters’. I think you have had a document circulated to you this morning in response to questions that I asked of Mr Waters yesterday. He is here again today in the public gallery. There seems to be some confusion. Could you talk us through the application of clause 41, in particular 41(1)(f) and the sub-subclauses under (f) about picking up other activity that is not directly related to money laundering, the proceeds of crime or financing of terrorism. Could you talk about the general thrust of those provisions of the bill. The Australian Privacy Foundation asserts that this bill is dragging in other areas, and we had a discussion about the reading of this particular clause yesterday.

Ms Blackburn—It is clear from the provisions of the bill that, on its face, it clearly requires and enables the provision of information for the purposes of investigating criminal activity that is either of itself the act of money laundering or financing of terrorism or predicate offences to that outcome. There is no limitation in the current Financial Transaction Reports Act to the provision of information that is limited to belief or suspicion that the crime is money laundering, and this bill continues that approach.

Senator PARRY—Would it be correct to say that, under the provisions of clause 41, when the first person inquiring or undertaking activity that pertains to this clause becomes aware of anything under (f)(i), (ii), (iii), (iv) or (v) and then moves into a different phase or picks up other illegal activity, they became aware of that other illegal activity because of their actions under the provisions of this bill in the first instance. Is that a fair assessment?

Ms Blackburn—Perhaps I will set out a simple process and then you can clarify whether I have answered your question. The obligation that arises under this bill is to report to AUSTRAC, in its role as both a regulator and the financial intelligence unit, the facts of an activity or a transaction that has given rise to a suspicion. That is the end of the obligation on the reporting entity—to make the report. Any consequence that flows from that report having been made is a consequence that comes from the use of that information either by AUSTRAC, as the regulator, for its analysis, or by the other law enforcement and regulatory agencies that are entitled to access that information. But as I said in my opening statement, the provision of the report to AUSTRAC cannot be more than intelligence that may trigger further investigatory activity by another agency in accordance with the rules that govern its activities.

Senator PARRY—That clarifies my question.

Ms Blackburn—I realise I did not mention any sections of the bill in that explanation.

Senator PARRY—That is okay.

CHAIR—You were here this morning when representatives from the Australian Mobile Telecommunication Association were here. They have some concerns that they have been caught advertently or inadvertently. Could you assist the committee with some information in relation to that and what discussions you have been having with them?

Ms Blackburn—Someone else will think about the detail of the conversations that we have had with them. As they note in their submission, they have come late to the process through not having understood whether or not they would be covered. I think it is possible for me to clearly say to this committee that there is no intention in this legislation to capture the provision of telecommunications services—or indeed legal services for that matter. The bill covers the provision of the designated services, and the identity of the provider of that service is irrelevant. They have raised in their submission a couple of interpretations. Obviously, we will look very closely at whether the services that they are describing are the services they are providing and whether we agree or not that they are encompassed by the definitions in here, but we will also go on to the second assessment of: should they be?

Some of the members of this committee were asking questions about the possibility of the abuse of services which, at one level, you may be able to classify as telecommunications services but which, if they are services that are able to be abused for the purposes of money laundering or terrorist financing, they are properly the subject of regulation through this legislation. We have all noted that it has a level of flexibility which then allows, if you form the view that the services should become part of the legislation, a further ability within the bill to determine what is the extent of the risk and what is the appropriate level of response that industry should be required to make to that risk. I think the starting point clearly is: there is no intention to capture telecommunications services. The definition of loans is clearly referenced to a loans business. I cannot see how you can get from: ‘I’m a provider of mobile telecommunications services’ to an interpretation of: ‘I’m in a loans business.’ We have looked briefly at those. I am not going to commit us on the record here as to whether we accept their interpretation or not; suffice it to say that we clearly will review those provisions to ensure that they are covering services which are properly included because of that list of designated services that is already there.

Senator BRANDIS—Following that: does the legislation include within its reach services that are incidental to the provision of the designated service or does it have to be a core function?

Ms Blackburn—It has to be a designated service to the extent that the definitions are an attempt to define those designated services as clearly as possible. It either falls within or without. Clearly, the submissions have raised—

Senator BRANDIS—That is why I asked whether it includes incidental matters.

