



COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

## SENATE

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL  
AFFAIRS

**Reference: Anti-Money Laundering and Counter-Terrorism Financing Bill 2006**

TUESDAY, 14 NOVEMBER 2006

MELBOURNE

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**SENATE STANDING COMMITTEE ON  
LEGAL AND CONSTITUTIONAL AFFAIRS**

**Tuesday, 14 November 2006**

**Members:** Senator Payne (*Chair*), Senator Crossin (*Deputy Chair*), Senators Bartlett, Brandis, Kirk, Ludwig, Scullion and Trood

**Participating members:** Senators Allison, Barnett, Bernardi, Bob Brown, George Campbell, Carr, Chapman, Conroy, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Fielding, Fifield, Fierravanti-Wells, Heffernan, Hogg, Humphries, Hurley, Johnston, Joyce, Lightfoot, Ludwig, Lundy, Ian Macdonald, Mason, McGauran, McLucas, Milne, Murray, Nettle, Parry, Patterson, Robert Ray, Sherry, Siewert, Stephens, Stott Despoja, Watson and Webber

**Senators in attendance:** Senators Ludwig, Murray and Payne

**Terms of reference for the inquiry:**

Anti-Money Laundering and Counter-Terrorism Financing Bill 2006

**WITNESSES**

**BATTEN, Mr Richard, Partner, Minter Ellison..... 32**

**HARTCHER, Ms Judith, Manager, Business Policy, CPA Australia ..... 2**

**KENNEDY, Ms Catherine, Professional Standards Consultant, Institute of  
Chartered Accountants in Australia ..... 2**

**SPITERI, Mr George, Senior Lawyer, Minter Ellison..... 32**

**STUBBINGS, Ms Ann Louise, Australian General Counsel, Insurance  
Australia Group ..... 11**

**THAM, Dr Joo-Cheong, Committee Member, Liberty Victoria..... 21**



**Committee met at 9.06 am**

**CHAIR (Senator Payne)**—Welcome to this hearing for the Senate Standing Committee on Legal and Constitutional Affairs inquiry into 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. The inquiry was referred to the committee by the Senate on 8 November 2006 for report by 28 November 2006. The committee has previously held an inquiry and reported on the exposure draft of the bill. The bill incorporates a number of amendments as a result of consultations undertaken in relation to the exposure draft of the bill and evidence received during the Senate inquiry. We intend that this inquiry will concentrate on changes made to the bills since the report on the exposure draft was tabled on 13 April 2006. Thus far the committee has received two submissions for this inquiry, although the period for submissions is still open. All submissions received have been authorised for publication and are available on the committee's website.

I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee.

The committee prefers all evidence to be given in public, but under the Senate's resolutions witnesses do have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera. If a witness objects to answering a question, the witnesses should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that that answer be given in camera. Such a request may of course also be made at any other time.

[9.08 am]

**HARTCHER, Ms Judith, Manager, Business Policy, CPA Australia**

**KENNEDY, Ms Catherine, Professional Standards Consultant, Institute of Chartered Accountants in Australia**

**CHAIR**—I welcome our first witnesses this morning. I understand that CPA Australia and the Institute of Chartered Accountants have launched joint submissions with the committee, which we have numbered 2 and 2A. Do you need to make any amendments or alterations to those?

**Ms Hartcher**—I don't think so.

**CHAIR**—We will ask you to make an opening statement and then we will go to questions.

**Ms Kennedy**—The Institute of Chartered Accountants in Australia and CPA Australia would like to thank the committee for the opportunity of appearing before it and addressing any issues that the committee might have. We also would like to acknowledge the efforts that the government has made in the course of the consultation process in taking on board the issues that have been raised by industry to assist in ensuring that the AML regime that is ultimately implemented is as effective and efficient as possible in achieving the objectives of the FATF recommendations and the government's objectives in combating money laundering, terrorist financing and serious crime.

We still have a couple of issues in relation to the bill that is currently before parliament which we have outlined in our latest submission. Broadly, those issues relate to section 41, which is the requirement to report suspicious matters. We have a concern in relation to the breadth of the issues which are required to be reported on. The danger that we perceive is that, because the obligation is imposed on reporting entities to report on all issues relating to breaches of Commonwealth, state and territory law, this could result in trivial and insignificant matters being reported to AUSTRAC, which could muddy the waters in terms of the implementation of the AML regime.

We also have some concern in relation to the section 38 third-party customer ID procedures. We are very pleased to see that there is an opportunity under the bill for reporting entities to be deemed to have completed the customer verification procedures, but unfortunately the circumstances under which those reporting entities can be deemed to have done the customer ID have not been established in the rules as yet. We would prefer there to be greater clarity at this stage in terms of the arrangements that might be made where third parties could perform those customer ID procedures. We would also hope that the opportunity will be presented to us, when the second tranche of the legislation is under discussion, to continue with the same sort of consultation that we have been able to engage in for the first tranche.

**CHAIR**—Thank you very much. If we are very lucky, Ms Kennedy, we will get to have more Senate committee hearings on the second tranche.

**Ms Kennedy**—We would look forward to that.

**CHAIR**—Do you have anything to say, Ms Hartcher?

**Ms Hartcher**—No, that is fine.

**CHAIR**—I will ask one general question and then I will go to my colleagues. It really flows from what you said then about the second tranche. How would you characterise the consultation process since the last discussion this committee had on the bill and the follow-up to that? Has it been a productive process for your respective organisations?

**Ms Kennedy**—I think it has been a very productive process. In fact, the issues that we have raised in this last submission are really the only ones that are outstanding from a much wider range of issues that we had originally raised.

**Ms Hartcher**—We would support the fact that it has been very productive. The Attorney-General's Department has been very open to suggestions in most cases.

**CHAIR**—Just in relation to the rules issue and seeking a little greater clarity about that, particularly in relation to section 38, what is AUSTRAC or the Attorney-General's Department saying to you about that?

**Ms Kennedy**—I think the indications that we have had from them is that the consultation process will continue in relation to those rules even after the bill has, hopefully, passed through parliament.

**Senator LUDWIG**—In terms of the way that the application of this legislation will impact upon the organisations you represent and your businesses, are you satisfied that (a) there has been sufficient consultation and (b) the legislation is now suitably adapted to ensure that you can actually achieve the objectives—that is, deal with money laundering? I am trying to engage in a broader discussion about where this legislation now is and how your organisations will help members cope.

**Ms Hartcher**—Most of our members will not be affected by this bill at all now because, in general, they do not provide the sorts of designated services that are in the bill. One of the main reasons for our engagement in this process is that the government have always said that they did not intend to capture accountants in this round, but the framework that the bill will establish will be the same framework that will apply in the second tranche. So, in terms of refining the definitions of designated services, most of our requests have had those refined so that they do not unintentionally capture a whole lot of additional businesses; that has been well received.

**Senator LUDWIG**—That is what I thought. What I was trying to distil down to were those accountants that you might represent who might still be in this area. Or do you think that most of them are well outside it—that is, they are not listed in schedule 6?

**Ms Kennedy**—At this stage the application of the legislation will be limited to members who have financial services licences, so it will be the financial planners who are largely captured as reporting entities. We think there is some limitation on the extent to which they will have to comply with the legislation.

**Senator LUDWIG**—We have not seen the final rules yet, so we are not sure of what the threshold will be.

**Ms Hartcher**—Apart from those with a financial services licence there might be some incidental accountants that have custodial services or safety deposit boxes, but I suspect even those will be excluded because the definitions are now in relation to businesses that are in the business of providing those services. They will probably be excluded there.

**Senator LUDWIG**—Turning to your submission and those issues with the wide nature of the reporting requirements, it appears, at least on my reading, that they would apply to practically any breach of a state or territory law in this area that has to then be reported to AUSTRAC. Have you had a look at the nature of the detail that might need to be provided and the extent to which businesses would be able to comply with ensuring that all of those matters have been dealt with? If you look at clause 41, Reports of suspicious matters, subclause (f)(ii) goes on to require:

may be relevant to investigation of, or prosecution of a person for, an evasion, or an attempted evasion, of a law of a State or Territory that deals with taxation;

But then (iii) goes on:

may be relevant to investigation of, or prosecution of a person for, an offence against a law of the Commonwealth or of a State or Territory;

It is very broad.

**Ms Kennedy**—It is very broad. I think in the submission that we lodged in September we made some recommended amendments to that particular section to ensure that it was only material and significant issues that were ultimately reported.

