CHAPTER 3

KEY CONCERNS FOR INDUSTRY

3.1 Submissions and evidence presented for the purposes of this inquiry indicate that business and industry bodies are generally comfortable with the Bill however some general and several specific issues remain unresolved. These issues will be discussed in this chapter. Chapter 4 will discuss privacy and discrimination issues in relation to the Bill.

Consultations with stakeholders

3.2 The committee was particularly interested in the extent and nature of consultations undertaken by the Department and AUSTRAC since its inquiry into the Exposure Bill. Most submissions and evidence indicated that the consultations have been extremely productive. Smaller businesses and industry groups felt that they became involved late in the process however the criticisms of the consultation process were not confined to these groups.

3.3 The minor criticisms generally consisted of a slow response or non-incorporation of suggestions. In relation to the latter criticism, the stakeholders acknowledged that consultations were continuing and they expected to resolve outstanding matters directly with the Department and AUSTRAC. The committee notes that many such matters involve technical drafting issues rather than issues of content.

3.4 The major criticism of the consultation process was that the AML/CTF Rules which were released on 13 July 2006 comprise an incomplete draft document.[1] For example, the Insurance Australia Group (IAG) said:

> There should be an adequate period in which industry can consider all aspects of the legislative package i.e. including the Bill, Rules and Regulations. This would enable training, intra group relationships and compliance arrangements to be simultaneously assessed and gaps identified against the requirements of the package.[2]

Department response

3.5 The Department stated that the draft indicative set of Rules provides prospective reporting entities with an understanding of how to comply with AML/CTF obligations. The committee was also told that the Rules are being finalised in a staggered fashion to coincide with implementation dates, with some stages already substantially complete, and that all Rules will be finalised by late 2007.[3]

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1 For example, *Submission 23*, p.2; *Submission 26*, p.1; *Submission 8*, p.2; *Submission 20*, p.1.

2 *Submission 3*, p.2.

3 *Submission 37*, p.1.

Evidence from the Department and AUSTRAC suggested that some of the concern in relation to the availability of Rules arose from a misconception that the government intended to issue rules in relation to all provisions of the Bill when there was no intention to do so:

> 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…unintended consequences or deliberate structuring and creation by industry of products which technically fall outside the definitions of the legislation…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.[4]

3.6 To address this confusion, AUSTRAC provided a table setting out provisions in the Bill which provide for the making of Rules, whether Rules are required or contemplated under each provision, and the status of draft rules.[5] AUSTRAC released further draft rules in relation to movements of physical currency into or out of Australia and movements of bearable negotiable instruments on 22 November 2006.

Implementation of obligations

3.7 Business and industry bodies have universally welcomed the 24 month implementation period, as well as the 12 month prosecution free period.[6] However, the staggered approach has caused concern.[7] The cause of the concern was essentially related to the status of the Rules and business and industry bodies' ability to implement their obligations on time.

3.8 ING Bank (ING) proposed:

> Commencement dates should begin from the date that Rules applicable to the relevant Part have been released and finalised. Alternatively, Royal Assent should not occur until the Rules have been finalised. This is because, whilst in theory, implementation can begin from the date of Royal Assent, the detailed obligations are contained within the Rules and implementation can not realistically commence until Reporting Entities are aware of the requirements outlined in the Rules.[8]

3.9 The Australian Bankers' Association Inc. (ABA) highlighted that:

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4 *Committee Hansard*, 23 November 2006, p.34.

5 *Submission 37a.*

6 For example, *Submission 3*, p.2; *Submission 23*, p.2.

7 One submission even queried whether the staggered approach to implementation was either necessary or appropriate - see *Submission 5*, p.4.

8 *Submission 23*, p.2. Also, see *Submission 15*, p.2; *Submission 26*, p.3; *Submission 10*, p.2.

> The prosecution free period does not allow for Rules development. It is not workable for industry to implement a Rule after Royal Assent either concurrently with or shortly preceding the commencement date...Compliance, enforcement and prosecution activity should then not commence until 12 months after commencement of the Part, including publication and finalisation of all necessary Rules to give effect to the Part.[9]

3.10 The majority of submissions and evidence given to the committee by business and industry groups indicated that a substantial amount of lead time would be required to implement AML/CTF obligations. Smaller businesses, which are not currently regulated under the *Financial Transaction Reports Act 1988*, particularly felt disadvantaged in this regard.