Ms Blackburn—No, it does not. It is either a designated service or it is not a designated service. Clearly, in that area of questioning, given that all laws have some level of uncertainty about them, this process has been very valuable for ensuring that many eyes are looking at those definitions to ensure that they are as clear and as precise as they can be.

CHAIR—So the committee ended up this morning, Ms Blackburn, with the view that it is potentially the case that the retailing of a stored value phone card—\$20, \$25, \$10; whatever that might be—may come within the purview of the operation of the act if other matters are satisfied and so on and so forth. These are sold through a newsagent, for example, or a 24-hour store. The implications for that would be significant at that level because the AMTA

representatives certainly left the committee with that view. Could we have your comments on that.

Ms Blackburn—It caused us some confusion because of the inclusion of the designated services at items 21 through to 24. We were somewhat at a loss to include that card in the definitions of a designated service.

CHAIR—We need some clarity around that for the purposes of exploring those issues.

Ms Blackburn—We can provide that. I am happy to undertake to provide a brief analysis of that to the committee because, if you look at the definitions that are in the table of items, I cannot see where a \$25 phone card fits. I am happy to specifically take that one on notice and include that in our answers.

CHAIR—Is that an issue you have discussed with AMTA in the discussions that have been held so far?

Ms Blackburn—I cannot answer that because I have not personally participated in any discussions with AMTA.

CHAIR—Have officers participated in discussions with AMTA?

Mr Gray—Yes, we have had discussions with them. They have raised these issues, we have pointed to the thresholds. The argument that they might be debit cards is something I personally have not considered. The other issue that they raised today about giving out prizes is not something that I am aware they have raised, but I am quite happy to look at that.

CHAIR—I think that was in their document, but I stand to be corrected on that.

Ms Blackburn—It is in their submission.

Mr Gray—It is in the submission, yes.

Senator LUDWIG—There are two issues that it revolves around. Telstra's submission raised the issue of loans and whether you are in the business of loans, and I think Senator Brandis also raised it. I have put a question on notice about the extent of that because, whatever way you look at it, by its very nature it is a broad definition that is designed to capture as much as it potentially can. There is a question as to how far it then goes, what it includes. I think your EM mentioned Centrelink. It is not in the business of loans, but if you look at Centrelink's business—maybe you have not seen it of late—it does seem to provide loans and pension schemes and the like. I am sorry I mentioned that, really!

Ms Blackburn—The inclusion of that example in the EM was very deliberate: to try to illustrate what would a loans business not look like. Perhaps it is worth noting at this point that there is a lot of demand in the submissions and in the consultations for further definition and further definition and further definition. This bill, in so many ways, uses terms which have an ordinary meaning which is clearly ascertainable by business and by the regulator and by the courts. You can form a view on whether a loans business is a loans business or you can seek to define it in a prescriptive way, which will inevitably include some people who think they are not, exclude some people who should be and increase the possibility of the structuring of businesses to avoid the technical definition.

CHAIR—I think most people submitting to this inquiry are keen not to have the experience of the courts exercising their view on the definitional matters, and that is why they are keen for definitions. You might include the courts on your list, but I think businesses are keen to stay out of that end of the process for good reason.

Ms Blackburn—The undertakings have been given very clearly that there will be consultation during the implementation. We would expect an issue like this to be raised with the government or with the A-G or with AUSTRAC long before we talk about it as a court issue.

Senator BRANDIS—That is true, but that does not mean we should not get it right first time if we can.

Ms Blackburn—If we can, we would be very happy to clarify it. Indeed, the process to date has been a search for continuing clarification and definition to ensure people do have as much certainty as is possible. I found it very heartening, from the submissions that have been received, that we are now down to some very narrow areas and some very technical areas for further clarification. To the extent that the work of this committee and these submissions enable us to take that to another level of clarity, that will be done.

Senator LUDWIG—To finish this section on loans: HECS debts—they seem to be loans to me.

Ms Blackburn—They do not seem to be loans to me.

Senator LUDWIG—For the purposes of this bill.

Ms Blackburn—That is correct.