**Senator LUDWIG**—They have not been picked up, by the look of it.

**Ms Kennedy**—No.

**Ms Hartcher**—Even more important is the fact that this piece of legislation is aimed at money laundering and terrorism finance 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 any Commonwealth, state and territory law. It has basically become a catch-all. It is just not practical for people to be required to report that, because a lot of people would not even be aware of the extent of that requirement and would not know what was relevant to a prosecution or investigation of Commonwealth, state or territory law. This brings the suggestion that the compliance program that would have to be put in place to allow staff to comply with that would have to cover off what all those breaches might be.

**Senator LUDWIG**—Could you turn your mind to clause 41 and the following clause, 42, dealing with exemptions. You may not have turned your mind to it at this point. It says:

This Division does not apply to a designated service that is of a kind specified in the AML/CTF Rules.

So there seems to be an exemption based system. We do not know what that will look like at this point. Does that cause difficulties in providing advice to your members about how you are going to report to them what those exemptions will be and how the rules will operate? At this point in time we do not know what all those exemptions will be, if any.

**Ms Kennedy**—Obviously, without the rules, it is difficult to provide guidance but we would prefer to see the limitation placed in the body of section 41 rather than in the exemptions.

**Ms Hartcher**—Rather than have a catch-all with exemptions, it would be more useful to have specific requirements to report certain things.

**Senator LUDWIG**—The reason I am going a little bit further is that we are not sure when the second tranche will come in. We don't seem to have a start date for that either, do we?

**Ms Kennedy**—The indication we have been given is that work should start on that once this bill has been passed. So the indications are some time in the first part of next year.

**Senator LUDWIG**—We are looking forward to that. This is why I raise it with your organisation particularly. On page 51, section 6(7) states:

The regulations may amend an item of a table in this section.

My reading of that is that is the Henry VIII clause, but I am open to a different legal opinion on that. What that means effectively is that the regulations may amend a table. So what can happen is that, some time between now and the second tranche being finalised, and passing this bill, we have signed up to a system where the regulations, as they are made, may amend section 6, which may then incorporate parts of the businesses that you represent into section 6 and make you a designated service, which would mean that those parts of this legislation would then apply, as I read subsection (7). Do you have a view about that? You may want to take that on notice, unless you have seen it before.

**Ms Hartcher**—We would not want to see any extension to the designated services without decent debate and proper scrutiny, so I would not like to see it being able to be amended by regulations.

**Senator LUDWIG**—This will allow it. This will mean that you can amend the designated service by the use of a regulation made by the minister and signed and gazetted and operative within 15 days of the parliament sitting, with no requirement for it to go before the parliament. Do you have a view about that issue?

**Ms Kennedy**—It looks as though that is definitely a possibility. However, given the experience in terms of the consultation on the first tranche and the commitments that have been made to us about the continuation of that process into the second tranche, I would expect that there would be significant discussion before that sort of course of action was taken.

**Senator LUDWIG**—Yes, we would hope so. It is a more general concern, though. Do you have a concern about the use of regulations to amend statutes? That is, in effect, what it will do.

**Ms Hartcher**—I think it depends on the circumstances. We would have concerns about regulations to amend section 6 and extend the designation.

**Senator LUDWIG**—Have you had an opportunity to look at the civil penalties and criminal sanctions that will apply? I know this is a little bit early, but I thought I would start talking to you in the sense that we are likely to be talking about the second tranche at some point between now and next year, because this framework, once in place, will generally apply to your members. Presumably, during the second tranche, schedule 6 will be amended. Your members will become designated services of that type and they will then become reportable entities. Then arrangements will have to be put in place by their businesses to deal with the customer or whatever the requirements might be under the rules, plus there will be programs

that they will need to put in place to ensure that they are compliant with the legislation. Your organisation has been considering this bill in that framework, I take it?

**Ms Hartcher**—Yes.

**Ms Kennedy**—Yes.

**Senator LUDWIG**—That is the precursor. But the real question is: have you looked at the civil penalty regime and the criminal sanctions? Do you have a view about whether they are adequate, whether they are a burden, whether they are disproportionate?

**Ms Kennedy**—At this stage, we know what the maximum penalties are, but I guess we do not have a clear idea of what the scale might be of those penalties that would be imposed on specific failures to comply in terms of other sections in the legislation. They will certainly focus the minds of the reporting entities.

**Senator LUDWIG**—But then we have not seen any experience from AUSTRAC as to how they will apply the scheme.

**Ms Kennedy**—No.

**Senator LUDWIG**—Have AUSTRAC indicated to your organisation how they will then deal with the regulatory requirements—whether they will take a light touch or a heavy regulatory approach?

**Ms Kennedy**—I do not think we have had a particular indication at this stage.

**Ms Hartcher**—No, except that the approach in the first few years will be more educative than investigative. In terms of the penalties, if you are talking about large financial institutions they might be reasonable but, when you are talking about small suburban accounting practices, jewellery stores or whatever, the maximum penalties are certainly unrealistic. The majority of the breaches, I would assume, would be breaches of process and not specific intent to commit a crime; they would be failure to report or failure to identify money laundering rather than active participation in money laundering and, in our view, they are probably a bit disproportionate.

**Senator MURRAY**—Are you familiar with the estimates of the extent of money laundering in Australia ranging between \$4.5 billion and \$11 billion?

**Ms Hartcher**—Yes.

**Senator MURRAY**—Just to help you, I am of the opinion that it is nearer the higher figure than the lower figure. I am also of the opinion that if you extrapolate that worldwide you are looking at well over a trillion dollars. So it is a lot of money. And I think money like that is like water—if you block it up in one area it will flow to a different area, which means that accountants and the people who deal with the management of entities, processes and systems are going to be caught up in that flow, wittingly or unwittingly.

I think, with this new regime, accountants will be reluctant to go straight to a reporting mode, unless there is an obvious breach in process or an intent to commit a crime which they have picked up, and they will be seeking advice. What have you decided on as to associations? How will you provide advice to people who ring up and say: ‘I am worried

about this. Do I have to report this? This looks to me as if it could be an issue.' What are you doing?

**Ms Hartcher**—We intend to work to develop a model compliance program that will assist members of the profession to identify areas of risk and we will be doing some analysis of where they might be exposed to risk. In some discussions I have had with practitioners who have been in practice for 20 or 30 years, they have said that during that period they have only had two to three clients who even raised some suspicion. So they are not as exposed as you might imagine.

**Senator MURRAY**—But they will be more concerned that they could be swept up in a 'failure to report' situation which, to me, means that they are not going to ring the local copper or the local ASIO person; they are going to ring your association and say, 'This is a grey area.' Compliance programs effectively put the onus on the individual, but I am thinking about the advice mechanisms. Have you thought about whether you will have to appoint officers—people with special training and understanding in this area? What costs are your associations facing?

**Ms Kennedy**—I think we will have a clearer idea of the level of support and guidance that we will be giving to members when we have seen the second tranche of the legislation and we have a better understanding of exactly the obligations that will be imposed on our members.

**Senator MURRAY**—Let me give you perhaps an odd analogy, and that is the introduction of the GST. In the introduction of that situation, as you know, associations like yourselves were given substantial sums of money by the government to assist you to educate and inform your members and assist in providing advice. Plus, the ATO itself set up very big advisory groups to take people through the transitional period. If we are talking big sums, somewhere between \$4½ billion and \$11 billion, which I expect accountants would have their fingers all over even though they might not know what they are dealing with—I am not saying they are criminals; they might just be part of the system—have you been offered any supporting mechanisms by the Attorney-General's office? Are you likely to get any form of formal assistance to enable you to address this new area of vigilance?

**Ms Kennedy**—I do not think there has been any direct assistance offered. The only indirect assistance has been the announcement of a commitment to a public advertising program to inform the general public about the new obligations that will be imposed on financial institutions and other reporting entities to obtain further customer identification.

**Ms Hartcher**—But we do recognise that this is going to be a significant learning curve for a lot of accountants—not just for those but for the other, smaller businesses that will be caught up in the second tranche. It is really a completely new obligation on those businesses, whereas the financial services sector has had some involvement in this area for a long time.

There are a whole range of additional issues that will come into play with the second tranche. For example, the longstanding and confidential relationship that an accountant has with their client is going to, in a lot of instances, make it much more difficult for them to report. AUSTRAC have already indicated that they would prefer to get more reports of potential breaches rather than less and that they would rather see a lot more reporting. Obviously, people who have a longstanding relationship with clients are going to be much

more cautious about what they report in case they report the wrong thing, yet, on the other hand, they are faced with significant penalties for failing to report. It will be a much more problematic introduction to that sector than perhaps this round has been.

