SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE
QUESTIONS ON NOTICE TO ATTORNEY-GENERAL'S DEPARTMENT

RESPONSE TO QUESTIONS ON NOTICE
BY SENATOR LUDWIG

[Second set of Questions for 22 November 2005]

Senator Ludwig asked the following questions:

1. In the Australian Bankers Association submission (No. 16) there is an attachment with a table of suggested changes. Can you provide a response to each of the suggested changes?

   Response Q1: Responses are set out in ***Attachment A***

2. The IFSA submission No. 20, p.2 states that life policies with cash back features may be caught by the definition of life policy in Clause 5. Is it the intention to capture life insurance polices with cash-back features?

   Response Q2:
   The policy objective is to capture life insurance products which have an investment component. If the life insurance policy with a cash back feature has a minimum surrender value and it is not excluded by paragraphs (b), (c) or (d) of the definition in clause 5, the product will be covered by the Bill

3. Also p.2 IFSA (No.20)
   Item 6, 7 in Table 1 Clause 6, is it intended that Fund Managers be caught by these items when investing in fixed interest securities and other debt instruments?

   Response Q3:
   If a fund manager subscribes to a debenture or buys a debt instrument, the fund manager would be making a loan to the issuer of the instrument, but the fund manager would be doing this as an "investment activity" and not in the course of carrying on a loans business, and so would not be caught. A business will only be caught if the person who made the loan (i.e. the fund manager) was in the business of carrying on a loans business.

4. Also p.3 IFSA (No.20)
   Item 35 in Table 1 Clause 6, what is their response to the suggestion that Item 35 has the unintended consequence of requiring funds managers who sell securities on an exchange to identify the person to whom they sell such securities?

   Response Q4:
   IFSA may have raised some valid points about the wording of item 35. The Government will consider this further and if necessary this scenario can be exempted via AML/CTF Rules made under paragraph (d) of Item 35.

5. (a) In relation to mortgage brokers and financial planners can the dept give a general explanation of how the legislation captures them and what requirements apply?

   (b) Will AUSTRAC consult with ASIC regarding whether brokers and planners and their employees are working under AFSL?

   Response Q5(a)

   Mortgage brokers will not be reporting entities under anti-money laundering and counter terrorism financing legislation. If a mortgage broker operates as a agent of a reporting entity it will be open for the reporting entity to authorise the agent to carry out applicable customer identification procedures on the reporting entity's behalf.

   Financial planners will not be reporting entities under the legislation unless they hold an Australian Financial Services Licence (AFSL). Holders of an AFSL will have limited AML/CTF obligations under the legislation when they make arrangements for a person to receive a designated service. The obligations for holders of an AFSL will be limited to initial identification and record keeping. It is proposed that the Bill will be amended to delete sub-clause 42(6) so that AFSL holders will have suspicious matter reporting obligations for the period during which they provide designated services.

   These measures were inserted at the request of industry to overcome potential problems which would otherwise arise in cases where an AFSL holder made arrangements for a person to purchase for example a superannuation package where the product issuer does not have face to face contact with the customer.

   Response Q5(b)
   AUSTRAC has already consulted with ASIC on the subject matter of the Senator's question. Further, AUSTRAC regularly consults with ASIC and will continue to do so in the future in the context of arrangements for information sharing and cooperation between the agencies. If it is necessary for AUSTRAC to consult ASIC to obtain information in the case of conducting an audit it will be open to AUSTRAC to do so.

6. Australian Mobile Telecommunications Association requests that the following services be exempt from the Bill:
   - debit cards issued by telecommunications companies;
   - loans made by telecommunications companies in connection with premium content and information;
   - transfer of money between pre-paid mobile accounts;
   - calling cards; and
   - games, trade promotion and marketing systems via mobile phone.

   Have you considered these telecommunication services which are caught under Clause 6 and is an exemption appropriate?

   Response Q6:

If a telecommunications company issues a debit card which falls within the definition of a debit card and the service provided by the telecommunications company enables the holder of an account to debit the account, there is no reason for exempting a telecommunications company which provides that debit card while requiring other providers of that service to comply with the requirements of the Bill.
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.
Loans are covered under Item 6 of Table 1 in clause 6 if made in the course of carrying on a loans business. A possible telecommunication service would not be carrying on a loans business.
The transfer of money between pre-paid mobile accounts does not fall within the definition of a remittance arrangement in the Bill.
We assume "calling cards" is a reference to mobile phone cards. Items 21, 22, 23 and 24 in table 1 of Clause 6 of the Bill cover stored value cards. Items 21 and 22 apply where part of the value of the card may be withdrawn in cash and items 23 and 24 cover cards where the value cannot be withdrawn in cash. Phone cards would be covered under items 21 and 22 if the stored value exceeds $1,000. Phone cards would be covered under items 23 and 24 if the stored value exceeds $5,000. The Department is not aware of any phone cards currently available that exceeds these values.
If games, trade promotions and marketing systems via mobile phones fell within the definitions of gambling services in Table 3 they should be subject to the requirements of the Bill. The provisions in Table 3 will be reviewed to ensure they do not capture the competitions and promotions run by many businesses which include an element of skill such as identifying a key promotional word, with low value prizes of goods and/or services.

