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

RESPONSE TO QUESTIONS ON NOTICE
BY SENATOR LUDWIG

[Third set of Questions: 22 November 2005]

Senator Ludwig asked the following questions:

1. What is the Department's response to the suggestion that AUSTRAC's decision making powers under the Act (for example under s161-s165) should be subject to review by the AAT?

   Response Q1:

   None of the decisions made by the AUSTRAC Chief Executive Officer (CEO) are currently subject to review by the Administrative Appeals Tribunal (AAT). The AML/CTF Bill will be amended to allow a reporting entity to apply for review by the AAT of a decision by the AUSTRAC CEO to issue a remedial direction under sub-clause 191(2) of the AML/CTF Bill. It is not appropriate for other decisions, including those under clauses 161 to 165 to be subject to AAT review because these provisions involve the exercise of audit powers which do not give rise to legal obligations other than an obligation to cooperate with AUSTRAC.

2. What is the Department's response to the suggestion that the Act should include a definition of politically exposed person?

   Response Q2:
   The term "politically exposed persons" is not defined in the Bill as it is a situational definition which can best be implemented through understanding the conditions which make a person a risk because of their past or current access to or association with public office.
   The key issue in whether or not a person might fall into this category is the source of their funds. This is a legitimate inquiry for any reporting entity to make of their customers. Clause 91 of the Bill also provides a mechanism under which AML/CTF Rules can be made enabling a reporting entity to require a customer to disclose information about the source of funds and rely on that disclosure.

3. In Item 8 of Table 1- is factoring 'with or without recourse' included?

   Response Q3:
   Factoring has its usual meaning. Once a person has factored a receivable they would usually have no recourse against the person whose receivable has been factored.

4. Does the Bill capture the electricity derivatives market?

Response Q4:
Yes.

5. INFOSYS have lodged a submission No. 7 regarding the tipping off provisions in clause 123. What is the Departments view on the proposed amendments at p.5 of this submission?

   Response Q5:
   FATF Recommendation 14 does not require the prohibition of disclosure of the suspicion or the prohibition of disclosure of underlying business records. FATF Recommendation 14 prohibits the disclosure of the fact that a suspicious transaction report or related information has been given to the Financial Intelligence Unit (FIU). Clause 123 of the AML/CTF Bill is broader than the FATF requirement.

   The *Financial Transaction Reports Act 1988* (FTR Act) prohibits the disclosure of the relevant suspicion and supporting information. Subsections 16(5A) and 16(5AA) of the FTR Act prohibit a cash dealer from disclosing the fact that he or she has formed a suspicion or that he or she has communicated further information to certain parties. Clause 123 of the AML/CTF Bill carries over the existing prohibition in the FTR Act. The Government has consistently maintained that implementation of the FATF Recommendations would not result in any lowering of Australia's existing standards.

   If the suspicion is formed by the reporting entity and is disclosed to the person about whom the suspicion is formed and a suspicious matter report is made to the Financial Intelligence Unit, the prohibition on the disclosure of the making of the report is rendered useless. The purpose of the prohibition is to prevent a person from being alerted to the fact that a suspicion has been formed about him or her, which would provide them with time to take evasive action which impedes subsequent investigation and prosecution of criminal activity.

6. In proposed ss62 (2) what is meant by leaves? Should this term be departs?

   Response Q6:
   "leave" has the same meaning as "depart".

7. Has the Department given consideration to how the interaction between legal professional privilege and the tipping off provision (c123) will be managed? In particular has the Department considered the UK Law Society advice on suspicious matter reporting?

   Response Q7:
   Clause 242 of the Bill states that "this Act does not affect the law relating to legal professional privilege". 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.

The website of the UK Law Society provides advice on systems for suspicious matter reporting. The UK system for suspicious reporting is different to that contemplated under the AML/CTF Bill. The definition of money laundering in the UK potentially includes lawyers who "enter into or become concerned with an arrangement" which they know or suspect facilitates the acquisition, retention, use or control of criminal property by or on behalf of another person ie if they formed a suspicion of money laundering (see section 328 of the *Proceeds of Crimes Act 2002* (UK)). A defence to this is that of "authorised disclosure" ie that the lawyer had filed a report with the Regulator. As a consequence many lawyers filed suspicious reports. Covered entities were prohibited from continuing to act for the customer until clearance had been received from the Regulator. This system was being reviewed in the UK following litigation (*Bowman v Fels*). The UK is currently undergoing a mutual evaluation by the FATF.