**Senator MURRAY**—Except I think you are caught up in this round indirectly anyway, simply because of the fact that your members are intimately concerned with the books and the entities to which money laundering may be attached—I am not saying knowingly concerned, but unknowingly. Could I request that you come back to the committee with a supplementary submission as to what you consider likely to be the extra onus on the professional associations—what additional services, processes or systems you might be required to provide? For instance, I can see that your disciplinary proceedings may have to start to take account of this area. I can see a need for an advisory capacity, and you have already mentioned compliance changes. I would be interested in knowing what assistance, using the GST analogy, associations like yours might need in this environment. Would you be willing to consider doing that?

**Ms Hartcher**—Certainly.

**Ms Kennedy**—We could put some broad indications around that. As I said earlier, the majority of our members will not be affected immediately with this bill, but with the second tranche obviously they will be specifically brought into it. We are hoping that in the negotiation process there will be some modification in the rules that will make that compliance a little easier. We can certainly provide you with some broad indications.

**Senator MURRAY**—I want to challenge your view that you will not be immediately affected. In challenging it, I want to use that analogy I used earlier with regard to water. I think this first bill will cause a redirection of money and there may be more demands for it to go in different areas and different directions. It is not going to just disappear. People are making money from crime and they think it is going to be reported and exposed through this bill in one direction, so they may try and shift it into another direction. If there is \$4½ billion to \$11 billion worth of money being laundered in this country, it will not just disappear when this bill appears. It will go somewhere else, and I think your members may feel the effects of that without knowing that. I am not sure enough consideration has been given to that.

**Ms Hartcher**—Even if they come across it at this stage, before the second tranche is brought in, if they are not providing any of the designated services, which the majority of them will not be, then they will have no legal obligation to report anything they see. They still have the obligations under our professional standards to—

**Senator MURRAY**—I know lots of accountants and they are moral, ethical people, so they will be placed in an awkward situation. I think it is an issue, frankly.

**Ms Hartcher**—They will certainly have obligations now.

**Senator MURRAY**—The main objectives of this government action are outlined at page 7 of the replacement explanatory memorandum. They are:

Provide a disincentive to crime by reducing its profitability.

I happen to think that is a vain hope.

Provide a disincentive to crime by reducing the pool of money available to finance future criminal activity.

Well, perhaps.

Aid the detection and prosecution of crime.

Yes, I have high hopes for that one.

Protect the integrity of the financial system and reputation of Australian business.

I hope that will be a result. And:

Avoid economic and competitive distortions.

I am not sure about that. But in the middle of that is the detection and prosecution of crime. The point I want you to consider and perhaps come back to us on is: are you likely, as a result of this bill, to start to see flows of money away from present activity and towards new activity which criminals and others will be wanting to get advice from your members on, and how will you deal with that?

**Ms Kennedy**—I think the extent to which there would be an opportunity for our members to receive a greater influx of that kind of money is uncertain, given that they do not generally provide services that are competing with the financial institutions. So they would not be in a position to accept deposits from people as an alternative.

**Senator MURRAY**—I am not suggesting they would be accepting deposits, but people need to restructure entities or organisations to rearrange their financial affairs. Criminals are like anybody else: they manage their money. I would expect that the effect of this bill will be to block traditional routes, and therefore they will look for new routes—and if you are looking for new routes you go to lawyers and accountants, don't you?

**Ms Kennedy**—It is a possibility.

**Ms Hartcher**—I am not sure that we are in a position to really estimate how much more activity they might be exposed to.

**Senator MURRAY**—What I am interested in is whether you will need less formal, more facilitative government assistance in this period of transition. That is really what I am after, because I cannot see a suburban accountant or even a small firm of 50 employees easily coping with the new regime and I cannot see your associations at present being equipped to deal with the new regime. Maybe I misunderstand your abilities, but I don't think so.

**Ms Kennedy**—It will certainly present challenges for us because, as Judy mentioned, these are completely new obligations. We are not in a position of transitioning from a previous compliance regime into the new AML regime. This is completely new for our members.

**Senator MURRAY**—If you think these are legitimate issues, could I request that you advise the committee so that we can consider whether we should be saying to the government that associations such as yours may need transitional assistance whilst this is being bedded down and what kind of assistance that should be? It does not matter if you paint broad brushstrokes in your response.

**Ms Hartcher**—Yes, we could do that.

**CHAIR**—Thank you. As Senator Murray said, that is a request for information, if you can provide it. We will provide you with a copy of the transcript as well so you can reflect on the discussion with Senator Murray.

**Ms Kennedy**—Thank you.

**CHAIR**—Ms Kennedy and Ms Hartcher, thank you both very much for attending and assisting the committee today and for your submissions. If, within the short period of time the committee has to report, you would like to inform the committee about anything aside from the issues Senator Murray has raised, please feel free to contact us.

[9.51 am]

**STUBBINGS, Ms Ann Louise, Australian General Counsel, Insurance Australia Group**

**CHAIR**—Welcome. I understand that IAG has just kindly provided a submission to the committee, which we will accept as a tabled document. Thank you very much for that. Perhaps you can make an opening statement, as my colleagues and I have not had time to go through the submission in detail, then we will go to questions.

**Ms Stubbings**—Pardon me for the lateness of the submission, but we did the best that we could in the time frame. I will highlight the matters in our submission that we consider to be of the most significance. I appreciate that general insurance, which is the predominant business within the Insurance Australia Group, is exempted from the ambit of the legislation. However, there are still various aspects of the legislation that cover businesses within the Insurance Australia Group and there are obviously other matters that we considered to be of enough significance to take the opportunity to make submissions on prior to today and today. The most important point that I would like to highlight to the committee is our view about the requirement for a further period of consultation. We are very much of the view that we need the opportunity to look at the entire legislative package, which would include any rules and regulations that flow out of the legislative package. We have previously stated this in our earlier submission, which was dated April 2006, and we consider this to be a point of real significance for us and, I would imagine, for other participants.

One of the other points in our submission that I would like to highlight to the committee is the transition arrangements that have been put into the bill. We appreciate that there has been the introduction of a 24-month implementation period and a 12-month focus on education, which is obviously a very good thing, and a limitation placed on punitive action being taken within that 12-month period. However, we are concerned that some parts of the bill may commence immediately upon royal assent being given and we think that industry participants would need at least six months after royal assent has been given to implement various requirements under the legislation. In our submission we have highlighted some of the parts that would in particular require that time frame. The systems changes, training and record-keeping requirements would need an extensive period of time to put in place.

The other point I wanted to highlight to the committee is in respect of designated business groups, which I have included in the written submission as point 5. IAG appreciate the change to the definition of ‘designated business groups’ but we are of the view that there should also be a provision that enables reporting entities to have their obligations discharged by another member of a designated business group. We consider the revised definition to be appropriate but we think it should go further and that the general obligation to report should be able to be discharged by another entity in the designated business group.

There is another point which we consider to be of real significance. Given the significant increase in the civil penalty provisions, 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. There is reference in the explanatory memorandum to the balance of probabilities being the relevant standard of proof—obviously, because it is a

civil penalty provision. However, 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. That may be somewhat unique in terms of a civil penalty but I think the consequences for reporting entities are now so significant that further consideration needs to be given to the civil penalty provisions.

Other than those points, I would rely on the points that we make in our written submission. Obviously you would not have had an opportunity to read the written submission, but I do go into each of these points in more detail. It is, unfortunately, quite high level because of the time frames.

**CHAIR**—We understand, as we are dealing within the same time frames. I have two questions. We are, as you say, slightly hamstrung by the absence of the rules and that further level of information, but the committee has to come to a view in this process, through these hearings this week and next week—and obviously we will talk to AUSTRAC next week about where that is up to. What willingness does an organisation like yours—an important organisation in this area—have to take on faith the assurances in relation to the rules and the details that might be contained in the legislation and to support this matter proceeding in legislation before the Senate?

**Ms Stubbings**—We obviously support the principles behind the entire legislative package and think that it is very important. I suppose our experience is somewhat affected by the financial services reform process and package that we have spent a long time coming to terms with. I think the consultation process that extended over a number of years, the extensive transition period for that legislation and the subsequent changes that have been made following further consultation have probably highlighted that perhaps earlier consultation or more discussion in respect of the rules or ASIC's ability in respect of class orders and the amount of work that has to be done post implementation are lessons that should be taken on board in moving into a phase like this with haste.

Though it is not relevant for this legislative package, we think FSR is very much heading in the right direction now, but it has taken quite some time to get there—to the point where, for a general insurance organisation, it works well. To move in haste with this legislative package could mean that, down the track, there will have to be a lot more work done to ensure that organisations can comply, particularly taking into account the fact that it is a risk based legislative package. I know there was a lot of uncertainty about a lot of the ramifications and the consequences and there was a lot of dialogue about the Financial Services Reform Act and how it worked. I think that if a lot of that could be avoided in this case it would be extremely helpful.

