Office of the Victorian Privacy Commissioner

GPO Box 5057
Melbourne Victoria 3001
Australia
DX 210643 Melbourne

Level 11
10-16 Queen Street
Melbourne Victoria 3000
Australia

Telephone 1300 666 444
Facsimile 1300 666 445

www.privacy.vic.gov.au
enquiries@privacy.vic.gov.au

17 November 2006

Please Quote: /FW

Senator Marise Payne, Chair
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Senator,

**Inquiry into the Provisions of 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**

I refer to the letter dated 9 November 2006 from Ms Jackie Morris, Acting Secretary of the Senate Legal and Constitutional Affairs Committee, inviting me to comment on the above Bills.

This office welcomes the opportunity to provide comments. Unfortunately, the very limited period for consultation has made it impossible to review the Bills and associated documents in any detail. I have had a brief opportunity to scan some of the commentary the Committee received in relation to the exposure draft stage of the Bill, such as the submissions of the Office of the Australian Privacy Commissioner and the Australian Privacy Foundation.

I share the grave concerns already expressed by others. Many aspects of the Bills will significantly impact on the privacy of much of the population, for purposes that have little or nothing to do with money laundering or financing of terrorism.

**Potential for population-wide surveillance of the financial affairs of ordinary citizens**

There is a significant risk that the proposed measures will lead to pervasive monitoring of the financial affairs of ordinary citizens – not necessarily due to any suspicion that they are financiers of terrorism or money launderers, but simply by virtue of their engaging in what may be ordinary everyday transactions. For instance, the Bill is framed to allow the government to now, or in future by introducing regulations, oblige financial providers and other reporting entities to supply AUSTRAC with details about the financial affairs of:

- individuals who wire any amount of money overseas specified in regulations, however small (clause 45);

- anyone who purchases a stored value card (such as those used for making phone calls or travelling on public transport) which contains the value of $1000 or any other amount specified in regulations, however small (clause 6); and

- with the passing of regulations, any person who takes out a loan of $10,000 or more to purchase real or personal property – potentially applying to every person who takes out a mortgage to buy a home or a loan to purchase a car (clause 5, definition of "threshold transaction").

The potential to extend the Bill's reporting obligations to cover such a significant portion of the population should not occur by regulation. The scope of the measures should be set out in the legislation after due scrutiny and debate by Parliament, and be accompanied by safeguards that are proportionate to the measures that are to be enacted.

**Mandatory, secret reporting of suspected tax evasion and criminal activity**

The Bill's objects (in clause 3) are to combat money laundering and the financing of terrorism. Yet the reporting obligations go well beyond these aims by requiring financial providers and other reporting entities to report on the financial affairs of individuals whenever there is a "suspicious matter" (clause 41). Suspicious matters are defined to include transactions that the reporting entity is satisfied:

- may be relevant to the investigation or prosecution of a person for evasion or attempted evasion of Commonwealth, State or Territory taxation laws;
- may be relevant to the investigation or prosecution of a person for any Commonwealth, State or Territory offence regardless of the nature or seriousness of the offence, potentially extending to the investigation of traffic and other summary offences; or
- may be of assistance to the enforcement of Commonwealth, State or Territory crimes confiscation laws.

Reports of suspicious matters must be kept secret. It is an offence for a reporting entity to tell anyone outside of AUSTRAC that an obligation to report of a suspicious matter has arisen (clause 123). Individuals' financial affairs will therefore be included on the AUSTRAC database without their knowledge.

First of all, the banner of terrorism should not be used to introduce measures that are in fact aimed at reducing tax evasion, enabling child support and welfare agencies to carry out their functions, and facilitating police and other government agencies in investigating and prosecuting any criminal offence.

Second, 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 provisions of the various confiscations laws across Australia. Failure to comply with a reporting obligation in a timely way (3 business days) may result in the imposition of a civil penalty (clause 41(2)). This appears to be an impossible task for financial institutions and other reporting entities to comply with and may lead to an excessive collection and disclosure of information with the risk that the AUSTRAC database will be inundated with irrelevant and unnecessary information about individuals who should not be the subject of scrutiny. This constitutes an unreasonable intrusion into individuals' personal affairs.