Senator LUDWIG—That will encourage many students out there, anyway.

Senator BRANDIS—I do not think your observation, Ms Blackburn, that the common speech meaning of terms is readily understood, survived the next question!

CHAIR—We are clearly moving away from that whole student loan concept. We will have to tell the department of education. They will be horrified.

Senator LUDWIG—Yes. They are not alone anymore. Stored value cards, gift cards and the like—this is where you have got a bit of specificity—includes a portable device. It has been raised that of course a range of department stores do not actually store value on the card itself but in a central server and therefore it is not a portable device; it is in fact stored at a central server which is accessed by the card, I guess, identifying the gift holder. Their concern is that they will then fall into the account category and then have to require those matters to be dealt with. In other words, the whole system would capture them in that way and they would not have the minimum amount. I take it you are seized of that issue?

Ms Blackburn—I have looked at that submission and it will take further consideration because there are some confusing elements in the submission as to whether the recommendation for their inclusion in the stored value card definition is indeed the appropriate outcome. So we are seized of the issues raised in that submission and we will review the application. Senator, you raised a number of matters in earlier questioning

yourself—that you need to explore the risk of the particular device/card under discussion being used or abused for the purpose we are trying to prevent.

Senator LUDWIG—Yes. I was only looking for certainty in how the bill would work.

Senator BRANDIS—You are being teasing now, Senator Ludwig!

Ms Blackburn—I am happy to state again that I am unable to give you that certainty at this stage.

Senator LUDWIG—Another issue was raised by the superannuation group, if I could use that broad term. They do seem to be concerned about the capacity of a trustee other than a self-managed fund, in item No. 43 in table 1, 'Financial services'. I note No. 42 talks about accepting a contribution or rollover or transfer in respect of a new or existing member. There is a question of whether or not they then roll over or transfer at the point of exiting. Do you remember the submission?

Ms Blackburn—I do.

Senator LUDWIG—Could you look at it?

Ms Blackburn—We will. I have looked at that and I think you are right: there is a distinction to be drawn between 'cashing out', I think was the language, and 'rollover'. Clearly there is a distinction between those two activities which would have different risks associated with them.

Senator LUDWIG—I accept that, because you would be rolling over into a 42 effectively—a designated service—and it might be captured at that point. But they do raise a point that cashing out is not all that they do; they can also provide annuities and the like.

Ms Blackburn—Indeed. The superannuation industry has been involved in extensive conversation with us, and those issues—particularly the one raised in their latest submission to the committee—will certainly be addressed.

Senator LUDWIG—I will run through a couple of them, because time, I suspect, will defeat us. You will no doubt remember the submission. There is the area of thresholds. Some were arguing for uniformity or at least some sort of cohesiveness, because we range from zero to \$1,000 to right up to \$10,000 for casinos, and not all of them relate back to the FATF numbers, so to speak. The casino one is a good example. How did you arrive at \$10,000 for casinos?

Ms Blackburn—The current FTR Act transaction level. I think the government made very clear statements early in the process that the implementation of these new requirements would involve a roll-back from the standards that were in place under the 1988 FTR Act.

Senator LUDWIG—Because that is significantly over what is required under FATF.

Ms Blackburn—There are different levels. Certainly the debate in the FATF about the various thresholds that are included in the FATF recommendations was as fiercely fought as I suspect the battle about coverage of lawyers is going to be—

CHAIR—What gave you that idea!

Ms Blackburn—and reflects the diversity of financial interests engaged in this. In developing the thresholds which are presently in this bill, we have taken into account the FATF levels, the existing legislative thresholds and advice from law enforcement agencies about the risks associated with the particular activities and whether the risk exists at, above or below certain levels of financing.

Ms Atkins—Particularly in relation to the gaming industry—and other industries and other thresholds—it is the same. I have been involved with the gaming industry. We have taken into account the practicalities for that industry and the arguments that they have given us about the level of transactions at particular levels and what would therefore be an appropriate threshold.

Ms Blackburn—I think there are some who have suggested that that \$10,000 should be indexed.

Senator LUDWIG—I would have thought it should be lower, but there you go.

Ms Blackburn—It is another piece of diversity in the risk approach to this industry.