3.11 The Australian Finance Conference (AFC) said:

> A number of our members are stand-alone finance businesses and do not benefit from the sharing of resources which may be available within large corporate groups. For smaller businesses, the cost of preparing for the new regime will be considerable in the context of their overall size.[10]

3.12 The Finance Sector Union of Australia (FSU) also told the committee:

> We believe the Government is effectively requiring finance sector staff to help with law enforcement activity but is not implementing mechanisms to ensure that these staff are given enough resources to carry out these activities…[our] main concern is ensuring that financial sector staff receive adequate training to comply with the new requirements and that finance sector staff are not unfairly burdened.[11]

3.13 Small and medium-sized enterprises have indicated that they will require some formal assistance for effective implementation of the AML/CTF regime.[12]

Department response

3.14 The Department informed the committee that the implementation timetable incorporated in the Bill provides time for reporting entities to implement AML/CTF obligations:

> We have a staged implementation timetable which has a 12-month period from royal assent to the commencement of the first substantive new

9 *Submission 16*, pp 1–2. Also, see *Submission 20*, p.2.

10 *Submission 15*, p.2. Also, see *Submission 2b*, p.2.

11 *Submission 33*, p.1.

12 For example, *Submission 2b*, p.2 where the CPA Australia and the Institute of Chartered Accountants suggested a national education program, ongoing technical support and advice, and development of profession wide compliance programs.

> obligations under this bill. At this stage, we have committed to those rules being available by 31 March.[13]

3.15 In relation to formal assistance, the Office of the Privacy Commissioner (OPC) will be providing guidance and assistance to small business operators to meet their obligations under the *Privacy Act 1988*. In addition, AUSTRAC will receive funding to conduct a public awareness campaign.[14]

Formation of the Rules

3.16 A second common concern in relation to consultation was that there is no agreed formal consultation process with respect to the Rules.

3.17 Allens Arthur Robinson (Allens) pointed out that:

> [Although the AUSTRAC CEO is required] to consult with reporting entities or their representatives in performing his functions (such as making Rules) section 212(5) provides that any failure to do so does not invalidate any action he might take in performing his function. In practice this means that the AUSTRAC CEO can issue Rules under section 212 without effective industry consultation.[15]

3.18 Liberty Victoria stated:

> Arguably, the central feature of the Bill is the wide power and discretion it confers upon the AUSTRAC CEO…most significantly, the AUSTRAC CEO will be responsible for making AML/CTF Rules...these rules are legislative instruments…this process of law-making is largely based on primary accountability to the responsible Minister and confines the consultation process principally to industry sectors...other persons and groups likely to be affected by the Bill…are not formally recognised in these procedures.[16]

3.19 Many submissions indicated a willingness to be involved in further consultations both generally and in relation to specific provisions of the Bill. [17]

Department response

3.20 AUSTRAC advised the committee that it intends to maintain consultation with stakeholders:

> [T]he consultation process will continue down to the level of the guidelines with industry. Consultation into the future, again, is something that we have

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13 *Committee Hansard*, 23 November 2006, p.35.

14 *Submission 40*, p.3. This formal assistance will include materials and educational activities.

15 *Submission 38*, p.6. Also, see *Submission 14*, p.4.

16 *Submission 1*, pp 13–14.

17 For example, *Submission 14*, p.3; *Submission 26*, p.3; *Submission 35*, p.3;*Submission 3*, p.5.

> 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.[18]

3.21 Additionally, AUSTRAC will maintain and consult its Privacy Consultative Committee.[19]

Lack of parliamentary review

3.22 Several submissions argued that review of the Bill and its associated instruments was vital and should be timely and transparent, particularly in light of AUSTRAC's extensive Rule and Regulation making powers.

