FEDERAL COURT OF AUSTRALIA

Chief Executive Officer of Australian Transaction Reports and Analysis Centre v TAB Limited [2016] FCA 122

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| File number: | NSD 852 of 2015 |
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| Judge: | **PERRAM J** |
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| Date of judgment: | 19 February 2016 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – notice to produce – application to set aside |
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| Legislation: | *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth)  *Crimes Act 1914* (Cth) |
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| Cases cited: | *Seven Network Ltd v News Ltd (No 11)* [2006] FCA 174 |
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| Date of hearing: | 12 February 2016 |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Economic Regulator, Competition and Access |
|  |  |
| Category: | Catchwords |
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| Number of paragraphs: | 61 |
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| Counsel for the Applicant: | Mr S White SC, Mr D Tynan and Ms A Avery-Williams |
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| Solicitor for the Applicant: | Australian Government Solicitor |
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| Counsel for the Respondent: | Ms R C A Higgins and Mr P R Gaffney |
|  |  |
| Solicitor for the Respondent: | Herbert Smith Freehills |

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| **Table of Corrections** |  |
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| 26 February 2016 | In accordance with judgment in this matter dated 26 February 2016 (Chief Executive Officer of Australian Transaction Reports and Analysis Centre v TAB Limited (No 2) [2016] FCA 148), the second, third and fourth sentences in paragraph 55 have been deleted. |
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| 26 February 2016 | In accordance with judgment in this matter dated 26 February 2016 (Chief Executive Officer of Australian Transaction Reports and Analysis Centre v TAB Limited (No 2) [2016] FCA 148), paragraph 62 has been deleted. |
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| 26 February 2016 | The paragraph number has been amended (to 61) on the cover sheet and certification to reflect the above change. |

ORDERS

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|  | | NSD 852 of 2015 |
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| BETWEEN: | CHIEF EXECUTIVE OFFICER OF AUSTRALIAN TRANSACTION REPORTS AND ANALYSIS CENTRE  Applicant | |
| AND: | TAB LIMITED  First Respondent | |

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| JUDGE: | PERRAM J |
| DATE OF ORDER: | 15 FEBRUARY 2016 |

THE COURT ORDERS THAT:

1. Dismiss the respondents’ application insofar as it relates to paragraphs 9 to 13, 21 to 23, 29, 32, 34, 35 and 37 of the notice to produce.
2. The respondents are to prioritise their responses to paragraphs 9 and 29 of the notice to produce and, in any event, to produce the documents called for under those paragraphs no later than Monday 14 March 2016.
3. The material produced by the respondents under order 2 is to be provided as it becomes available.
4. In relation to paragraphs 13, 21 to 23, 32, 34, 35 and 37 these are to be produced as they become available after the completion of the production under orders 2 and 3.
5. The paragraphs of the notice to produce not the subject of this decision are to be stood over for further directions on Tuesday 17 May 2016 for further consideration in light of the respondents' evidence.
6. The time for the applicant to file and serve its evidence in chief is extended to Friday 18 March 2016.
7. Costs reserved.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

## 1. Introduction

1. By an application filed on Friday 5 February 2016 the respondents (collectively, ‘the TAB’) seek orders setting aside paragraphs 1 to 13, 15 to 24 and 26 to 44 of a notice to produce issued to it by the applicant (‘Austrac’) on 11 December 2015. As will be seen, part of the TAB’s present argument is that it would be premature to require it to produce the material where it has not yet delivered its evidence. In light of that argument Austrac was content, by the time the application was called on for hearing on Friday 12 February 2016, to narrow its present call to paragraphs 9 to 13, 21 to 23, 29, 32, 34, 35 and 37 of the notice with the balance of the paragraphs to be stood over to a time after the TAB had delivered its evidence. I do not, in that circumstance, propose to deal other than with the paragraphs upon which Austrac now calls. I will stand paragraphs 1 to 8, 14 to 20, 24 to 28, 30 to 31, 33, 36 and 38 to 44 to Tuesday 17 May 2016 at 9.30am for directions only.
2. The application was supported by two affidavits of Ms Warner, the solicitor for the TAB, sworn respectively on 4 February 2016 and 12 February 2016 both of which were read without objection. For Austrac, an affidavit by its solicitor, Ms Marsic, affirmed on 11 February 2016, was read apart from paragraph 17. In relation to that paragraph, it was agreed as a fact between the parties that the TAB has spent a large amount of money in defending the current proceedings to date.