Senator LUDWIG—The general issue that Westpac raised, though, in safe harbour: if you are going to adopt a risk based approach then you would not have a safe harbour, would you?

Ms Blackburn—If you were to adopt a pure risk based approach and the principles, which are clearly in the legislation, of individual assessment of individual risk and individualised response to it, that is correct. There is no requirement in the bill to have the safe harbour provisions. The bill enables the safe harbour provisions to be made. As we have clearly stated, the safe harbour provisions are there because consultation with industry identified a very high-level need for a safety net so that reporting entities have a very clear choice. They can go forward and design their own systems to meet their own risks and their own business needs, and the regulator will make a determination as to whether that is appropriate compliance. If they do not want to take the risk of doing that, they can implement the safe harbour provision, and it provides that the regulator will form the view that that is adequate. I should note, though, that the safe harbour provisions are only available where the assessed risk is low or medium. So, even within their own framework, they are limited to low or medium risk.

Senator LUDWIG—You could then make it for low so that at least, say, half a provision might operate in terms of a safety net, rather than raise it to medium.

Ms Blackburn—You could. You could delete them, you could limit them to low or you could leave them in their current form. As I said in my opening statement, the rules in their current form, as at their published date on 13 July, were the result—and I think Mr Jensen alluded to it—of many days locked in a room drafting the rules with industry and they reflect a negotiated outcome with industry.

CHAIR—I have a question about the range of electronic verification issues which have been raised with the committee and across submissions. They are quite broad. There are the Abacus position and the American Express position and there are the issues raised this morning by Baycorp Advantage. Their suggestions also range from: 'Put it in the legislation so that we have got some certainty,' to 'Give us a better idea of how you want this to work.' Where are the department and AUSTRAC up to on that?

Ms Blackburn—I will make some comments and then AUSTRAC can. As a matter of policy principle, the legislation must enable electronic verification. The world we live in simply demands that—the business world and the normal operating world. The challenge is to find a form of electronic verification that is at least as robust as the current system.

It is interesting that you refer to the Abacus submission, because the current system does have this acceptable referee method, which is no longer allowed under legislation and no longer accepted by the FATF. It clearly has a very low level of robustness in its identification. I was very interested to hear some of the language used in some of the presentations talking about a system that guarantees the identity of the person that the organisation is dealing with. The current system does not provide that and I am not sure that any system in the future is going to provide a 100 per cent guarantee as to identification. As a matter of policy, the legislation has been drafted to enable electronic verification to be conducted by methods which are available now and in the future to a standard which meets the regulator's decision of whether or not those procedures give a sufficient level of certainty as to the identification of the person you are dealing with.

CHAIR—To take the point that you make, I do not think the committee is saying that we expect you to tell us that you can guarantee the person is the person. That is not the point that the committee is making. The point that I am seeking to hear your response on is more about how the legislation is going to handle it, I guess.

Mr Jensen—I think one of the most difficult problems we face in electronic verification concerns the small number of participants in the marketplace at this particular time who can provide some level of electronic verification. We have had to be very careful in the way that we have put this into the rules not to give a competitive advantage to a particular organisation, and that has made it quite complex. We have put in something that is reasonably general to enable industry to look around to see what is available at the present time and see what they can use. There are some provisions in the current Financial Transaction Reports Act which allow for electronic verification. They may want to adopt some of those, but really, at this point in time, it has been a matter of, 'If you want to use electronic verification, tell us about what is there and what you can use, and we can talk further about it.' By putting it in a general way in the rules we are enabling them to make those sorts of decisions and for us to be able to review it at a later stage.

CHAIR—To take that further, what happens if you review it and you are unhappy with the way the organisation in question is exercising its electronic verification processes, through probably no fault of their own?

Mr Jensen—I think the issue is probably with the word 'review'. That was probably incorrect use.

CHAIR—That was not your word.

Mr Jensen—No, I understand, and I used it incorrectly. It is the consultation process, and we will be continuing to talk with these organisations about what they are providing.

CHAIR—I understand.