**CHAIR**—My second question is in relation to your suggestion on transitional matters. For those parts of the bill which are not in the staggered implementation period, as it were, you suggest six months rather than commencement on the day of royal assent. Just quickly reading your written material, I understand this is because some of those areas might require some quite significant IT systems changes which you obviously cannot do within a matter of weeks.

**Ms Stubbings**—No. I appreciate that there are probably other parties that would be affected more significantly by that than IAG, however, we do not really know how long it would take to implement some systems changes. Some systems changes can take longer than six months and others may take less time. It would depend what was required. I suppose until we could actually see what was in the detail in respect of rules and what was required in respect of the programs that needed to be implemented from a compliance perspective and then from a systems perspective we really do not know whether six months would be appropriate.

**CHAIR**—It becomes a bit circular, doesn't it?

**Ms Stubbings**—It does. I suppose the difficulty is that until we know what is required, to have that required immediately after royal assent makes it extremely difficult for compliance.

**Senator MURRAY**—I want to ask you about APRA. I have an opinion that since APRA has been reorganised and restructured it is an effective and capable regulator. It is the regulator you have most interaction with, isn't it?

**Ms Stubbings**—That is correct, from a prudential perspective.

**Senator MURRAY**—On item 6 of your submission you have given us today you discuss AUSTRAC powers. That is on page 4. You submit that the new power should be deleted from the bill and make various queries with respect to reporting to AUSTRAC. My experience of the new Senate is that you are unlikely to get your wish even if others agreed with you. So assuming that AUSTRAC will keep these powers, would it be helpful, useful, advisable, desirable, or any of those sorts of words, for APRA to be involved in that process? You make the point that AUSTRAC know very little about your industry but APRA know a great deal—and, of course, they are very experienced with regulatory issues.

**Ms Stubbings**—I think it would be extremely useful to have APRA involved to some extent. Obviously general insurers are very used to dealing with APRA and its risk based principles approach. Particularly now with the new prudential standards regime, it is becoming more so. APRA has very good experience now with general insurance and it is also becoming more and more experienced at dealing with the information that is given to it in the new requirements, such as financial condition reports et cetera, which have a lot of information in them in respect of general insurance operations. I do not know whether you are thinking in terms of delegation of power across or what you are thinking in that sense, but perhaps some level of consultation.

**Senator MURRAY**—I want you to do the thinking for me. I want you to think about whether you want to come back to us with some suggestions in this area because you made the point that AUSTRAC can now require a reporting entity to carry out a money-laundering and terrorism financing risk assessment and provide a copy of a written report to the AUSTRAC CEO.

If AUSTRAC did require that and it is in insurance, should they consult with APRA and design it in conjunction with them, or should they delegate it to APRA, or should APRA be part of the reporting hands into which these things go? I do not have a clear view on this, but I do have a good opinion of APRA and their abilities. I also know that their interactions with your industry are very close. Would you accept those thoughts and come back to us on them?

**Ms Stubbings**—Yes, I would appreciate the opportunity to come back to the committee on those points. We may have some clear suggestions on how it should work and where some of our reporting requirements for APRA might cross over with some of these requirements. I will take the opportunity to provide a further written submission by the 17th.

**Senator MURRAY**—Thank you. I am not sure whether you were in the room when I had an interaction with the previous witnesses, but I used the analogy of money being like water and that the blockages which are going to be put in place to prevent money-laundering systems and processes will result, hopefully—because this is their purpose—in that money going off in different directions. In my ignorance, I have always failed to see how insurance fits into money laundering. I guess other people would know better than I about that. However, I am most of all interested in your international connections and interactions and so on. How far, if at all, will new processes of reporting simply duplicate or replicate reporting systems you are being asked to adopt elsewhere in the world in this area?

**Ms Stubbings**—They might to some extent. At the moment, we are still looking at APRA's requirements on conglomerate rules and the impact that they will have on reporting requirements in Australia in relation to our overseas entities. To some extent those requirements might impact upon what is required under this legislation. The other point that we have made about our overseas businesses is outlined in point 8—the definition of permanent establishment and how broadly that is drafted. We are in the position where we have requirements that we have to comply with in offshore jurisdiction. To the extent that they are different from requirements here will depend on the reporting entity requirements for Australian operations versus what we have offshore.

**Senator MURRAY**—I asked you that question from two perspectives. The first is that I want you to integrate your thoughts on your international connectivity in the submission that you will give us on the APRA relationship. I am aware that APRA visits internationally, tries to integrate its systems internationally and so on to a degree that I suspect AUSTRAC would not and could not. I would like to know how that links in.

The second thing is whether the legislation should include greater flexibility than it does at present to include the ability to change reporting requirements by disallowable regulation to accommodate systems, processes and reporting mechanisms which are working elsewhere so that you as an international business have a common reporting mechanism. Does that make sense to you?

**Ms Stubbings**—Yes, it does make sense. Again, I will have to include that in our further written submission, because we are looking at that in the context of APRA's requirements and in the context of acquiring offshore businesses in different jurisdictions and the requirements in the different jurisdictions. I suppose the point would be that, if the requirements were higher or more onerous in another jurisdiction, what would the position be in respect of the requirements in Australia? So we would need to have a think about that and include it in our written submission.

**Senator MURRAY**—My understanding of this is that anti-money-laundering devices are an international effort and we are trying to get as much consistency worldwide as possible. I have just been through an almost decade-long process of actively supporting and campaigning

for international accounting standards so there is a common system of reporting accounts all over the world. It would seem daft to move to a domestically based reporting system, particularly in areas which are more fringe than mainstream. I think financial institutions are right at the heart of money-laundering problems; I am not as convinced that insurance bodies are.

**Ms Stubbings**—I agree with your view in that sense, that insurance is not at the heart of the anti-money-laundering push in that the risk in respect of general insurance and money laundering is quite low, and obviously that is why it has been excluded from the legislation not only here but in some of the offshore jurisdictions.

**Senator MURRAY**—I am of the view that legislation is unlikely to be adjusted, so I am looking for legislative flexibility through a regulatory device. For instance, if the insurance industry were able to make a case for reporting to be in a particular way, the government of the day could adjust to that rapidly through a regulatory device, of course disallowable. That is what is in my mind.

**Ms Stubbings**—Thank you.

**Senator LUDWIG**—As you have indicated, the majority of the business under which the Insurance Australia Group operates is not in this bill, but it is likely that some of the work you do will be drawn in in the second tranche. Have you started the consultative process with the drafters or with the minister about ensuring that, when the second tranche comes in, your concerns will be taken into account? Of course the framework is here now and there is likely to be little ability to change it once it is in place, and the second tranche will be drawn in by changing the rules, I suspect, and then dealing with schedule 6 as well. Have you looked in the broader sense at what those negotiations might involve?

**Ms Stubbings**—Not in any detail at this stage. We have really been trying to deal with the impact on other parts of the group that are still actually affected by the legislation. We have not really focused at all yet on any consultation in respect of the second phase.

**Senator LUDWIG**—I note that your submission deals with designated services and the issue of loans. Rather than go through it in detail, could you give an overview of the types of issues that will be drawn into the provisions of this bill and why you say that they should not be drawn into the legislation.

**Ms Stubbings**—There are several areas that are affected but two significant areas are affected. The first concerns issues to do with consumer credit insurance products and the second concerns our premium funding operation. In terms of the definitions that are provided in the legislation, we are unclear about the impact on our premium funding operation. In respect of the consumer credit insurance product, even though consumer credit insurance has actually been removed from the ambit of the legislation—and there are details about this in our written submission—there are still certain aspects that we consider will actually draw in and affect consumer credit insurance products.

**Senator LUDWIG**—Which general areas would the consumer credit products apply to?

**Ms Stubbings**—It is a general insurance product with a life insurance component. The life insurance component is provided by a separate life insurer outside of the group. There is a

general insurance component in that product. So it is actually a combined product, if you like, but the life insurance component is what, I suppose, causes the impact for us.

**Senator LUDWIG**—What is the nature of that impact? What will you now have to do if you are unsuccessful?

**Ms Stubbings**—If we are unsuccessful, we may have to look at restructuring some of the arrangements because there are a number of ways that the consumer credit insurance arrangements are set up between the general insurance organisations and the life insurance organisations. We may have to look at restructuring those arrangements, which would mean new product releases and other impacts in customer documentation and systems changes et cetera.

**Senator LUDWIG**—Could you provide a little bit more detail? That is to avoid coming under this legislation so that you then do not have to provide your customer requirements. Why is that? Which is easier: to change your product so that you do not fall under this legislation or to provide your customer details? That is what I am trying to struggle with at the moment. In broad terms, what is the challenge in not being able to then say, 'These products do fall within this area and we can certainly comply'? I am sure you operate offshore. You would already be subject to the first and second EU directives. You are familiar with the UK and the US legislation.