**Use of AUSTRAC's database for purposes unrelated to terrorism or money laundering by, eg, child support and welfare agencies**

The information, once collated on the AUSTRAC database, will be used not just for counter-terrorism and anti-money laundering purposes, but may be accessed by a range of "designated agencies" for a variety of purposes (Division 4 of Part 11). Designated agencies may be granted access by AUSTRAC to information on the AUSTRAC database in order to perform any of the agencies' functions and powers (clauses 126 and 127). "Designated agencies" is widely defined and includes:

- Centrelink;
- the Child Support Agency; and
- any yet-to-be prescribed authority of or agency of a State or Territory.

It is first of all unclear why agencies such as Centrelink and the Child Support Agency should be given the ability to access such sensitive information as that which is recorded on the AUSTRAC database. If these agencies' existing powers to obtain information are inadequate, then that should be addressed in their respective laws, which also set out the applicable limits and accountability framework.

It is of some concern that access should be granted to agencies known to have problems with protecting their own databases from being inappropriately accessed by their own staff (see, for example, press reports such as "Eyeing Big Brother", *Canberra Times*, 26 August 2006, http://canberra.yourguide.com.au/detail.asp?story_id=505091&class=News%2D+Features).

The use of regulations to authorise other State or Territory authorities and agencies to seek access to the AUSTRAC database is also of concern. Specifying the intended users and purposes for which the information is accessed would improve transparency and enable Parliament to properly scrutinise and debate the appropriate scope and safeguards that should apply.

**Requiring potential State and Territory designated agencies to comply with the federal privacy principles is problematic**

Clause 126(3) empowers the AUSTRAC CEO to require designated agencies to agree to be bound by the federal privacy principles under the *Privacy Act 1988 (Cth).* This appears to be intended to apply to State and Territory agencies and authorities who fall outside of the federal privacy law. However, this provision is problematic for a number of reasons.

- It is not appropriate that obligations to protect personal information be left to the discretion of the AUSTRAC CEO. Rather, it would be more appropriate for Parliament to determine the appropriate safeguards that should apply.
- The Bill only provides that agencies comply with the federal Information Privacy Principles; it does not make these agencies subject to the complaints and compliance provisions of the privacy legislation. The obligation to comply with privacy principles without access to a complaints mechanism will mean the protection is effectively meaningless.
- It does not take into account existing State and Territory privacy laws, such as those applying in Victoria, New South Wales, the Northern Territory and Tasmania. Although the Bill allows other laws to operate concurrently (clause

240), it creates uncertainty about which principles will apply in a given context, and what rights of complaint arise where there is an interference with privacy. Consultation with the governments of relevant States and Territories is urged.

**Bulk disclosure of the electoral roll**

The Bill making consequential amendments will allow bulk release (under clauses 13ff) of the joint Commonwealth/State electoral roll to reporting entities (such as banks, insurers, superannuation funds, gambling services) for the purposes of customer identification. This information must then be retained by reporting entities for 7 years (under clause 113 of the main Bill), under threat of a civil penalty for earlier disposal.

This collection and retention is excessive and disproportionate, particularly where bulk release of the entire roll occurs irrespective of the number of customers whose identity is to be verified. Such a broad authority may undermine the limitations set out in the Victorian *Electoral Act 2002.*

**Review of the Bills and related instruments should be sooner, with greater accountability and transparency**

For the reasons outlined above and canvassed by other submitters, the government's proposals run the risk of not being seen as a legitimate, proportionate or effective response to the stated objectives of combating money laundering and the financing of terrorism.

Although there is provision for a review of the Bill, regulations and rules in 7 years' time, this should occur much sooner. Moreover, greater 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. The matters to be reviewed should include whether the legislation is effective in meeting its intended objectives of combating money laundering and the financing of terrorism, and should address the privacy impact of the broader uses of AUSTRAC information in terms of its actual use.

Many additional privacy concerns exist but are beyond the time and scope of these comments.

Yours sincerely,

HELEN VERSEY
Acting Privacy Commissioner