7. APF Submission No. 9, p.8
   How do you respond to the APF's concerns at page 8 regarding the use of information held on the Electoral Roll?

   Response Q7:
   Item 16 of the Anti-Money Laundering and Counter-Terrorism Financing (Transitional Provisions and Consequential Amendments) Bill 2006 makes it clear that the "only permitted purpose" for access by reporting entities to the Electoral Roll "is for the person or the organisation to carry out an applicable customer identification procedure under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*".

   All reporting entities will be subject to the *Privacy Act1988.* The use of any information received from the Electoral Roll will be governed by the provisions of that Act.

8. Can you provide a chart of the threshold amounts which apply to particular designated services and the rationale for the differences in these thresholds?

   Response Q8:

Obligations relating to some designated services will only apply where the value of the services is above a given threshold as set out in the tables in clause 6 of the Bill. These thresholds are contained in the tables at clause 6 of the Bill. The following table lists those designated services to which thresholds apply:

Designated Service	**Threshold contained in**	**Threshold**
Issuing a store value card (where cash may be withdrawn from the card)	Table 1 – Item 21	No obligations below $1,000
Increasing the value of a stored value card (where cash may be withdrawn from the card)	Table 1 – Item 22	No obligations below $1,000
Issuing a store value card (where cash may not be withdrawn from the card)	Table 1 – Item 23	No obligations below $5,000
Increasing the value of a stored value card (where cash may not be withdrawn from the card)	Table 1 – Item 24	No obligations below $5,000
Issuing a money order, postal order or similar order	Table 1 – Item 27	No obligations below $1,000
Redeeming a money order, postal order or similar order	Table 1 – Item 28	No obligations below $1,000

The different thresholds reflect an assessment of the different risks associated with the product. For example, stored value cards from which cash may be withdrawn are at a greater risk of abuse for the purposes of money laundering or terrorism financing, than stored value cards from which cash cannot be withdrawn.

9. Part 11 Div 4 – Access to AUSTRAC information
(a)What is the rationale for permitting agencies defined in Section 5 to have access to AUSTRAC's data, in particular the Child Support Agency?

Response Q9(a)
The Child Support Agency was provided access to AUSTRAC information under the *Financial Transaction Reports Act 1988* to facilitate investigation of criminal activity associated with that agency's responsibilities.

The list of designated agencies under the AML/CTF Bill 2006 which has access to "AUSTRAC information" picks up all government agencies which have access to "FTR information" under the *Financial Transaction Reports Act 1988.*

Five new government agencies will be added under the AML/CTF Bill. These are:

- The Department of Immigration and Multicultural Affairs;
- The Australian Prudential Regulation Authority;

- The Division of Treasury responsible for administration of the *Foreign Acquisitions and Takeovers Act 1975;*
- The Inspector General of Intelligence and Security;
- The Australian Competition and Consumer Commission; and
- The Australian Commission for Law Enforcement Integrity.

The reasons why these new agencies have been added are as follows:

- The Department of Immigration and Multicultural Affairs requires access for criminal activity associated with the responsibilities of that Department.
- FATF Recommendation 23 requires that prudential regulation for banks should apply in a similar manner for AML/CTF purposes. For this reason APRA needs access to AUSTRAC information
- The Division of Treasury responsible for administration of the *Foreign Acquisitions and Takeovers Act 1975* requires access to assess foreign investment review decisions.
- The Australian Competition and Consumer Commission requires access for its enforcement actions against criminal or quasi criminal conduct including Internet activity, where the identity and the locus of parties are hidden, as well as serious cartel activity, where it has been successful in enforcing multi-million dollar fines.
- The Inspector General of Intelligence and Security supervises the Australian Security Intelligence Organisation which has access to "FTR information" under the *Financial Transactions Reports Act 1988.* The Inspector General of Intelligence and Security requires access to AUSTRAC information to carry out this supervisory role.
- The Australian Commission for Law Enforcement Integrity needs access to AUSTRAC information to carry out its functions of investigating corruption.

9(b) How is it intended to manage the risk that these agencies will use this data for subsidiary purposes?

Response Q9(b)

Entrusted agency officials will be able to get access to AUSTRAC information under Division 4 of Part 11 for any lawful purpose of that agency.
It is a criminal offence for an *entrusted agency official* to disclose AUSTRAC information unless the disclosure is in connection with the performance of the official's duties, or the disclosure is authorised by, or in connection with communicating AUSTRAC information for official purposes (clause 127(2)).