## 2. Background

1. Austrac is responsible for the administration of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (‘the Act’). The objects of the Act include, by s 3, the fulfilment of Australia’s international obligations to combat financing of terrorism and money laundering. The key concept in the Act is that of a ‘designated service’, which is defined in a most exhaustive way in s 6. A person who provides a ‘designated service’ is a ‘reporting entity’ (s 5). The Act imposes a large range of obligations upon reporting entities.
2. For present purposes, it is convenient to know that the TAB is a ‘reporting entity’ because it provides gambling services and such services fall within the very extensive definition of ‘designated services’ in s 6.
3. The relevant obligations that are imposed on the TAB are, for the purposes of this litigation, those contained in Part 2 (which require a reporting entity to carry out procedures to identify the clients to whom they supply services) and those contained in Part 7 (which require a reporting entity both to have, and also to comply with, an anti-money laundering and counter-terrorism financing program).
4. Since at least 2012, Austrac appears to have been assessing the TAB’s compliance with its obligations under the Act. On 21 July 2015, Austrac commenced these proceedings. Its statement of claim is 215 pages long and includes 1615 paragraphs of allegations. In addition to suing TAB Limited itself, two other related entities have been sued; these are Tabcorp Holdings Ltd and Tabcorp Wagering (Vic) Pty Ltd. Austrac seeks declarations that these entities have between them contravened ss 32(1), 41(2)(a), 51B(1)(a) and 81(1) of the Act. For the purposes of the present application, only ss 32(1), 41(2)(a) and 81(1) are relevant. Austrac also seeks the imposition of a civil penalty under s 175(1) of the Act. The maximum penalty under s 175(4) is 100,000 penalty units for a body corporate. This, of course, relates to each contravention. A penalty unit is defined in s 4AA of the *Crimes Act 1914* (Cth) to mean $180. The maximum penalty for each contravention is, therefore, $18 million. Given the very large number of contraventions that Austrac alleges that the TAB has committed, it is clear that the proceedings carry with them significant economic risk to the TAB.
5. The gist of Austrac’s case, at least so far as disclosed on the present application, is, first, that the TAB has failed, in a number of instances, to have complied with its obligations in relation to the obtaining of customer identification information contrary to Part 2; and, secondly, that it does not have in place (or perhaps enforce - there is some controversy about this) an adequate anti-money laundering and counter-terrorism financing program as required by Part 7 (the interests of brevity will be best served if such a program is hereafter referred to only as an ‘AMLCTF Program’). Obviously, this is denied by the TAB.
6. Some of the TAB’s submissions turn on practical issues relating to the trial process and the timing of the notice to produce in relation to those issues. It is, therefore, necessary to make some brief observations about those issues. As I have mentioned already, the proceedings were filed on 21 July 2015. They were given a first return date of 11 August 2015. However, on 5 August 2015 the parties agreed that the first directions hearing should be adjourned until 25 August 2015 and an order, by consent, was made on that day having that effect. At the first return date orders were made, inter alia, for the filing of the TAB’s defence and the holding of a conference between the parties as to the future conduct of the matter. At the same time, I fixed the case for an estimated 4 week trial commencing on 5 September 2016. The matter was stood over for further directions on 17 November 2015. As events transpired, a defence was filed on 13 October 2015 and a reply on 27 November 2015. The defence was subsequently amended on 7 January 2016.
7. A dispute then arose between the parties as to whether the issue of the liability of the TAB, if any, for the alleged contraventions should be tried before the consideration of any question of penalty. The TAB initially resisted the separation of the issues in this way but ultimately I determined on 18 November 2015 that such a separation was appropriate in a case such as the present. I directed, at the same time, that Austrac’s lay and expert evidence as to liability be filed and served by 22 February 2016. No order was made as to the provision of the TAB’s evidence.
8. With some minor qualifications, that is more or less where the parties presently find themselves.

## 3. Austrac’s perspective on the notice to produce

1. Perhaps unsurprisingly, Austrac does not propose to lead much in the way of lay evidence although I was informed that it was proposing to call expert evidence. Senior Counsel for Austrac, Mr Simon White SC (who appeared with Mr Daniel Tynan and Ms Amelia Avery-Williams) accepted during argument that only a small part of the documents which were sought under the notice were relevant to evidence that Austrac was due to deliver on 22 February 2016. The rest of the material was such that it would be tendered and there was accordingly no need for the TAB to produce the material with any unusual expedition (other than in the case of the documents which were relevant to Austrac’s expert witness).
2. At a general level, Mr White submitted that the notice to produce was designed having regard to the TAB’s defence and, indeed, frequently enough it was couched in language which explicitly invoked that defence. I took from this that at a general, or strategic, level, the notice was in large measure designed to obtain evidence relating to the TAB’s various defences.