3.23 In response to concerns regarding subclause 6(7) which allows the broadening or narrowing of the definition of 'designated service', the Department provided the following response:

> It is reasonable to expect that while every attempt has been made in the AML/CTF Bill to cover all of the services which could be used for the purposes of money laundering or terrorism financing, those determined to avoid the operation of the provisions may find new and unforseen ways to structure activities so that they achieve the same outcomes as designated services but fall outside the definitions in clause 6. Sub-clause 6(7) will enable the Government to respond quickly to the emergence of such activities. Regulations will be disallowable instruments and subject to the normal procedures under the Legislative Instruments Act 2003.[20]

3.24 Minter Ellison, Lawyers (Minter Ellison) told the committee:

> [AUSTRAC] should be subject to the scrutiny of and accountable to a Parliamentary Committee. We also believe that it should be required to consult with other regulators of the financial services industry (such as ASIC and the Australian Prudential Regulation Authority), in addition to the industry itself, when making Rules or modifications to ensure that the impact of its proposals are fully considered and understood and to limit any regulatory overlap.[21]

3.25 More generally, Privacy Victoria stated:

> [G]reater transparency and public accountability should be guaranteed. The Bill should specify the matters that will be examined, establish an independent review committee, compel public consultation, and provide for timely tabling of the review report.[22]

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18 *Committee Hansard*, 23 November 2006, pp 33–34.

19 *Submission 37*, p.2.

20 *Submission 30a,* p.6.

21 *Submission 5a,* p.6.

22 *Submission* 14, p.4.

Suspicious matter reporting obligation

3.26 The committee received several submissions raising concerns about the breadth of the suspicious matter reporting obligation. In addition to the privacy and discrimination implications, it was said that this reporting obligation would result in AUSTRAC being inundated with suspicious matter reports.[23]

3.27 CPA Australia (CPA) and the Institute of Chartered Accountants (ICA) commented that:

> This piece of legislation is aimed at money laundering and terrorism [financing] and there really does not seem to be any justification for including breaches or having to report anything that is relevant to the prosecution or investigation of an offence against the Commonwealth, state and territory law.[24]

3.28 A suspicion that provision of a service relates to 'financing of terrorism' is a ground giving rise to suspicion matter reporting obligations under paragraphs 41(1)(g) and (h). Liberty Victoria argued more specifically that the definition of 'financing of terrorism' is extremely broad and improperly captures funding organisations where there may be no intention or knowledge that the funds will be used to carry out terrorism.[25]

3.29 Privacy Victoria added:

> The proposed measures effectively require financial agencies and others to police their customers for possible breaches of the taxation and criminal laws of every Australian jurisdiction. The Bill also requires these agencies to recognise situations where reporting a matter may assist government in enforcing the complex provision of the various confiscations laws across Australia…this appears to be an impossible task for financial institutions and other reporting entities.[26]

3.30 The FSU as well as the CPA and ICA expressed similar concerns that small business customer relationships might be adversely affected by the reporting obligation.[27]

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23 *Submission 2a*, p.4; *Submission 1a*, p.3; Submission *14*, p.2; *Submission 40*, p.6 and *Submission 7*, p.9 which suggested that reporting entities would be likely to err on the side of caution and over-report due to the enforcement provisions within the Bill. Also, see Chapter 2 of this Report.

24 *Committee Hansard*, 14 November 2006, p.3; Also, see *Submission 41*, p.1 and *Submission 38*, p.3 which noted an extension of the obligation to overseas law enforcement.

25 *Submission 1*, pp 1–4.

26 *Submission 14*, p.2.

27 *Submission 2*, p.1 and *Submission 33*, p.2.

Register of Providers of Designated Remittance Services

3.31 The committee examined Part 6 clauses 75 to 79 which relate to the requirement of the AUSTRAC CEO to maintain a *Register of Providers of Designated Remittance Services*. In particular the Department was questioned about whether these provisions should include the ability to refuse registration to or to de-register providers. The Department responded:

> 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.[28]

Penalties and sanctions

3.32 The expansion of the civil penalties and criminal sanctions provisions drew a wide range of comments. For example the submission from the CPA and ICA stated:

> The majority of the breaches…would be breaches of process and not specific intent to commit a crime…in our view [the maximum penalties] are probably a bit disproportionate.[29]

3.33 IAG similarly submitted that:

> We consider that there needs to be further consultation and discussion around, or at least consideration given to, the standard of proof that is required in respect of the civil penalty provisions…the penalties are potentially so significant for a reporting entity that we consider that a higher standard of proof should apply and that consideration should be given to whether an element of fault should also apply.[30]

3.34 The submission from Minter Ellison went further, arguing that:

> Most if not all the obligations imposed on Reporting Entities should not directly give rise to civil penalties or criminal offences. We submit that they should be legal obligations which can be enforced by AUSTRAC directing the Reporting Entity to comply with the obligation. A Reporting Entity should only be liable to prosecution if it fails to comply with such a direction.[31]

3.35 Infosys Technologies Australia Pty Ltd (Infosys) argued that the 'tipping off' provisions should not encompass the suspicion that triggered the reporting obligation or the business records and source information on which the suspicion is based.