9(c) How long will agencies be permitted to maintain data they access?

Response 9(c)

The Bill does not set any time limit. Agency retention of AUSTRAC information would be governed by any relevant Agency specific laws or other requirements to maintain archives and destroy records.

10. Does the Department consider that the example given by SDIA at p.2 of Submission No. 13 is accurate?

Response Q10

The Financial Planner in the SDIA example would not have to file a report under Part 5 of the Bill. Part 5 places reporting obligations on financial institutions that accept or receive funds transfer instructions.

11. In proposed s76 is there an obligation to register persons as remittance providers even if they had for example a history of money laundering?

Response Q11

Yes. The AUSTRAC CEO does not have a discretion to refuse to register a person who applies using the approved form to be registered. It is important that that the registration system capture all providers of remittance services particularly those that are vulnerable to or have a history of money laundering.

12. Has the government considered implementing a licensing scheme similar to the UK model instead of a registration scheme?

Response Q12

Special Recommendation VI requires that each country should take measures to ensure that remittance dealers should be licensed or registered. Part 6 of the AML/CTF Bill establishes a system for registration. There is no current proposal to implement a licensing regime.

Attachment A

Response to Q1 – Responses to each of the issues raised by the Australian Bankers Association in the Table ***Attachment A1***

1. Commence to provide – Clause 5
   Response: This issue can be addressed by AML/CTF Rules under clause 33. Draft Rules have been discussed with the Australian Bankers Association. Clauses 30, 33 and 34 do not commence until 12 months after Royal Assent. AML/CTF Rules will be finalised by 31 March 2007.

2. Definition, scope and operation of "designated business group" – Clause 5
   The Australian Bankers Association has been advised that AML/CTF Rules under paragraph (b) of the definition of "designated business group" (which specifies that members of the designated business group must make an election to be a member of the designated business group in accordance with the AML/CTF Rules) and paragraph (d) (which specifies that each member of the designated business group must satisfy such conditions as are specified in the AML/CTF Rules) have been drafted and will be finalised by 31 March 2007. The Australian Bankers Association has also been advised that no AML/CTF Rules are currently contemplated under paragraph (e) of the definition of "designated business group" which specifies that the designated business group must not be of a kind specified as ineligible under the AML/CTF Rules.

3. Definition of "allowing a transaction" – Clause 6 Table 1 items 3,5,7 and 11
   The Australian Bankers Association has stated that this issue will be less significant if the concept of "ceasing to provide a designated service" is changed. The phrase "ceasing to provide" has been deleted from clauses 29 and 31 as requested by the Australian Bankers Association.

4. Designated services – Clause 6 Table 4
   Subclause 6(7) is designed to provide a means to amend an item in a table in clause 6 in circumstances where new products of a similar kind to the existing designated services are created or structured in such a way that they would not be covered by existing items in the tables or where an industry or sector identifies and attempts to exploit a loophole in the table. It is not necessary to publish a formal consultation process for the making of regulations. The making of Regulations is subject to parliamentary scrutiny. Regulations will be disallowable instruments and are subject to the consultation requirements of under the *Legislative Instruments Act 2003.* The Government has clearly stated its intention to continue effective consultation arrangements with industry.

5. Making arrangements for a person to receive a designated service – Clause 6 Table 1 Item 54

   Item 54 of Table 1 in clause 6 of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 makes Australian Financial Service Licence (AFSL) holders who make arrangements for the provision of designated services reporting entities for limited purposes of customer identification and

suspicious matter reporting. AFSL holders will be reporting entities, rather than their authorised representatives, though the authorised representative may carry out AML/CTF obligations as agent for an AFSL holder. This is consistent with the Corporations Act framework governing AFSL holders and their authorised representatives. As the reporting entity, the AFSL holder will remain responsible for the conduct of its authorised representatives which is consistent with the framework governing AFSL holders and authorised representatives under the *Corporations Act*. No obligations will be triggered under the AML/CTF Bill if a customer merely seeks financial advice from an AFSL holder.

6. Signatories are defined as customers – Clause 6 Various items eg Item 2
   The FATF Recommendations require that any person purporting to act on behalf of the customer is identified. Cash dealers under the *Financial Transactions Reports Act 1988* are currently required to obtain account information from signatories. As signatories can operate an account to the same extent as the "customer" the risks associated with the identity of the signature are the same as those for the customer.

7. Thresholds for walk in customers – Clause 6 Various items.
   The Australian Bankers Association has been advised that if industry puts forward a case demonstrating, on the basis of risk of money laundering and terrorism financing, that thresholds are appropriate, this will be considered. The Australian Bankers Association has been advised that arguments for a threshold for travellers' cheques are currently under consideration.