## 4. The TAB’s perspective on the notice to produce

1. The objections of the TAB were of a detailed nature but largely fell into four categories. First, it was said that the notice was premature in large part. The TAB was going to have to go into evidence and its affidavits would inevitably touch upon, or at least traverse, much of the same material which was, of necessity, going to feature in its evidence. There was a real risk, therefore, of the production of the material sought transpiring at the end of day to have been unnecessary and there was the concomitant risk that work would be done twice which should only be done once. Secondly, it was submitted that much of the material which was sought was irrelevant to any extant issue in the proceedings. In large part this was, as Ms Higgins of counsel persuasively developed the argument, because the TAB had admitted many of Austrac’s allegations with the result that there was, in many cases, no live issue between the parties to which the eventual fruits of the notice could be seen as relevant. Thirdly, it was submitted that the notice was oppressive, and functionally equivalent to discovery. It was pointed out that the notice was very large and that complying with it would require a considerable deployment of resources which would not only be expensive, but would also necessarily drain litigation resources away from other theatres of operation. Lastly, it was submitted that another likely consequence would be the eventual delay in the provision of the parties’ evidence. With a hearing only 7 months away this obviously carried with it a risk, perhaps not large at this stage but certainly nascent, that the trial dates could be imperilled.
2. The relevance arguments must be addressed by reference to each paragraph of the notice to produce. I return to that below. However, the arguments about oppression, delay and prematurity proceeded by reference, in effect, to all of the categories. It is useful to address those arguments at the outset.

## 5. Prematurity

1. The TAB has not yet been directed to put on its evidence but it may safely be assumed that such a direction will shortly be made. Nevertheless, even at this relatively early stage it was Ms Warner’s evidence on the application that the factual scope of the proceedings was not only narrow but narrowing. Most helpfully, Ms Warner had gone through the pleadings and identified at a fairly high level of abstraction what she believed the issues were. They were:
2. the Credit Betting Allegations (it being contrary to the Act to provide a credit betting facility);
3. the NRL Betting Incident Allegation;
4. the Suspected Credit Card Fraud Allegations;
5. the Program Allegations;
6. the Online ACIP Allegations; and
7. the Retail ACIP Allegations.
8. Associated with each of those sets of allegations was an independent issue known as the S 236 Defence issue. In short compass, s 236 will provide the TAB with a defence to a claim for a civil penalty in respect of a contravention if it proves that it ‘took reasonable precautions, and exercised due diligence, to avoid the contravention’.
9. Ms Warner’s evidence was that there was good reason to think that the issues surrounding the NRL Betting Incident Allegation might be substantially narrowed in the near future. Furthermore, the effect of s 236 was to impose upon the TAB an obligation to prove that it took reasonable precautions and exercised due diligence in relation to each of the categories (a) to (f). To discharge that obligation it was going to be necessary for it to go into evidence to provide much of the background material to the nature of the allegations. That being so, there was a high degree of likelihood that much that was presently sought in the notice would eventually be produced when the TAB put on its evidence.
10. Dr Higgins, in her submissions, developed this somewhat further. She submitted that a more sensible course than requiring production now would be to wait and see just how much was going to be needed at the end of the day. There is force in this submission but there are countervailing considerations as well. One which concerns me arises from the arguments which the TAB advanced in relation to the difficulties it will have in garnering the material. Part of Ms Warner’s evidence was to the effect that it would cost around $100,000 and take around 15-19 weeks to respond to the notice. Given the large amounts of money being expended on this litigation, the $100,000 figure is perhaps not as alarming as it first appears. What is alarming is the 15-19 week estimate, that is to say, around the 4 to 5 months it will take to respond. Although the time for service of the TAB’s evidence has not yet been set, it would seem to me to be unlikely that it would be served much before the middle of May. If that be so – and I think there is a real risk that it is – this would mean that the TAB would not begin the process of complying with the notice until then and, on Ms Warner’s evidence, would not conclude it until the middle, or even the end, of the trial. Of course, if Ms Warner is correct in her view that Austrac may find itself satisfied with the evidence served by the TAB, then this problem may well be minor. However, I regard there as being a reasonable risk, with respect, that Ms Warner’s hopes will prove to be disappointed, that Austrac will not be so satisfied and that a large quantity of documentation will be produced leading up to and possibly during the trial.
11. Against that it may be said that there is no reason why the TAB could not provide the documents it produces in tranches once it delivers its evidence. Such a course would reduce the risk of the production of a large quantity of material on the eve of the trial.
12. Ultimately, I have come to the view that the TAB should start this work now rather than wait until May. It is clear that it will be needing to cover much of this material for the purposes of its various s 236 defences so there would appear to me to be savings in taking that course in terms of only doing the process once. Combined with the risk to the hearing dates posed by not requiring the process to be started until around May, I do not accept that the notice should be defeated by reason of prematurity only. An additional reason to start the work now is the fact that in a timetable with a fixed hearing date at its end, it is generally better to get work done early.
13. I reject the arguments based on prematurity.