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28 *Committee Hansard* , 23 November 2006, p.44.

29 *Committee Hansard,* 14 November 2006, p.5.

30 *Committee Hansard,* 14 November 2006, p.8.

31 *Submission 5a,* p.7.

Infosys submitted that by providing otherwise the Bill goes beyond FATF Recommendation 14, does not accord with comparable jurisdictions and has the practical effect of prejudicing the rights of innocent third parties.[32]

3.36 In relation to a specific form of banking entity, Bendigo Bank argued:

> If owner-managed branches are to be put on the same footing as other branches (thereby ensuring a level playing field), the exemption in section 123(8) should extend to sections 123(1), (2) and (3)…The sharing of information between banking groups (including between the bank branches) is critical to ensure that suspicious activity is properly tracked and dealt with throughout the group.[33]

Customer identification obligations

3.37 Some submissions raised concerns in relation to the customer identification obligation. Abacus Australian Mutuals (Abacus) was concerned that its members will no longer be able to rely on the Acceptable Referee identification method. This method will expire 12 months after the Bill receives royal assent. Abacus argued that smaller approved deposit taking institutions (ADIs) will then have to either engage an agent or a reciprocal reporting entity to verify and validate identification documentation. The latter option would 'in effect [involve] sending a potential customer, where there is no established relationship, to a competitor'.[34] It was argued that the identification obligation would pose a risk to competitive neutrality and choice in retail banking.

3.38 This argument was based on the lack of a viable alternative to the Acceptable Referee identification method. The alternative, electronic verification (e-verification) found universal support as a necessary component of modern banking.[35] However, business and industry groups debated whether electronic data is sufficiently available and reliable for use in e-verification.

3.39 Abacus told the committee:

> The capacity for [reporting entities] to verify the authenticity of core government-issued documents – such as Passports, Driver's Licences and Birth Certificates – is severely limited…unfortunately, the AML/CTF Bill does not expand access to available databases for identification purposes. The proposed Medicare and welfare services Access card will not be an identity panacea and access to the planned government document verification system (DVS) remains a distant possibility.[36]

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32 *Submission 7*, pp 5–9.

33 *Submission 28*, p.4.

34 *Submission 17*, pp 1–2.

35 *Submission 22*, p.4. Baycorp identified remote customers and organisations with no branch networks as persons who particularly rely upon e-verification.

36 *Submission 17*, p.2.

3.40 ING submitted that:

> In order to facilitate the 'safe harbour' contained in the draft Rule, a provision must be inserted [into the Amending Bill] authorising Reporting Entities to have access to information held within credit reports for the limited purposes of verification of identity in accordance with the Reporting Entities' AML/CTF programs, and authorising credit reporting agencies to disclose such information to Reporting Entities.[37]

3.41 Baycorp Advantage Limited (Baycorp) argued that one hurdle to the establishment of effective electronic verification systems was that the provisions supporting electronic verification were included in the Rules and not the Bill itself:

> All references to electronic verification as a component of an appropriate customer identification procedure identification system are only within the Rules…[which] may be easily amended as AUSTRAC sees fit. It is unreasonable to expect an organisation such as Baycorp to invest in the significant development of its business infrastructure to cater for a method of customer identification that is so easily subject to change…[electronic verification] should be included in the body of the legislation…or the safe harbour provisions should be included in Regulations, as these are subject to direct ministerial oversight.[38]

3.42 Westpac Banking Corporation (Westpac) expressed concerns about whether the safe harbour provisions would maintain reliable customer verification. Westpac acknowledged that a suitable document verification system could facilitate e-verification, however, in the interim:

> The safe harbour provisions present a weaker form of identification compared to the current *Financial Transaction Reports Act* (FTRA) standards and are inadequate in establishing that the person is who they are purporting to be…this would represent a 'wind-back' of the FTRA, weakening the financial system and increasing rather than decreasing the risk of ML/TF as well as fraud and identity theft for Australia.[39]

3.43 With reference to securities issued by trusts, Computershare Limited (Computershare) argued in favour of an exemption from the identification obligation. Computershare told the committee that in practice an identification process will already have been undertaken by either or both the bank on which a cheque for the application money has been drawn or the CHESS participant, who processes the application.