8. Control test – Clause 11
   It is not clear from any discussions with the Australian Bankers Association on this issue what unintended consequences might flow as a result of the use of the control test definitions from the Social Security Act. The parliamentary draftsperson has advised that the Social Security Act test is the appropriate test. The Government will consider any information provided on possible unintended consequences.

9. Agency – Clause 37
   Sub-clause 37 (3) is expressed to be "for the avoidance of doubt" as requested by the Australian Bankers Association. This clause will not commence until 12 months after Royal Assent.

10. Use of another reporting entity's applicable customer identification procedure – Clause 38
    Draft AML/CTF Rules for clause 38 have been shown to and discussed with the Australian Bankers Association, the Financial Planners Association and the Investment and Financial Services Association as well as representatives from gaming bodies. The Attorney-General's Department and AUSTRAC are considering comments made on the draft. This clause will not commence until 12 months after Royal Assent. The Rules will be finalised by 31 March 2007.

11. Reporting suspicious matters – Clause 41(1)(f)

This clause will not commence until 24 months after Royal Assent. Sub-paragraph is drafted in almost the same terms as the equivalent provision under the *Financial Transactions Reports Act 1988.* The majority of the members of the Australian Bankers Association are cash dealers under the *Financial Transactions Reports Act 1988* and are familiar with the concept and systems for suspicious transaction reporting under the *Financial Transactions Reports Act 1988.*

12. Electronic funds transfer instructions – Part 5
    These comments relate to amendments to the *Financial Transactions Reports Act 1988* which were made in December 2005 and which will come into effect on 14 December 2006. The Australian Bankers Association has been extensively consulted on this provision and affected industry sectors were given 12 months to prepare for commencement.

13. Obtaining customer information for electronic funds transfers – Day "1" compliance – Clauses 64 – 71
    The provisions in Part 5 almost exactly match amendments to the *Financial Transactions Reports Act 1988* which were made in December 2005 and which will come into effect on 14 December 2006. The Australian Bankers Association has been extensively consulted on this provision and affected industry sectors were given 12 months to prepare for commencement.

14. Credit and debit cards, cash advances and originator information obligations – Clause 67(2)
    Paragraph 10(a) of the Interpretive Note to Special Recommendation VII of the FATF Recommendations states that "*when credit or debit cards are used as a payment system to effect a money transfer, they are covered by SR VII, and the necessary information should be included in the message*".

15. Implementation at Offshore Permanent Establishments (OPEs) – Part 7 and others
    Reporting entities generally do not have to comply with AML/CTF obligations in relation to their offshore permanent establishments. The only requirement is that they must include these parts of their business operations in their AML/CTF programs as they are a legitimate consideration for any assessment of the risk of money laundering and terrorism financing. Part 7 of the AML/CTF Bill does not commence until 12 months after Royal Assent.

16. Countermeasures – Part 9, Clause 102
    Reporting entities will only have to "operationalise" under this Part if regulations are prescribed designating specified transactions, parties or foreign countries. No such regulations are currently contemplated.

17. Privacy Act – Clause 105, Clause 123(9)
    The AML/CTF Bill is consistent with the *Privacy Act 1988*.

18. Record keeping (Photocopying) – Clause 111
    Clause 111 does not come into practical effect until Part 2 of the Bill commences which is 12 months after Royal Assent. The clause does not

require a reporting entity to make photocopies of all customer identification documents.

19. Keeping records of customer information in electronic funds transfer instructions received from overseas financial institutions – Clause 115.
    It is not clear why this recordkeeping obligation "would require a large build" as the records will be electronic and will be all in existence. The members of the ABA will not have to create new records. The Government will consider any further information about the nature of this burden and any reasonable suggestion for amelioration which still enable the obligation to be able to identify the originator and beneficiary of an electronic funds transaction to be identified.

20. Risk Management Audit – Clause 161
    The proposed AML/CTF regulatory regime is an entirely risk based system. The Government must be able to have confidence that reporting entities are properly identifying, assessing and investigating risk. Requiring an external audit of the reporting entity's risk management systems is an appropriate regulatory tool.

21. Risk assessment – Clause 165
    This clause is necessary if the Government is to have confidence in the effectiveness of the risk based approach to regulation in detecting and deterring money laundering and terrorism financing.

22. AUSTRAC Rules – Clause 229
    Officers from the Attorney-General's Department and AUSTRAC met with Mr Tony Burke from the Australian Bankers Association on 13 November 2006. Mr Burke was invited to nominate any AML/CTF Rule that the ABA considered had to be made immediately after the AML/CTF legislative package received Royal Assent. The outcome of the meeting is set out in the attached table.

23. Defence of taking reasonable precautions and exercising due diligence to avoid a contravention – Clause 236
    The defence only applies to offences against the regulations as all criminal offences for regulatory conduct have been removed from the Act. The defence is not an appropriate defence for any of the remaining offences in the Bill.