## 6. Oppression

1. Ms Warner gave detailed evidence about the extent of the steps which will need to be taken in order to comply with the notice. The email boxes of 34 custodians will need to be restored for a period of around 5 years, their contents interrogated in various ways and the results assayed. This will cost around $100,000 and, with the review work, take the 4 to 5 months to which I have already referred.
2. Ms Warner did not give evidence about the amount of work which the TAB would need to do in order to prepare its evidence on the issue of its s 236 defences. But she did give evidence that the service of the TAB’s evidence ‘may obviate the need to produce much of the material sought by the Notice to Produce’. My impression is that this must be because of an overlap between what the TAB intends to prove on its s 236 defence material and what Austrac seeks under its notice. If that be so – and it was not suggested that it was not – this tends to suggest that the notice may merely require the TAB to do a little more thoroughly what it was already proposing to do to make good its own defences. For that reason, I do not accept, subject to the other issues, that the fact that these inquiries will be extensive necessarily amounts to oppression.
3. An additional and independent reason for reaching the same conclusion is that I do not accept, given the scale of this litigation, that the $100,000 put forward by Ms Warner amounts to much more than a drop in the ocean in the context of the amounts of money being spent by the TAB; that is to say, one ought not accept that great expense in litigation of this kind is necessarily positively correlated with the imposition of prejudicial burden.
4. For completeness, it should be noted that the TAB also objected to the notice because of its use of the wording in the covering paragraph of ‘evidence or record’. The objection was not that this was a disguised version of discovery or inappropriate, in principle, for use in a notice to produce. Rather, the objection was that the words were sufficiently broad to encompass material which might provide secondary evidence of the matters sought. So, for example, where in paragraph 21 board minutes were sought, the effect of the opening words was said to mean that not only would the board minutes themselves be liable to be produced, but also any other documents from which their content might be deduced, such as drafts, emails to which they were attached and so on.
5. If the words ‘evidence or record’ were that broad in their ordinary connotation then I would incline to the view that this argument was of substance and real prejudice, otherwise unwarranted by forensic utility, demonstrated. That, however, is not how I read the notice. It is, I think, tolerably clear that it seeks direct evidence of the matters enumerated in its various paragraphs, rather than secondary or indirect evidence of those matters. A parallel reason for arriving at the same conclusion arises from the word ‘record’ itself, which is not apt, in its natural meaning, to fit comfortably alongside a reading of ‘evidence’ that extends to secondary evidence. On the basis of that reading of the notice, I reject the challenge.

## 7. Delay in the timetable

1. Ms Warner gave some detailed evidence about the knock on effect that delay in Austrac’s evidence would have on the timetable. I think this evidence can be largely put to one side because Mr White agreed in the course of argument that, with one exception, Austrac did not need access to the documents produced under the notice prior to serving its evidence.
2. The one exception to this relates to paragraphs 9 and 29 of the notice. According to Austrac’s solicitor, Ms Marsic, she has been informed by her expert witness that he needs access to the material sought in paragraph 9 before he can provide his opinion, and that the material sought in paragraph 29 would be relevant to any opinion that he forms on an AMLCTF Program. As will be seen, I believe adequate arrangements can be made in the case of these two paragraphs to ensure that the delay in the timetable is kept to a minimum. I will deal with that issue as I deal with each paragraph.
3. In short, I do not accept that requiring the TAB to comply with the notice threatens the timetable in an unmanageable or excessive way.