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37 *Submission 23*, p.3 and *Submission 15*, pp 2–3 which noted that the Amending Bill has the effect of narrowing access to information obtained under the *Commonwealth Electoral Act 1918*. This position was at odds with *Submission 22*, p.7 which advocated greater access for less limited purposes but *Submission 9*, p.8 which argued that any access by reporting agencies would be subject to commercial abuse.

38 *Submission 22*, pp 4–5.

39 *Submission 26*, p.2.

> To add in a requirement that the issuer of the security (in this case the issuer of the units in the trust) also to carry out an identification, is an unnecessary and costly duplication...It has the potential to require the establishment of two differing processing requirements…[and] where there is an issue of a stapled security that involves a share and a unit, a longer application period may need to be implemented to cater for the additional identification requirements.[40]

3.44 Superannuation funds are treated slightly differently in relation to the customer identification obligation. Superannuation funds are only required to identify their members when money is leaving the superannuation system. The Bill recognises that complying regulated superannuation funds present a low-risk of money laundering and financing of terrorism. However, the Association of Superannuation Funds of Australia Limited (ASFA) has drawn attention to the fact that:

> Cashing is not exempted from the up-front identification requirements…[but] there are cashing transactions that are prescribed by law and not initiated by the member…The regime should ensure such transactions [are] not captured by inappropriate customer identification requirements.[41]

Recognition of corporate groups

3.45 The broadening of the definition of 'designated business group' in clause 5 was generally welcomed.[42] There were two suggestions in relation to such groups. IAG submitted:

> There should be a general provision to the effect that any obligations of a reporting entity under the Bill can be discharged by another member of a designated business group.[43]

3.46 Telstra Corporation Limited (Telstra) added that:

> The Bill still provides no qualification or exception where a designated service is provided to another member of a designated business group.[44]

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40 *Submission 27*, p.2.

41 *Submission 10*, p.3. For example, the payment of unclaimed monies to a state registrar of unclaimed funds. Also, see *Submission 5*, p.8 where Minter Ellison, Lawyers presented similar arguments in respect of transfers and roll-overs between reporting entities.

42 Although the Australian Privacy Foundation did not support these changes arguing that designated business groups could effectively 'blacklist' customers – see *Submission* 9, p.7.

43 *Submission 3*, p.4 and *Submission 38*, p.2.

44 *Submission 24*, p.2. For instance, intra-group loans and parent company guarantees. The Business Council of Australia made similar comments in relation to corporate treasuries adding that the lack of qualifications and/or exemptions would increase compliance costs for corporations operating internal treasuries – see *Submission 1*, p.2.

Limited use of agents

3.47 Some submissions raised concerns regarding the limited use of agents for applicable customer identification procedures. For example Baycorp was critical of the deemed agency provision in clause 38 which applies only when a 'reporting entity' has carried out the original applicable customer identity procedure.[45] Allens and IFSA expressed a broader concern that there is no provision for the general use of agents in the Bill.[46]

Overseas permanent establishments

3.48 The Bill requires reporting entities to implement AML/CTF Programs in respect of any overseas permanent establishments (OPEs) through which a reporting entity provides designated services to the extent it is reasonable and practicable to do so having regard to local laws and circumstances.

3.49 Westpac sought an exemption for OPEs in New Zealand noting that New Zealand is in the process of developing AML/CTF legislation:

> It is therefore possible, depending on the transition timeline, that many Australian reporting entities will have to 'roll-out' AML/CTF procedures twice in NZ as a result of Australia's regime having extra-territorial application. NZ has existing suspicious transaction reporting obligations, and this will operate to mitigate NZ being a target for money laundering in the interim.[47]

Department Response

3.50 The Department noted that reporting entities do not generally have to comply with AML/CTF obligations in relation to OPEs, except in relation to inclusion of these OPEs in their AML/CTF program. In addition, Part 7 which imposes these obligations does not commence for 12 months after Royal Assent.[48]

International electronic funds transfers

3.51 Under the Bill international electronic funds transfer instructions must include certain information about the origin of transferred money. Debit and credit card transactions are exempted from the operation of this Part except when the transaction involves a cash advance other than via an ATM.