**Ms Stubbings**—The issue with consumer credit insurance is that, because it is a hybrid product of life and general insurance, there would be requirements imposed upon the life insurance and the general insurer. The issue I suppose is getting all of that combined into a package that is useful, easy to use for the consumer and able to be understood. The point we are making about consumer credit insurance here is that the intention is that it be removed from the legislation, which we consider to be appropriate. I suppose the bill at this stage we think, just on some technical drafting points, does not quite go all the way to doing that. Why it should not be in the legislation is that fundamentally it is a general insurance product with a life insurance component, so the risk of money laundering we would put into a similar category as the general insurance products that we sell throughout the rest of the group.

**Senator LUDWIG**—Have you had any success with the drafters to be able to convince them of the changes that you indicated?

**Ms Stubbings**—I suppose the success has been where it has got to to date in terms of the drafting. These are additional points in respect of further technical drafting issues. Consumer credit insurance in the financial services regime did cause some complications in people's understanding the product. I think it is not an easy product for legislators to draft in respect of, if I can put it that way.

**Senator LUDWIG**—Did you want to attempt to provide more information about the product itself and why it is such a challenge?

**Ms Stubbings**—Only because it has the life insurance component in it. That is what makes it complicated in a sense because of the different requirements imposed upon a general insurer versus a life insurer.

**Senator LUDWIG**—You make some comment about AUSTRAC powers in terms of the reporting entity having to carry out money-laundering and terrorist financing risk assessment and provide a copy of a written report to AUSTRAC's CEO. You say that that is a broad power. Why should they not have that broad power?

**Ms Stubbings**—We are saying that AUSTRAC already has broad powers, as highlighted in paragraph A. The point is really in paragraphs B and C, where we are saying that if AUSTRAC—and we have discussed this previously—gets that risk assessment, that report, then the issue would be what it does with it. Does it have the ability, capacity and experience to review it, and does it then provide feedback? Does it assess it in terms of its appropriateness? What obligation is AUSTRAC taking on by obtaining a copy of that report?

**Senator LUDWIG**—Have you formed a view of who should be doing it? If we assume that the assessments should be done, who should be doing them if not AUSTRAC?

**Ms Stubbings**—I think the point made by Senator Murray before in respect of APRA would be a point that we would like to pursue further in the context of our further written submission.

**Senator LUDWIG**—In relation to the transitional arrangements—I think Senator Murray touched on some of that, or it might have been Senator Payne—if you are unsuccessful in getting a technical change, what will you then be required to do? You have indicated that you might change your products to get yourself out of it; that is one area. But in section 6 of the bill, subsection (7), on page 51, says:

The regulations may amend an item of a table in this section.

So you might find that by regulation, even if you start to work your business out of it, you are back in it again as a consequence of that section.

**Ms Stubbings**—We would have to put in place whatever was required to ensure that we could be up and running with the appropriate systems within the time frame.

**Senator LUDWIG**—That was what I was trying to identify. At what point in the 'know your customer' requirements does the business model fit in, like the product is retailed through NRMA or other insurance groups?

**Ms Stubbings**—It is retailed basically through an insurer in our group called Swan Insurance, through an intermediated distribution network. The prospect of changing a product to suit a legislative regime is not something that we would normally look at. This is not with a view to noncompliance, obviously; it is with a view to—

**Senator LUDWIG**—I am pleased you said that.

**Ms Stubbings**—Yes, it is obviously an extremely compliant organisation. The difficulty with CCI is that I do not think the consequences that have arisen are intended. I think they are drafting points. The fact that CCI has intentionally been excluded now I think we could work through in the drafting points to ensure that consequential amendments are made. There are technical interpretation issues that mean we think that CCI may still be caught in a couple of areas. We would obviously endeavour to push that point as far as we could or hope that in a regulation package that would be dealt with. In the event that all of that failed, we would have to comply and we would comply, but that is really an extreme solution for us.

**CHAIR**—Have you put your proposition in relation to the six-month period before commencement to the Attorney-General's Department or to AUSTRAC, and have you had any response on that?

**Ms Stubbings**—No, we have not put it to either party.

**Senator MURRAY**—This is a consequential question. As you would know, the initiation of new and more complex requirements in Corporations Law resulted in a lift in the cost of professional indemnity insurance for directors and other people. I can envisage a situation where professions caught up in a greater requirement for reporting and the greater possibility of inadvertently breaching requirements might require them to get better or more costly professional insurance. Has that been an issue in IAG's minds at all, or have you discussed that?

**Ms Stubbings**—We have not had any discussion in respect of that point at all, but I think it is certainly worth us considering in terms of the ramifications. Or, alternatively, it is a matter of policy in respect of the impact in the possibility of increased premiums for professional indemnity coverage, or the coverage itself.

**Senator MURRAY**—Compliance cost typically is regarded as a systems, a training, an advisory cost. But one of the costs is often prudential insurance. If it is possible for you to give us an inkling of what that might mean it might be a useful understanding which I do not have at present.

**Ms Stubbings**—I would have to consult with the relevant business unit on the impact under the policy itself—whether in fact there was any impact in respect of this legislative package and, therefore, what that would mean for possible price consequences or coverage.

**Senator MURRAY**—Although this tranche does not directly concern accountants at present, I think it indirectly concerns them immediately because of the way money moves and needs to be organised and managed. But, anyway, for the second tranche, I would still be interested to know if you think there would be a likely increase and what it would be in terms of professional insurance.

**Ms Stubbings**—I will take that on.

**Senator MURRAY**—Thank you.

**Senator LUDWIG**—I would just challenge you a little bit more in terms of this area. What I would like is to put a little bit more information on the record about the products that we are talking about. I know in broad terms we are talking about motor vehicle insurance and life policies, but I would like to know where it falls into the area of your concern—in other words, the range of products that you provide and the type of product and an explanation of that type of product that is potentially caught which should not be caught, in your view. I would like to know just how it operates—a bit more of the mechanics, perhaps.

**Ms Stubbings**—The product that is of particular concern is the consumer credit insurance product. There are other parts of the group that would be affected, but I think for your purposes the consumer product or the part of the group that is related in this sense, in terms of consumer impact, is a consumer credit insurance product. That product is a general insurance product which has a number of components. It is a retail product for FSR purposes. So it is

actually covered by all of the financial services reform requirements—disclosure et cetera. And there is a component in respect of it which covers your obligation in respect of a loan. For example, you purchase a car and you take out insurance in respect of your repayments on the car financing arrangement.

**Senator LUDWIG**—Usually they ask you whether you want to fill out a form—

**Ms Stubbings**—When you go to the car—

**Senator LUDWIG**—and pay additional money. Sometimes they want the security. It seems to be that they require it. But it is optional.

**Ms Stubbings**—It is.

**Senator LUDWIG**—I think you can then pay an additional amount of money and then there is a component to cover it, so that if something should happen then the loan is secured.

**Ms Stubbings**—That is correct. But as a component of that product there is a life insurance component. The Insurance Australia Group does not have a life insurer within its confines. Therefore we go outside the group to provide that life insurance product.

**Senator LUDWIG**—I see. So you might take general insurance on the loan itself?

**Ms Stubbings**—That is correct.

**Senator LUDWIG**—What types of events might that be for? Is it non-payment or is it broader—if a person is ill, incapacitated or has lost their job?

**Ms Stubbings**—It is more like the personal accident type of product.

**Senator LUDWIG**—So that is within your framework—that is, IAG?

**Ms Stubbings**—Yes, that is correct, but then—

**Senator LUDWIG**—But then, should a person succumb and die, you have to have taken that eventuality into account, so the person would have signed up to a life policy. So it might be one or two units in a life insurance policy by a general life insurance company?

**Ms Stubbings**—And we do not have a licensed life insurer in the group—either APRA or obviously AFSL—therefore we have to go outside to obtain that cover.

**Senator LUDWIG**—It is not uncommon in the marketplace for general insurers and a range of financial service providers to in fact not have those elements and to go out into the market to get others. It is important in designing this legislation—although they have split it into two tranches—to ensure that, in the first tranche, you do not impact partly on a business.

**Ms Stubbings**—That is correct.

**Senator LUDWIG**—That is exactly what you are saying here in that sense, that you are impacting on a very small part of the business that would otherwise not fall within this legislation because of the nature of the way you structure your commercial arrangements?

**Ms Stubbings**—That is right. I think the point is that the legislation is just not quite yet achieving what it seems to be intending to achieve—

**Senator LUDWIG**—Yes—the idea in section 6 is to not make a designated service, but the way you then interpret the definition of ‘loan’ et cetera then draws you into it. Then, of

course, if you are there, there are two options: whether or not you restructure your business to ensure that you are not there, as is the purpose of the legislation, or alternatively you then meet all of the requirements given that your other competitors in the marketplace probably will not do so because they may have a different business model.