## 8. Individual paragraphs: 9 to 13, 21 to 23, 29, 32, 34, 35 and 37

### Paragraph 9

1. This paragraph requires production of the documents or things ‘which evidence or record…the risk assessment(s) referred to in Section 9 (pages 13-14) of the Joint AML/CTF Program v0.09 dated 25 September 2012’.
2. The ‘Joint AML/CTF Program’ is, or is intended to be, as I understood it, the program that the TAB is required to maintain by Part 7 of the Act. A copy of the document was in evidence. At pp13-14 there is a section headed ‘Risk Assessment’. To give the flavour of the current problem, one part of this section reads ‘Tabcorp Wagering has assessed the AML/CTF risks in its wagering business and considers that the wagering business poses a low AML/CTF risk.’ Paragraph 9 seeks the risk assessments carried out to come to this conclusion.
3. The TAB submits that there is no issue to which the risk assessments could go. It says that when one looks at the way the case has been pleaded and the way its defence works, the real issue between the parties is whether the program which it has in place meets the statutory requirements of Part 7.
4. The critical provision in Part 7 is s 81 which provides:

81. Reporting entity must have an anti‑money laundering and counter‑terrorism financing program

(1) A reporting entity must not commence to provide a designated service to a customer if the reporting entity:

(a) has not adopted; and

(b) does not maintain;

an anti-money laundering and counter‑terrorism financing program that applies to the reporting entity.

Civil penalty

(2) Subsection (1) is a civil penalty provision.

1. The concept of a program is then expanded upon in ss 83-87. It is not necessary to set those provisions out in full but it is useful to refer, by way of example, to one. Section 85 deals with joint AMLCTF Programs, which are divided into two parts, Part A (general) and Part B (customer identification). Section 85(2)(a) defines Part A of a program as being something whose primary purpose is to identify, mitigate and manage what might broadly be called money laundering and financing of terrorism risk. It might usefully be noted that s 82(1) imposes a parallel obligation on a reporting entity to comply with Part A of a program. I was taken to several parts of the statement of claim where it is alleged that the TAB failed to comply with s 81. Paragraphs 1322-1325 will serve as an example of the pleading structure:

1322. The Joint Program does not identify, mitigate and manage the ML/TF risks that Tab Limited and Tabcorp Vic each may reasonably face in relation to the provision of designated services that may involve Suspected Credit Card Fraud.

Particulars

The Joint program fails to include any systems, policies or  
procedures the purpose of which is to identify, mitigate and manage  
the ML/TF risks reasonably faced by Tab Limited and Tabcorp Vic  
with respect to Suspected Credit Card Fraud

Letter dated 15 June 2015 from Tabcorp Holdings Limited to  
AUSTRAC

1323. By reason of the matters pleaded at 1321, the Joint Program does not comply with s 85(2)(a) of the Act.

1324. By reason of the matters pleaded at paragraph 1323, Tab Limited and Tabcorp Vic have failed to adopt and maintain an AML/CTF program within the meaning of s 81 of the Act.

1325. By reason of the matters pleaded at paragraphs 6, 10, 1204, 1323 and 1324, Tab Limited and Tabcorp Vic have commenced to provide designated services to a customer in contravention of s 81 of the Act on and from 25 September 2012.

1. The way the pleaded case works, therefore, is that there is an allegation that the TAB’s program does not ‘identify, mitigate and manage’ the risk of some particular kind of default (in the case of paragraph 1322, credit card fraud), and this is then said to be a breach of s 81, as a result of non-compliance with s 85(2)(a) (infra). The case, therefore, is not that the TAB has an adequate program which it has failed to enforce; rather, it is that it has failed to put in place an adequate program in the first place (although paragraph 1324 does include an allegation that there was a failure to maintain an AML/CTF program).
2. The TAB’s defence to paragraphs 1322 to 1325 is as follows:

1322. In answer to paragraph 1322, they:

(a) deny the paragraph;

(b) refer to and rely upon the whole of the Joint Program, including the Transaction Monitoring Program;

(c) say further that at all material times, SMRs in relation to suspected credit card fraud were lodged from time to time with the Austrac CEO.