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45 *Submission 22*, pp 8–9.

46 *Submission 38*, pp 1–2 and *Submission 20*, pp 6–7.

47 *Submission 26*, p.4.

48 *Submission 30c*, p.9.

3.52 Visa International (Visa) told the inquiry that the protocols of providing the required customer information cannot be met in a debit or credit card transaction involving a cash advance and that:

> We are not aware of the rationale for the requirements for complete payer information for cash advances involving debit and credit cards at bank branch or merchant terminals, while ATM transactions are exempted …since the electronic routing and information exchanged in both types of transactions is identical, this is somewhat anomalous.[49]

3.53 In relation to electronic funds transfer reporting obligation, the Securities & Derivatives Industry Association (SDIA) noted that:

> There should be a carve out / exemption to comply with this obligation for those reporting entities who are not ADIs, Credit Unions or similar …every reporting entity is obliged to make the relevant reports and one would assume the relevant ADIs that these reporting entities use, will be required to make the same report. …this part of the legislation should be re-worded in such a way that reporting entities who are not ADIs or similar, can rely on their relevant ADI to do the reporting for them.[50]

Minimum value thresholds

Travellers' cheques and foreign currency transactions

3.54 The committee received several submissions regarding the absence of minimum value thresholds with respect to travellers' cheques and foreign currency transactions. Travelex Limited (Travelex) argued that in not applying minimum value thresholds to these services the Bill is at odds with internationally accepted recommendations, best practice and has additional impacts, including unnecessary collection of personal information.[51] Similarly American Express gave evidence that:

> [There is a] de minimis exception for certain stored value products, namely stored value cards, postal orders and money orders. These are only designated services…for transactions of $1,000 or more. For travellers' cheques, on the other hand—they are also stored value products with largely similar characteristics and risk profile to these other products—there is no $1,000 threshold. In our view, this anomaly unfairly discriminates against travellers' cheques, which, in our submission, should be similarly treated under the bill.[52]

3.55 The Australian Financial Markets Association (AFMA) added:

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49 *Submission 29*, pp 1–2. The practical effect of this submission was that Visa's Australian members believe that they would be forced to deny cash advances at Merchants or bank branches to Australian Visa cardholders travelling overseas.

50 *Submission 13*, p.1.

51 *Submission 12*, pp 1–2 and *Submission 19*, pp 1–2 and Attachment pp 1–5.

52 *Committee Hansard*, 22 November 2006, p. 35.

> The Bill should apply a realistic and practical threshold to the requirement on currency exchange providers to check the identity of customers …in our view the threshold should not be specified in the AML/CTF Bill but set by regulation or by Rule that can be varied more easily from time to time to take into account changes in AML/CTF risk factors, customer usage and transaction values.[53]

Gift, store and phone cards

3.56 In addition, it was argued that while stored valued cards, such as phone cards or gift cards, are intended to be subject to minimum thresholds the current drafting of items 21 to 24 in table 1 of clause 6 actually excludes most stored value cards because the value is not stored on the card itself. Mallesons Stephen Jaques (Mallesons) argued that:

> Issuing SVCs is intended to be a designated service. The relevant designated services are drafted to exclude low risk, low value SVCs from regulation. Unfortunately, the definition used for "stored value card" (SVC) does not apply to [gift cards or many similar, low-risk products] for technical reasons.[54]

3.57 Mallesons argued that if gift cards fell outside the stored value card provisions in table 1 then they would risk being captured as debit cards under items 18 to 20 which are not subject to a minimum threshold amount.[55]

3.58 It was similarly argued that phone cards and pre-paid mobile phone credit were captured by the debit card provisions of the Bill. For example, the Australian Mobile Telecommunications Association (AMTA) gave evidence that:

> Perhaps we can help the committee by giving some examples…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.[56]

Department response

3.59 The Department responded that if industry puts forward a case demonstrating, on the basis of risk of money laundering and terrorism financing, that thresholds are appropriate for walk-in customers in relation to services such as foreign currency

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53 *Submission 19*, Attachment p.1. The most commonly suggested minimum value threshold was $1 000.