**Ms Stubbings**—Or a different view.

**Senator LUDWIG**—They would be interesting decisions that you would have to make.

**Ms Stubbings**—That is correct. As I said, changing the product or the nature of the product is an extremely significant decision and it would be one that certainly would not be taken lightly. I do not really envisage that that would be what would be intended by the drafters, given that consumer credit insurance has actually been excluded.

**Senator LUDWIG**—You will be able to let us know how you go with those consultations between now and—

**Ms Stubbings**—Between now and two days time!

**Senator LUDWIG**—Yes!

**CHAIR**—I am sure it is three.

**Ms Stubbings**—Okay. We will be busy.

**CHAIR**—Yes, we know the feeling. Thank you very much for appearing before the committee. There are a number of matters you have agreed to come back to us on. We will follow those up with you so that we are as one on those issues. We do appreciate you providing us with the written submission today. Thank you for your help with that.

**Proceedings suspended from 10.33 am to 10.52 am**

**THAM, Dr Joo-Cheong, Committee Member, Liberty Victoria**

**CHAIR**—Welcome. It is good to see you again, Dr Tham. It has been some time.

**Dr Tham**—Likewise.

**CHAIR**—Do you have any comments to make on the capacity in which you appear?

**Dr Tham**—I am a senior lecturer at the law faculty of the University of Melbourne and a committee member of Liberty Victoria.

**CHAIR**—Liberty Victoria has lodged a submission with the committee which we have numbered 1. Do you need to make any amendments or alterations to that submission?

**Dr Tham**—The main alteration I will speak to in my opening remarks. It relates to the privacy implications of this bill.

**CHAIR**—Thank you. We will come to that. Thank you very much for your submission—in the time frame, it is particularly comprehensive. Would you like to make an opening statement? After that we will go to questions.

**Dr Tham**—Firstly, thank you very much for inviting Liberty Victoria to appear before the committee. Our submission highlights five major areas of concern with the bill. I am going to focus on three in my opening statement: firstly, the bill is unjustifiably based on overly broad financing-of-terrorism offences; secondly, the bill poses the risk of increased racial and religious discrimination; and, thirdly, the bill needs to actually ensure that the activities of AUSTRAC and AUSTRAC's CEO are democratically accountable.

With regard to the first one, the starting point is that the bill actually defines financing of terrorism rather broadly by picking up on a number of offences in the Criminal Code—namely, in section 102.6 and in division 103. It also picks up on the offences in sections 20 and 21 of the Charter of the United Nations Act. The central point to be made about the bulk of these offences in section 102.6 of the Criminal Code and sections 20 and 21 of the Charter of the United Nations Act is that they do not require a link between illegal conduct and violence, an attempt to commit violence or an intention to commit violence.

So, if a person donates to Hamas for the exclusive purpose of funding its social welfare activities and knows that the recipient of the funds is in fact Hamas, that will now be punishable by a maximum of 25 years. If a person donates to the Liberation Tigers of Tamil Elam for the sole purpose of reconstruction of homes after the tsunami disaster, that is a crime punishable by five years under the Charter of the United Nations Act. I use these not merely as hypothetical examples but as examples of real issues facing Melbourne Tamil and Melbourne Muslim organisations. What they highlight is what this committee itself has dubbed 'legislative overreach' in terms of antiterrorist criminal offences.

How this flows through in terms of implications for the bill is that the bill hinges upon the concept of risk of financing of terrorism—that is, the risk of these various offences occurring. If we have these financing-of-terrorism offences as broad as they are and thus picking up on conduct which has no link to violence or attempts to commit violence, what we have is the spectre of Australian Muslims, Australian Sri Lankans and Australian Tamils being

disproportionately affected by the provisions of this bill. They might be more likely to be subject to suspicious matters reports. They might be more likely to be subject to more stringent identification procedures before being able to receive the provision of designated services from various financial institutions. What we recommend is to define the concept of financing terrorism in a way that maintains the connection between illegal conduct and violence and intention to commit violence. For that purpose, we recommend that that concept be defined to solely mean conduct classed as an offence under division 103 of the Criminal Code.

The risk that this bill poses of increased racial and religious discrimination stems from the fact that flowing through this entire bill is an emphasis on a risk based approach. A core feature of the risk based approach is that it is going to confer a lot of discretion upon reporting entities as to how they comply with the obligations of the bill. This discretion raises the danger of racial and religious discrimination. The submission canvasses various reasons for this, including the difficulties and complexity in terms of detecting when funds are to be used for funding terrorism. It also points to the fact that some commentators have described the training of bank officers in relation to detecting money laundering as lax.

What I want to focus on is the fact that representatives of financial institutions have publicly contemplated breaching antidiscrimination statutes in order to comply with the provisions of the bill. For example, in evidence given to this committee in its inquiry into the first exposure draft, representatives of the Australian Friendly Societies Association expressly contemplated some customers perceiving that their business has been rejected due to 'discrimination on the grounds of race'. To give you another full quote, this is a paragraph that is found in the *Australian Banking and Finance Law Bulletin*. It reads:

Any risk-based approach will require financial institutions to more strenuously apply their KYC and reporting obligations when dealing with 'suspect persons or countries'. In this way, certain persons may be subject to more rigorous standards and checks than others, *purely by virtue of their nationality, religion, political beliefs and so on.*

This is a paragraph that is taken from an article written by Andrea Beatty and Ros Grady. Both are partners at the law firm Mallesons Stephen Jaques and regularly advise major banks on their legal obligations, including their compliance with anti-money-laundering provisions. Our submission is that this paragraph should be taken as a serious indication of how the provisions of the bill will operate when the bill is enacted.

To make things worse, it is our submission that the bill actually sanctions racial and religious discrimination. It does so by providing good faith immunity or immunity from any legal action under any statute, Commonwealth or state, in relation to anything done or omitted to be done in good faith—that is, in compliance or in purported compliance with the provisions of the act, the regulations or the rules. In our submission we have canvassed this particular point in detail, but the key thing I want I stress is this: one can still breach anti-discrimination statutes even when one is acting in good faith. What that means is that this clause will apply to insulate otherwise discriminatory conduct from legal action under anti-discrimination statutes.

A further point I make is this: racial and religious discrimination not only is wrong in principle but also threatens to undermine the effectiveness of counter-terrorism measures.

This stems firstly from the fact that it is overinclusive. If financial institutions begin to actually profile people based on their race or religion they are going to pick up or collect information on a range of innocent individuals who have no connection with violence or attempts to commit violence. The second reason it threatens to undermine the effectiveness of counter-terrorism measures is that it is underinclusive. When we look at the various persons who have been charged under the anti-terrorism legislation in recent times, the individual that comes closest to fitting the meaning of a terrorist—a person who engages in politically motivated violence—is in fact Jack van Tongeren. There is no way a system that is based on race or religion—whether you are Muslim or a Tamil—would have picked up Jack van Tongeren, the white supremacist who is alleged to have attempted to firebomb four Chinese restaurants. There is no way any such system would have picked up Jack Roche or Jack Thomas.

Thirdly, there is the imperative of actually ensuring that AUSTRAC and the AUSTRAC CEO are democratically accountable for their activities. Arguably, one of the central features of the bill is a discretion and a power it confers upon the AUSTRAC CEO—most notably, the power it confers upon the AUSTRAC CEO to make AML/CTF rules. As the committee is very well aware, these rules will determine the substance of the obligations under the bill on a range of fronts. What the bill envisages in terms of this process of law making—and let us make no mistake about it; it is a process of law making by an executive body—is that it be primarily based on accountability to the minister and a consultation process that principally involves industry sectors.

There are two deficiencies with this process. Firstly, there is attenuated parliamentary review, with parliamentary scrutiny limited to the ability to disallow these AML/CTF rules when they are tabled before parliament. Secondly, these procedures do not formally recognise various parties that are going to be affected by the provisions of the bill. They do not formally recognise customers and staff of reporting entities. By failing to do so, in our submission they in fact entrench this objectionable practice of failing to adequately consult these groups. In fact, this committee itself observed in relation to the first exposure draft:

... the committee does remain concerned about the apparent lack of formal consultation with privacy, civil rights and consumer representative groups in the development of the regime to this point ... this may have resulted in some fundamental privacy, consumer and civil rights issues being overlooked.

What I wish to add at this particular point is that the government should be congratulated on taking privacy concerns much more seriously with the current bill by firstly undertaking a privacy impact assessment and removing the exemption in relation to business with an annual turnover of less than \$3 million when they become reporting entities under the bill.