Senator LUDWIG—In terms of section 82, the superannuation industry also indicated that they use the tax file number. It is important in that industry, so it seems, whereas the legislation does not require that nor does it preclude them, I suspect, from continuing to use the tax file number. Have you seen their submission in respect of that issue?

Ms Blackburn—It is not one that I read recently, that I remember.

Mr Jensen—I cannot recall the specifics of the submission. The use of the tax file number has limitations because of the tax legislation. We have been through this process over a number of years and looked at the feasibility of being able to use the tax file number in the process of an identification scheme and that is still not, as I understand it at this stage, able to be done.

Senator LUDWIG—I think their concern is that they would like to be able to use it and it is not part of the program because you only need a name and those sorts of limited things. Clearly it is a matter for the superannuation industry, but perhaps you could explain to the committee why TFNs cannot be used at this point in time?

CHAIR—Is that on notice or to be answered now?

Senator LUDWIG—On notice, please.

CHAIR—Okay. May I just get your guidance, Senator Ludwig, on the committee's procedures at this point. As I understand it, we have placed a number of technical questions on notice out of the submissions in relation to both last week's hearing and this week's hearing. Some, if not all, of last week's have been answered. We have more on notice now. What, in terms of the time frame—

Senator LUDWIG—There were more that came out this morning which relate to more technical issues as well. I can put them on notice, with your indulgence, with the secretariat between now and the next hour for the AGD and AUSTRAC to have a look at. There are also a couple of broader issues that I was going to go to, but I know we are running out of time. There was one issue that we could deal with in, say, another five or 10 minutes and then we could put the rest on notice.

CHAIR—All right.

Senator LUDWIG—Because I know we were due to stop at one o'clock.

CHAIR—Yes, and it is now seven minutes past.

Senator LUDWIG—I know.

CHAIR—We will go to a quarter past one, Senator.

Senator LUDWIG—Thank you. In relation to the register of providers of designated services in part 6, I take it you are familiar with *The Regulation of Money Service Business: A Consultation* by HM Treasury in September 2006?

Ms Blackburn—Senator, personally, no, I am not.

Senator LUDWIG—I am disappointed.

Ms Blackburn—Sorry. I missed that in my reading, clearly.

Senator LUDWIG—I did not. It provided a snapshot of the MSB sector in the UK and its key features. One of the matters they raised was this tension between whether you choose to license or register. In choosing to register, what they noted was that once you have gone down the registry path you cannot take someone off the registry. What they found was that there might be a known money launderer, criminal or offender who turns up again. They are a money service provider. You fine them eventually because they did not go on the register. You might take an offence and prosecute, then they front up and say, ‘Well, I’ll now register.’ You might take a view that you do not really want them to register or you might want to be able to rule them off the register at some point if they are a serial offender. I am not making the decision about what level of activity might require that action, but the way the legislation is framed you can turn up and require to be registered, full stop, and you then have to register. There is no ‘fit and proper purpose’ test that has to be passed. They also then outline those sorts of issues, but also indicate that there is a significant problem with compliance—in other words, finding them in the first place to register. But it was more the former matter of whether you had turned your mind to the register, how you manage the register and whether you can remove people from the register.

Ms Blackburn—Certainly there was consideration in the early stages of our work on this legislation of the question: should you have a licensing or registration scheme? A decision was made that registration was the approach that we would take. In your question you have articulated some of the very significant difficulties about a licensing regime. Mr Jensen, did you want to add anything about the way the current scheme operates?

Mr Jensen—Yes. In the example that you have provided, if they are a money launderer we would like their name to still remain on the register. We do not want to take their name off because they are a money launderer. Under section 75 we can correct some of the entries that are on there, but that is not a removal situation. Under section 78 we can remove them from the register, but that is at their request, not at our request.

Senator LUDWIG—That is right; it is only at their request. The report goes on to say:

Second, there is no mechanism for de-registration—

so you are following the UK example—

of MSB traders who, once registered, prove themselves to be of insufficient honesty, integrity, reputation, competence or capability to undertake their MLR obligations.

Ms Atkins—Yes, but I guess that is the difference between registration and licensing: registering them does not give them any rights; registering just means that we know who they are, they are on the register, and they have complied with that obligation.