54 *Submission 11*, p.1.

55 *Submission 11*, pp 3–4.

56 *Committee Hansard*, 23 November 2006, p.3.

exchange and bank cheques, this will be considered. Furthermore, arguments for a threshold for travellers' cheques are currently under consideration.[57]

3.60 The Department also advised the committee that:

> A pre-paid phone card or a card which allows people to charge calls made on one phone to an account for another phone does not fall within the definition of a debit card.[58]

3.61 The Department's view is that if such cards are captured by the Bill they will be subject to the stored value card provisions in items 21 to 24 which are subject to minimum threshold amounts.[59]

3.62 In response to a question from the committee the Department also indicated that it is intended to establish thresholds of $10,000 in relation to customer identification obligations for some designated services provided by casinos.[60]

Reporting of Threshold Transactions

3.63 Some concerns were raised in relation to the requirements to report threshold transactions which apply to transactions over $10,000 (clauses 43 and 44). OPC pointed out that the $10,000 threshold has not been increased in the 18 years since the *Financial Transaction Reports Act 1988* was introduced:

> The Office notes that the number of significant cash transaction reports has increased approximately 200% since 1991. In 2005-06, the number of reported significant cash transactions was 2,416,427. The prescribed significant cash transaction threshold has remained constant at $10,000 since the scheme was introduced and, as a consequence of price inflation, the reporting scheme will increasingly capture personal information regarding transactions that may not have been anticipated when the legislation was first drafted.[61]

3.64 The submission from ASFA raised specific concerns about the impact of the provisions on superannuation funds:

> Uncertainty remains as to exactly which transactions are captured under the reporting requirement as the term *threshold transaction* is broadly defined and contains linked definitions…Without proper exemptions, the threshold transaction reporting requirement would significantly impact on superannuation funds. Funds would be required to report every transaction of $10 000 or more to the Regulator within 10 business days of performing

57 *Submission 30c*, p.8.

58 *Submission 30c*, p.3.

59 *Submission 30c*, p.3.

60 *Submission 30a*, p.2.

61 *Submission 40*, p. 6.

> the transaction. Contributions, rollovers and transfers should be exempted from threshold transaction reporting.[62]

Industry Specific Concerns

3.65 A number of submissions were received by the committee which concerned the application of the Bill to particular businesses or industry groups. Many of these submitters stated that they were working directly with the Department in order to resolve outstanding issues.[63]

Telecommunication industry

3.66 In addition to the concerns about phone cards and pre-paid mobile phone credit, it was argued that other telecommunications products and services such as post paid third party content and trade promotions were inadvertently captured by the Bill. These products were said to be 'in no way in competition with the financial sector' and to have a low or negligible risk of money laundering or terrorist financing activity.[64]

3.67 Telstra stated that:

> The Bill would impose onerous and impractical legislative obligations on the telecommunications sector without any clear anti-money laundering or counter-terrorism financing benefit. Such an outcome appears to be inconsistent with the Government's purported intention, and an unintended consequence of the first tranche of reforms.[65]

Department response

3.68 The Department's view is that the provision of post paid third party content by the telecommunications industry is not captured as a loan by item 6 of table 1 in clause 6 because the loan is not made 'in the course of carrying on a loans business'.[66]

3.69 The Department advised that it is reviewing the provisions in table 3 of clause 6 to ensure they do not capture as 'gambling services' competitions and promotions run by businesses, which include an element of skill, with low value prizes of goods or services.[67]

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62 *Submission 10*, p. 4.

63 See for example *Submission 35*, pp 1–2.

64 *Submission 24*, p. 1 and *Submission 4a*, p. 1.

65 *Submission 24*, p.2. It was also pointed out that the telecommunications industry is regulated by the Australian Communications and Media Authority however it is noted that many other stakeholders are also regulated independently of AUSTRAC.

66 *Submission 30c*, p.3.

67 *Submission 30c*, p.3.