These positive developments in fact highlight my point in that these changes can be directly traced to the report of this committee on the first exposure draft. In fact, the privacy impact assessment was one of the things that this committee recommended in relation to the first exposure draft. These developments or changes to the bill may very well not have happened but for the inquiry by this committee.

So what we recommend in our submission is that the AML/CTF rules and guidelines that result in significant change be subject to mandatory parliamentary review and also that, more generally, the activities of the AUSTRAC CEO are subject to annual review either by this

committee or by the Parliamentary Joint Committee on Intelligence and Security. Thank you very much.

**CHAIR**—Thank you very much, Dr Tham. I am not sure that the committee can take all the credit for what is and is not done. We recommend all sorts of things all the time which are not necessarily taken up, but we are always grateful when some of the things that we suggest are considered by government. I have a question in relation to the racial and religious discrimination issue that you raise at the centre of your submission. As I understand that, you are suggesting that to make it absolutely clear—or the parliamentary draftsman might just like to avoid doubt—the bill should be amended to include an express reference to the fact that it is not the intention to override the operation of the Racial Discrimination Act 1975.

**Dr Tham**—And more broadly, I think. This particular clause also has an impact on state antidiscrimination statutes because of section 109 of the Commonwealth Constitution, so our recommendation is that the various antidiscrimination statutes be expressly excluded from the scope of this clause. Also, to add to that point, that seems to be consistent with the intention of the government as stated in the explanatory memorandum—so if that is their intention it should be expressly spelled out in the statute. The other recommendation we made is that there be a reinstatement of the clause as it was in the first exposure draft. The immunity in the first exposure draft was contingent upon the reporting entity demonstrating there was no negligence, whereas this immunity clause is solely contingent on their demonstrating that the conduct was in good faith.

**CHAIR**—Okay; thank you for clarifying that for me. We will have an opportunity in hearings next week to talk to officials of both the AGD and AUSTRAC and we can pursue these things with them.

**Senator LUDWIG**—Dr Tham, I note in your submission you deal with a range of issues including the discrimination matter but, more particularly, you also talk about protection against liability only applying when there is no negligence, as was the case in the first exposure draft. Could you expand on what that will mean if it remains the way it is—in other words, if negligence is not included as it was in the exposure draft?

**Dr Tham**—In our submission we say that notions of good faith will be profoundly shaped by prevailing practices, and in a context where representatives of financial institutions and their advisers are publicly contemplating racial and religious profiling you can very well argue that conduct can still be in good faith even though somebody is racially profiling a customer.

**Senator LUDWIG**—Do you say if you amended it to include the original draft it would have been dealt with, or was the flaw still in the exposure draft?

**Dr Tham**—I think this particular problem can only be directly addressed by the amendment I just discussed with Senator Payne—that is, expressly excluding the antidiscrimination statutes at both federal and state levels. But if we do include the requirement that the immunity is contingent upon undertaking reasonable diligence, I think that will minimise the danger of racial and religious discrimination.

**Senator LUDWIG**—The inclusion of both the state and federal antidiscrimination statutes—have you raised that with the Commonwealth, with the Attorney-General's Department?

**Dr Tham**—Yes, I have. In fact, that particular recommendation was part of a submission to the Attorney-General's Department on the second exposure draft.

**Senator LUDWIG**—Did they provide any response to you as to why they thought it should not be included?

**Dr Tham**—Not a direct response. I suppose their response is what is found in the explanatory memorandum in the reference of the chief general counsel's advice, which I have analysed in the submission.

**Senator LUDWIG**—Earlier, in the original submissions, you sought a privacy impact assessment. That has been undertaken. Have you had an opportunity to look at that?

**Dr Tham**—I received more than 100 pages of documents yesterday. I have only had a glimpse at best.

**Senator LUDWIG**—I have it in my suitcase to go through in detail. I am wondering whether I could impose upon you. I am sure you will read it and have a close examination of it. If there are elements of that which you did want to raise with the committee, would you mind providing those submissions?

**Dr Tham**—Not at all.

**Senator LUDWIG**—Having gone to the extent of asking for a privacy impact assessment—I think that everyone supported that view; at least I did—we now have one and we should take cognisance of it.

**Dr Tham**—I agree.

**Senator LUDWIG**—That would also mean that consideration will be given to extending the Privacy Act to businesses with a less than \$3 million annual turnover. That now appears in some respects to be dealt with through this bill.

**Dr Tham**—That is correct, yes. As I mentioned, I think, the government should be congratulated on addressing that particular recommendation in its consequential amendments bill.

**Senator LUDWIG**—They were the broad areas. The other questions were to do with page 15 of your submission. In terms of the exposure of the bill—we have not got the rules yet, so we are still a bit challenged as to what could be in there—there is also the issue of guidelines, because they will be instrumental in how the scheme will operate for businesses in the marketplace. Your view is that those guidelines should be made available on the web; they should be out there for public consultation and then signed off at some point. Is that the gist of the argument?

**Dr Tham**—Yes. I suppose the central thrust of that part of the submission is to ensure there is proper public and democratic accountability. So, with those guidelines and rules, we recommend a two-month mandatory period where they are made available to the public and then signed off, as you say, down the line.

**Senator LUDWIG**—Do you think it should also embody a consultative process? You could, in meeting that requirement, easily stick them on the web and say they will be operative in two months time. It may not necessarily address your concern because all that has happened is that they publish the guidelines and have a two-month period before they come into operation. That will allow us, in some instances, to adjust to what the guidelines might say, but it does not invite a consultative process, so to speak.

**Dr Tham**—That is correct. That is why we recommend a full range of measures from parliamentary review to formalising consultation with various affected groups, including that mandatory two-month consultation period for those guidelines and rules.

**Senator LUDWIG**—You do not go so far as to say they should be legislative instruments or do you?

**Dr Tham**—The guidelines?

**Senator LUDWIG**—Yes.

**Dr Tham**—No, we do not go so far as to say that.

**Senator LUDWIG**—Do you think that they do not need to be legislative instruments, that guidelines are sufficient?

**Dr Tham**—As you probably appreciate, Senator, it is hard to answer the question because we actually do not know the details of the guidelines and therefore I am not able to make a judgement of significance or otherwise of the guidelines. That is why we recommend an annual parliamentary review of the activities of AUSTRAC and the AUSTRAC CEO; it is only with a review like that that the judgement can be made as to whether those guidelines need to be legislative instruments under the Legislative Instruments Act.

**Senator LUDWIG**—I understand your submission a bit better now. It is difficult in that sense to follow how much will be in the primary rules and how much will then be shifted into the guidelines. We are hopeful we will be able to talk to the AGD next week to ascertain the information on those particular issues. In terms of the annual review, there is also a seven-year review within this bill. Is that too long or too short a period, in your view?

**Dr Tham**—It is a reasonable period if it is accompanied by other accountability measures—an annual review in particular. If it is relied upon as the main mechanism of review, I would say that seven years is far too long.

**CHAIR**—On the question of the proposition of an annual review, were you envisaging perhaps a report to the parliament on the activities of AUSTRAC and the AUSTRAC CEO in relation to this legislation by the relevant minister, which can then be the subject of debate and discussion in the parliament? Is that what you are envisaging—or a full-on inquiry by a parliamentary committee? I know you make a reference to the Parliamentary Joint Committee on Intelligence and Security and to this committee.

**Dr Tham**—The latter.

**Senator LUDWIG**—I turn to the areas you think should be reviewed—if we do not have the rules, we do not have the guidelines. In terms of the bill—at least this bill—we have that now and it provides more of a framework. The easiest way to understand it is if you are

familiar—I am sure you are; more than I am perhaps—with section 6, which seems to provide the designated services and how they can be expanded through regulation. It seems to suggest that the regulations may amend an item of the table in the section so that the format is such that, once we get the framework in place, the government will be able to incrementally change and alter section 6, which then deals with the designated services as well. So we might also have incremental change occurring. We will then get experience from business—how they operate under the rules in this legislation as to whether they have to comply, as they do, with the various provisions. Is that a broader area or is it more the legislative framework?

**Dr Tham**—I am sorry; you need to repeat the question. I was not quite sure—

**Senator LUDWIG**—It is more the type of review that you are contemplating. Is it a broader review dealing with the legislation, the guidelines, the rules?