Senator LUDWIG—No, this is the same. This is a registering scheme. They are contemplating perhaps the early days of why they were going to maintain a registering scheme and considering a licensing scheme, but that is a matter for HM government. The nub of the question is that you might want to consider—because you certainly have not considered—whether you can deregister, because if you deregister then they cannot conduct a money service business lawfully.

Ms Atkins—They still can.

Senator LUDWIG—Yes, but you can then certainly prosecute, as a regulator.

Ms Atkins—For nonregistration, not for conducting the business. That would be an ASIC—no, actually ASIC does not cover it.

Senator LUDWIG—No. That might be another question you might want to turn your mind to.

Ms Blackburn—The questions you are raising do raise some interesting issues about whether, under this legislation, you actually want to implement a regime for licensing the conduct of business—as I am sure you would appreciate—through the range of other industry sectors that are covered by this. This bill is not about the terms and conditions on which you can conduct the business; it merely says that, if you conduct the business, it must be done in accordance with these rules. Because there is no current system that even identifies remittance providers, we have taken the approach in this bill—which of course carries over the provisions from—

Mr Jensen—The counter-terrorism act.

Ms Blackburn—That is right. We have taken the approach here that, from the perspective of attempting to be able to investigate, prevent and prosecute money-laundering activity, it is the ability to identify the providers of those services that is the most important aspect for those activities.

Senator LUDWIG—Yes, I understand that, but you have identified them if you can deregister them or delist them from registering.

Ms Blackburn—If they are delisted from the register then we do not know where they are.

Senator LUDWIG—I would be surprised if that were the case. The third EU money-laundering directive will require by the end of 2007 the establishment of a ‘fit and proper’ test. Have you considered whether or not that is an issue that you should consider in all of this, to at least ensure that money services businesses are appropriately conducting themselves?

Ms Blackburn—No, we have not considered it, and the FATF special recommendations do not require the inclusion of that test. The third EU directive has gone further than those requirements. In the normal course of events, that means that debate potentially will come back into the FATF as to whether indeed the FATF requirements should be amended to reflect that.

Senator LUDWIG—But you are not saying that you have contained yourselves only to within the FATF recommendations?

Ms Blackburn—No, I am saying that we did not consider doing it—

Senator LUDWIG—No, but in a broader sense.

Ms Blackburn—and we are not required by FATF to do it. There were two components to my answer.

Senator LUDWIG—Yes. And the component to my request is that this bill, though, does go further than FATF in some areas.

Ms Blackburn—Yes, because the government's starting position was that this new legislation would not wind back any of the existing provisions and standards that were reflected in the FTR legislation. There are some other areas where a decision has been made to go further because there is a belief that that is what is needed to have an effective system in place.

CHAIR—Senator Ludwig, we might complete on that point.

Senator LUDWIG—Yes, thanks.

CHAIR—We are aware that, as a result of the tight time frame that the committee has been asked to work under by the Senate, we have given a lot of technical matters on notice to the department and to AUSTRAC. We report on Tuesday, if memory serves me correctly, so this is an extremely tight turnaround, so your assistance with responding on those issues would be very much appreciated. It may be, as Senator Ludwig said, that there are a smaller number of matters out of this morning's discussion as well which also need to be responded to.

Ms Blackburn—My understanding is that we have two lists that you have already provided to us from yesterday and today—is that correct? And we are now expecting a further short list?

CHAIR—I thought it was short, Ms Blackburn, so I am sure it is a short list!

Ms Blackburn—As I said earlier, we will make our very best endeavours to have the answers to the committee by the end of tomorrow, subject to considering the list.

Senator LUDWIG—I am happy to table the document, if they would like it.

CHAIR—From HM Treasury? All right, we will take that as a tabled document, thank you, Senator Ludwig. I thank all of the witnesses and those individuals and organisations who have provided submissions to the committee for this inquiry. It is a very complex piece of legislation, the result of extensive consultation and negotiation, it would seem, but we have been doing this inquiry over a particularly tight time frame, so, to those who have provided submissions and appeared as witnesses: we are very grateful for that input. I thank all of the witnesses who have appeared here today.

Committee adjourned at 1.15 pm