Particulars

The SMR references include: 559717704; 559717703;

559718415; 559717706; 559717702; 559717701; 559717705;

553708642; 509639365; 512709077; 512709065; 512708230;

486800061; 559684110; 559696150; 559698311; 559698559;

559699711; 559702476; 559700248; 562956778.

1323. In answer to paragraph 1323, they:

(a) deny the paragraph;

(b) say further that if (which is denied) Part A of the Joint Program does not contain the detail required to be set out therein in relation to suspected credit card fraud, it nonetheless is a Part which has the purpose specified in s 85(2)(a) of the Act.

1324. They deny paragraph 1324.

1325. In answer to paragraph 1325, they:

(a) deny the paragraph;

(b) refer to and repeat paragraphs 6, 10, 1204, 1213, 1323 and 1324 herein;

(c) say further that if (which is denied), TAB and Tabcorp Vic did not include in the Joint Program and September Program Document the detail required to be set out therein in relation to suspected credit card fraud, TAB and Tabcorp Vic, in the circumstances, took reasonable precautions and exercised due diligence to avoid the contravention.

Particulars

1. Refer to and repeat paragraph 1204 herein.

2. Tabcorp included in the September Program Document details of transaction monitoring processes and systems that aimed to identify, mitigate and manage the risk of suspected credit card fraud.

3. Tabcorp implemented the Transaction Monitoring Program.

4. Tabcorp implemented systems and controls offered by card schemes aimed at protecting against credit card fraud, including that Tabcorp has merchant agreements with Australian and International retail banks which provide, as part of the service provided by the retail bank to their customers, that all online transactions are validated through either the Verified by Visa or Mastercard SecureCode services. The purpose of this process is to detect credit card fraud by adding an extra layer of security to online transactions by requiring the customer to provide further personal information.

5. Tabcorp undertook the AML Project.

1. The TAB’s submission was that there was no dispute about the text of its program. The question of whether the TAB had complied with s 81 was, therefore, a debate of limited scope whose outer parameters were marked out by comparing the terms of the program to the requirements of the Act.
2. I do not agree. The full text of s 85(2)(a) is as follows:

85 Joint anti‑money laundering and counter‑terrorism financing program

…

Part A (general)

(2) Part A of a joint anti-money laundering and counter‑terrorism financing program is a part:

(a) the primary purpose of which is to:

(i) identify; and

(ii) mitigate; and

(iii) manage;

the risk each of those reporting entities may reasonably face that the provision by the relevant reporting entity of designated services at or through a permanent establishment of the relevant reporting entity in Australia might (whether inadvertently or otherwise) involve or facilitate:

(iv) money laundering; or

(v) financing of terrorism; and

…

1. This calls for an inquiry into the purpose of a document. It seems to me legitimate to say that a program does not have the requisite purpose under s 85(2)(a) if no risk assessment was carried out in formulating the program, or if any process of risk assessment was manifestly inadequate. If the risk assessment process which led to the formulation of the program was devoid of merit or merely formulaic then it is at least arguable that it will be possible to contend that the ensuing program lacks the purpose required by s 85(2)(a). Indeed, a purely formulaic assessment process may well lead to the conclusion that a program derived from it is not intended to identify and manage relevant risks.
2. In the TAB’s written submissions, as opposed to during argument, it was not completely clear to me that the relevance allegation was pursued against paragraph 9 although it was certainly pursued against paragraphs 10 and 11. In any event, it seems to me that material of the kind sought by paragraph 9 is legally relevant to the issues in dispute. The test of relevance as regards a notice to produce is whether the documents sought are ‘reasonably likely to add, in the end, in some way or other, to the relevant evidence’: *Seven Network Ltd v News Ltd (No 11)* [2006] FCA 174 at [6] per Sackville J. What is involved then is a question about reasonable likelihood, not possibility. In my opinion, production of the assessments referred to at pp13-14 of the Joint AML/CTF Program dated 25 September 2012 (or, if there be none, their non-production) is reasonably likely to add to the relevant evidence.
3. The material called for by paragraph 9 of the notice is said by Ms Marsic to be needed by her expert before he can deliver his evidence (presently due on 22 February 2016). Ms Warner has given evidence in relation to paragraph 9 that the email mailboxes of at least five custodians will need to be consulted. In another part of her evidence, Ms Warner gave detailed evidence as to how long it would take to restore, unpack and assess the mailboxes involved. There were a number of steps:
4. ***Step 1:*** Restore the email mailbox electronic archives: 34 mailboxes would take approximately 25 business days.
5. ***Step 2:*** Index the files so as to be suitable for review: 34 mailboxes would take at least 32 business days.
6. ***Step 3:*** Apply key word search terms: 34 mailboxes would take approximately 15 business days.
7. ***Step 4***: Extract, e-process and input the results into a review platform: this was hard to estimate but likely 4 weeks.
8. All up Ms Warner thought this would take 15 to 19 weeks. It seems to me that for 5 email boxes it can most likely be done in around 3 weeks. I will direct, in due course, that the TAB respond to paragraph 9 first and as soon as it can.