Legal profession

3.70 The Law Council of Australia (Law Council) acknowledged that the Bill has limited application to the legal profession but argued that the particular role of legal practitioners means that they ought to be dealt with separately to other businesses:

> The Law Council is fundamentally opposed to the imposition of reporting obligations on legal practitioners which undermine the independence of the profession and which are at odds with legal practitioners' well established duties to their clients, the court and the public...The Law Council believes that any AML/CTF reforms affecting the legal profession should be dealt with separately from the regulation of other business relationships. This is appropriate both because of the special nature of the lawyer-client relationship and because the Australian legal profession is already subject to extensive specialist regulation.[68]

Department response

3.71 The Department noted that clause 242 of the Bill ensures that the Bill does not affect the law relating to legal professional privilege. The Department stated that:

> Legal practitioners will be obliged by the Bill to lodge suspicious matter reports in relation to the provision of designated services under the Bill. As providers of designated services they are appropriately subject to the same reporting obligation as any other provider of designated services. The tipping off provision will not prevent a client of a legal practitioner making a claim for legal professional privilege in any legal proceedings. The question of what action a legal practitioner must take under their professional rules as a result of making a suspicious matter report is a matter for determination by the profession.[69]

Community banks

3.72 Bendigo Bank Limited (Bendigo Bank) expressed concern that the Bill does not properly classify its Community Bank and Tasmanian Banking Services branches as 'owner-managed branches'. In particular, Bendigo Bank considered that clause 12 which defines 'owner-managed branches' was too narrow to encompass the Community Bank and Tasmanian Banking Services branches because it requires the arrangements with the bank to be 'exclusive' and for services to be offered 'under a single brand, trademark or business name'.[70]

3.73 Accordingly Bendigo Bank argued, that these branches will be treated as reporting entities:

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68 *Submission 25*, p.3. Also, see *Submission 38*.

69 *Submission 30d*, pp 2–3.

70 *Submission 28*, p.1.

> As reporting entities these branches will be under a range of obligations that an ordinary branch of a bank is not, including the requirement to have their own AML/CTF Program…in addition, there is no provision in section 123 which allows [Bendigo Bank] to disclose information regarding suspicious activity reporting except via the Designated Business Group exception.[71]

3.74 Bendigo Bank noted that it was working cooperatively with the Department to address this issue.[72]

General insurers

3.75 IAG argued that its Consumer Credit Insurance products (CCIP) have unintentionally been captured by the Bill on account of their life insurance component. IAG believes that CCIP are fundamentally low-risk and should be excluded from the operation of the Bill by consequential amendments.[73]

Financial planners

3.76 The AFSL holders' designated services provision (item 54 of table 1 in clause 6) was described in submissions as vague with the potential to capture almost any service provided by a reporting entity.[74]

3.77 The Financial Planning Association of Australia Limited (FPA) submitted that:

> The wide drafting of this item has led to a situation where, as license holder, a financial planner may potentially have greater responsibilities in providing designated services (other than those financial services covered by an AFS Licence) than an intermediary who provides similar services but is not licensed…this raises issues in terms of competitive neutrality and does not appear justified in terms of a policy outcome…Item 54 should explicitly state that it relates only to the financial services that the Licensee carries out under its licence.[75]

3.78 In addition the FPA told the committee that AFSL holders were concerned that the Bill does not afford them sufficient protection from prosecution in the event of their agents' disregard or wilful neglect of AML/CTF obligations.[76]

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71 *Submission 28,* p.3. Note that only designated services are covered by the ambit of the designated business group exception.

72 *Submission 28,* p.1.

73 *Committee Hansard*, 14 November 2006, pp 11–12.

74 *Submission 13*, p. 2 and *Submission 39,* p. 1.

75 *Submission 39*, Attachment p.1. Also, see *Submission 3,* p.3 and *Submission 20,* p.5.

76 Also, see *Submission 20,* p.7.

> It remains unclear whether a well constructed and effectively implemented training and supervisory program would enable a Licensee to avail itself of s236.[77]

3.79 IFSA noted that item 54 arrangers are excluded from the requirement of having to provide a suspicious matter report and argued that this exclusion exposes the item 54 arranger to a number of adverse consequences.[78]

Department response

3.80 The Department has advised that:

> It is proposed that the Bill will be amended to delete subclause 42(6) so that AFSL holders will have suspicious matter reporting obligations for the period during which they provide designated services.[79]

77 *Submission 39,* Attachment p.1.

78 *Submission 20,* pp 4–5. For example, not being able to communicate the risk to the reporting entity providing the designated service on account of the tipping off provisions.

79 *Submission 30c,* p.2.