### Paragraph 10

1. Paragraph 10 is as follows:

10. in relation to paragraphs 577, 586, 595, 605, 614, 623, 632, 642, 662, 672, 682, 692, 702, 712, 722, 732, 742, 752, 762, 772, 782, 792, 802, 812, 822, 831, 839, 849, 864, 879, 889, 899, 909, 916, 924, 931, 938, 952 and 1193 of the Defence:

(a) all charge-back letters;

(b) any investigations into the Persons and accounts for suspected credit card fraud and decisions to freeze the accounts for suspected credit card fraud;

(c) the freezing of each account including but not limited to any internal referrals in relation to the freezing of each account;

(d) communications with the NSW and/ or Victorian Police in relation to each incident of suspected credit card fraud.

1. To give this some context it is useful to examine paragraphs 577-578 of the statement of claim and the amended defence. These are as follows:

577. On 3 June 2013, Tab Limited froze Person 59's TAB account, preventing further transactions on that account, because it suspected fraudulent credit card deposits had been made into the account.

Particulars

SMR reference 559717704

578. By no later than 3 June 2013, Tab Limited suspected on reasonable grounds that information Tab Limited possessed in relation to Person 59's TAB account may be relevant to the investigation of, or prosecution of a person for an offence against a law of New South Wales or of the Commonwealth.

Particulars

SMR reference 559717704

and

577. As to paragraph 577, they:

(a) admit that on 3 June 2014 (sic), Person 59’s TAB account was frozen because a person with authority to freeze accounts suspected credit card fraud;

(b) otherwise deny the paragraph.

578. They deny paragraph 578.

1. The bottom line of these is that the TAB admits that the account was frozen by a person with authority to freeze an account but denies that it suspected a contravention of the law. Mr White submitted that the TAB was going to seek to deny that the employees involved in suspending accounts had authority to form reasonable suspicions. Dr Higgins did not deny this as I understood it, although she did submit that there were other permutations which might not have that consequence.
2. It does not seem to me to matter very much one way or the other. If the TAB is going to deny that it suspected on reasonable grounds the commission of an offence when it froze accounts because its staff thought they involved suspected credit card fraud, then it must be relevant in the requisite sense to know what happened in each case.

### Paragraphs 11-13

1. These were as follows:

11. the procedures for the referrals referred to in paragraph 10 (c) above.

12. the authority the persons in the Audit & Investigations Team or any other team had to submit SMRs on behalf of the Respondents since September 2012.

13. the reporting lines of the Audit & Investigations Team or any other team that has or had authority to submit SMRs on behalf of the Respondents since September 2012.

1. These are tied back into the issues arising from paragraph 10 and will be allowed on the same basis.

### Paragraphs 21-23

1. These paragraphs were as follows:

21. minutes of the Board of each respondent adopting or approving the Joint Program referred to in paragraph 1204 of the Defence.

22. the adoption or approval of all AML CTF programs maintained by the respondents for the period 25 September 2012 to 1 February 2013.

23. minutes of the Board of each respondent adopting or approving all AMLI CTF programs maintained by the respondents for the period 25 September 2012 to 1 February 2013.

1. The relevance of these matters requires a slight digression. The program upon which Austrac relies in its statement of claim is dated 25 September 2012 and bears the moniker ‘Version 0.09’. In its defence the TAB says that this program was only in place from in or about February 2013. Austrac now seeks to understand what was happening between September 2012 and February 2013. I accept this is relevant.
2. I have rejected the TAB’s general argument about oppression above.

### Paragraph 29

1. Paragraph 29 is as follows:

29. the following referred to in Sections 2 (page 3) and 3 (page 4) of the Joint AML/CTF Program v0.09 dated 25 September 2012, for the period 25 September 2012 to 21 July 2015:

29.1. Compliance Framework;

29.2. Annual Compliance Plans;

29.3. minutes of the Board Audit, Risk and Compliance Committee reviewing and approving annually the documents referred to at 29.1 and 29.2 above;

29.4. reports by the GM Regulatory Integrity and Responsible Gambling informing the Board Audit, Risk and Compliance Committee of significant matters of noncompliance with the AMLICTF Program;

29.5. minutes of the Board Audit, Risk and Compliance Committee's consideration of the reports referred to at paragraph 29.4 above.

1. For the reasons I have given in relation to paragraph 9, I am satisfied that this material is relevant in the requisite sense. Paragraph 29 is one of the categories that is relevant to any opinion Austrac’s expert may form on an AMLCTF Program. Ms Warner believes that at least seven custodians would be involved in locating the information. It is quite likely that there is a significant overlap with the 5 custodians for paragraph 9. I will direct that the TAB attend to paragraph 29 at the same time as paragraph 9, and in advance of the other paragraphs.

### Paragraphs 32, 34, 35 and 37

1. These paragraphs were as follows:

32. the determination of Persons 19, 101, 102 and 103 as "high risk" as referred to in paragraphs 1471 and 1535 of the Defence.

34. the entry onto the "customer risk registers", referred to in paragraph 1229(b)(ii) of the Defence, of the following persons:

34.1. Person 101 as defined in Confidential Annexure A to the Statement of Claim (including all variations in spelling of his name, dates of birth and address);

34.2 Persons 19, 102 and 103 as defined in Confidential Annexure A to the Statement of Claim (including all variations in spelling of his name, dates of birth and address;

34.3 Persons 60, 62, 66, 83, 86 and 87 as defined in Confidential Annexure A to the Statement of Claim (including all variations in spelling of his name, dates of birth and address);

34.4 Persons 71, 72, 77, 78, 79, 81, 82, 84 and 84 as defined in Confidential Annexure A to the Statement of Claim (including all variations in spelling of his name, dates of birth and address);

34.5 all persons using the Guildford address as defined in paragraph 574 of the Statement of Claim; and

34.6 “Rocky”, as referred to in paragraphs 1610 to 1615 of the Statement of Claim.

35. all ECDD undertaken in relation to the persons listed in paragraph 34 above following their entry onto the "customer risk registers", or at any other time (whether or not they were entered onto the "customer risk registers").

37. the ACIPs carried out in respect of Persons 87, 62, 83, 59, 61, 84, 96, 97, 98, 99, 100, 101, 19, 102 and 103 admitted in paragraphs 1362, 1369, 1377, 1386, 1394, 1401, 1408, 1415, 1422, 1431, 1438, 1445, 1452, 1459, 1466, 1472, 1484, 1496, 1509, 1522, 1537, 1550, 1563, 1575, 1587 and 1600 of the Defence.

1. Paragraph 32 seeks records of a determination made in relation to 2 customers using 4 names. There is no dispute between the parties that the two individuals had been identified as high risk. However, the TAB’s admissions do not include any admission as to the time at which the TAB determined that the individuals in question were high risk; that is to say, the date of determination remains unknown. Austrac says it is relevant to know when the determination was made. Various reasons for this are advanced. For example, it is said to be relevant to the case based on s 32 because once it is known when the TAB had identified a customer as high risk, it will become clear what steps it took (or did not take) in light of that information. I accept this argument.
2. Paragraphs 34, 35 and 37 go to the same basic issue.

## 9. Conclusion

1. I make the following orders:
2. Dismiss the respondents’ application insofar as it relates to paragraphs 9 to 13, 21 to 23, 29, 32, 34, 35 and 37 of the notice to produce.
3. The respondents are to prioritise their responses to paragraphs 9 and 29 of the notice to produce and, in any event, to produce the documents called for under those paragraphs no later than Monday 14 March 2016.
4. The material produced by the respondents under order 2 is to be provided as it becomes available.
5. In relation to paragraphs 13, 21 to 23, 32, 34, 35 and 37 these are to be produced as they become available after the completion of the production under orders 2 and 3.
6. The paragraphs of the notice to produce not the subject of this decision are to be stood over for further directions on Tuesday 17 May 2016 for further consideration in light of the respondents’ evidence.
7. The time for the applicant to file and serve its evidence in chief is extended to Friday 18 March 2016.
8. Costs reserved.

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| I certify that the preceding sixty-one (61) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Perram. |

Associate:

Dated: 19 February 2016