**Dr Tham**—All those things, yes—I suppose, operationalising it.

**Senator LUDWIG**—Then there are the business operational issues as well that come to light.

**Dr Tham**—To talk about operationalisation in the context of this particular statute is, I think, a misnomer. We know that the AML/CTF rules are in fact going to be determinative. They will determine the substance of most of the obligations. I definitely contemplate review of the rules. But there is a fundamental issue with this piece of legislation, as with any other piece of counter-terrorism legislation: what are the tangible benefits of preventing terrorism? The government's own admission in the explanatory memorandum is that they do not really know. That is fine as a starting point, but that highlights the necessity of review. We have this massive regulatory edifice that will impose a lot of costs on businesses and involve a lot of collection and storage of personal information, and one of the purported aims is to prevent terrorism. Review should ensure that that practical objective is being achieved in a proportional manner.

**Senator LUDWIG**—Some of the earlier witnesses today highlighted the breadth of the reporting obligations—that they can extend to any state or territory law and that they have to be reported as breaches of those particular laws. Have you had an opportunity to look at the breadth of the reporting obligations on AUSTRAC and the AUSTRAC CEO and whether it is appropriate in the context of anti-money-laundering legislation?

**Dr Tham**—I suppose the reporting obligations are based on overly broad offences. In that sense, they are disproportionate, in our view. As to the specific issue you raised about state and territory legislation, I have not examined it in detail but I am happy to come back to the committee on that issue.

**Senator LUDWIG**—Under division 2, Suspicious matters, section 41, Reports of suspicious matters, subsection (f), it says the legislation covers matters that:

- (1) may be relevant to investigation of, or prosecution of a person for, an evasion, or an attempted evasion, of a taxation law;

It does not seem to be limited in that sense, which is a very broad reporting of suspicious matters. I am interested in Liberty Victoria's view about the breadth and nature of the requirement to report suspicious matters. I know we have a very limited time frame, but the

other part, of course, is the way the exemption system works. Liberty Victoria may not have turned your minds to it, but it would seem that, as it says under section 42:

- (1) This Division does not apply to a designated service that is of a kind specified in the AML/CTF Rules.
- (2) The AML/CTF Rules may provide that a specified provision of this Division does not apply to a designated service ...

Does it concern Liberty Victoria that, with that structure, you can set up a designated service that is an entity that has to report but then provide for exemptions in the rules themselves? It would be difficult for business to know whether they are in or out. I am interested in your view, from the perspective of ensuring individual consumers' privacy concerns are dealt with.

**Dr Tham**—I will get back to the Senate on this. It highlights the point made about the broad powers given to AUSTRAC to make the rules. Another example is the designated remittance arrangements. These provisions are targeted at alternative remittance systems and how they will operate. Section 10(1)(c) leaves it at the discretion of the AUSTRAC CEO to determine which particular remittance arrangements will be caught, as specified by the rules. So, while we have the framework of this legislation, whether or not obligations apply is not determined by the bill itself but by rules—to describe your point in a different way.

**Senator MURRAY**—Just on that point: a high level of discretion by a regulator, generally speaking, is the prompt that results in parliamentary oversight. When the government recognised that ASIC would have a high degree of discretion in its regulatory activities, it gave oversight to the Joint Committee on Corporations and Financial Services—similarly, with ASIO and the intelligence organisations. Remarkably, that was not the case for the taxation commissioner until just this month, when the Joint Committee of Public Accounts and Audit asked him if he would submit to a twice-yearly annual oversight process—and he agreed. He can make that agreement as an independent statutory officer, which, as I understand it, the AUSTRAC CEO is—in which case, you do not need legislation. The committee could ask the AUSTRAC CEO and, if he agreed, oversight would occur; if he did not agree then of course you would go to a statute. Having given you that outline, are you aware that discretion is one of the criteria which does result in parliamentary oversight?

**Dr Tham**—I would agree with that. To strengthen that particular point, I think the other reason why parliamentary oversight is absolutely crucial in regard to the activities of AUSTRAC and AUSTRAC's CEO is to do with the secrecy that is going to be cloaking their activities. I suppose one of the additional reasons organisations like ASIO, ASIS and DSD are actually subject to intensive parliamentary scrutiny is simply because the normal mechanisms of accountability that come from transparency and publicity are not available.

**Senator MURRAY**—I will not use the rude English expression “‘A” about face’; I will use the expression ‘horse before the cart’ instead. I see one of the problems with legislation like this is that it is a consequence of under-regulation or a lack of regulation and it is trying to fill an information gap. You are familiar with my work on the requirement that not-for-profit entities be regulated.

**Dr Tham**—Yes.

**Senator MURRAY**—It seems to me that some of the onus on reporting could be minimised a little if not-for-profit entities had proper standards of regulation, common accounting standards, common annual reporting standards and so on. Instead, it is very diffuse, complex and confused. If you have lost my paper, which I put to the senators and members, I will send it to you as a reminder. If there was more transparency and regularisation of the not-for-profit sector, would some of your concerns be better addressed? It seems to me that a lot of the reporting will be of people as private citizens interacting with not-for-profit entities set up for charitable, political, community or educational purposes, which fall outside the regulatory regimes that we are used to with APRA or ASIC.

**Dr Tham**—You raise a novel point. I have not actually fully considered that particular point. I am happy to take it on board and come back to you.

**Senator MURRAY**—Do you want me to send you that paper again?

**Dr Tham**—I think I still have it.

**Senator MURRAY**—I will send it to the secretary so that there is a reminder there. One of the counters to your concerns about privacy and an overintrusive state is that if you had a more transparent and open state in terms of reporting that would not be an issue.

**Dr Tham**—Yes.

**Senator MURRAY**—If you buy shares, for instance, in a public company, you are listed on a public register. If you sign up to vote, you are listed on the electoral roll. There are many areas in which people accept it is automatic that you are publicly listed. The reason I am putting this question to you is that perhaps we should consider it a defence if in fact you are publicly registered as a donor and listed, and it is a transparent exercise. Surely you cannot have a nefarious purpose if you are public about it.

**Dr Tham**—I will take your comments on board.

**Senator MURRAY**—Could you consider that and respond to the committee as to whether greater transparency should in fact be an automatic defence?

**Dr Tham**—Yes.

**Senator MURRAY**—Do you understand what I am getting at?

**Dr Tham**—I understand where you are coming from.

**Senator MURRAY**—I turn to the issue of discrimination based on race, religion and nationality. Is the question not that you are identified as being a Catholic or an atheist or a Buddhist or a follower of Islam but that only one group is targeted? Or would you argue that no-one should be profiled in any sense at all? There are forms of reporting which already profile people. For instance, the periodic census does that. It asks: 'What religion are you? Where were you born?'

**Dr Tham**—What we object to are those indicators being used as indicators of a risk of financing terrorism—that type of profiling. So I suppose it is not the gaining information as you mentioned, but the fact that you have a Sri Lankan name being used as shorthand for thinking that you are sending funds to Sri Lanka, or for thinking that you pose a risk of financing terrorism, therefore triggering a suspicious matters report.

**Senator MURRAY**—Like assuming, because of my name, that I am a Scots nationalist?

**Dr Tham**—Yes.

**Senator MURRAY**—I might be, of course! My main expectation with all this legislation is that it will pretty well pass unchanged. So the question for me is of a proper defence for people innocently caught up in these things—for instance, for someone who donates to an organisation believing it will go to build houses that have been affected by a national disaster and it is used elsewhere. The problem for me is that defences only operate when you get to the courts, and meanwhile you have gone through terrible agony before you get there. What sort of defences could we look at which would prevent it getting that far—would, in other words, prevent the regulator being over-zealous and over-punitive? I want to give you an analogy. It is the very criticism that the Inspector-General of Taxation has levelled against the tax office—that long before a matter gets to what you might call a legal stage people feel victimised by the approach, by the attitude, of the tax office. So how do you put into the law processes which allow for defensive considerations?

**Dr Tham**—The most direct way—and I suppose one not within the scope of this committee's inquiries—would be to amend the counterterrorism legislation that underlies this bill, by requiring that there be an intention to commit violence and so forth, or by providing a defence in those parts of the legislation in the Criminal Code. Given that that is not part of this committee's inquiry, it becomes an issue of the processes.

There are two things, I suppose. One of our key recommendations is: define risks of financing terrorism in a more narrow way, to focus on divisions 1 or 3 of the Criminal Code which require that there be some connection with violent conduct. Secondly, ensure that the activities of AUSTRAC, ASIO and AFP, who have access to the information, are subject to proper accountability. That can take various forms, and one of the recommendations we make is that the activities of those organisations should be subject to regular audits by the Human Rights and Equal Opportunity Commission and the Privacy Commissioner.

**Senator MURRAY**—I am glad you responded because, to my mind, there need to be internal processes. Some of the organisations you have outlined have internal integrity systems—almost ombudsman-like systems—within their own organisations, so that you can make a complaint and have it dealt with under due process internally. I do not know enough about AUSTRAC to know whether that sort of thing is in consideration, but I do not think it is, whereas the more traditional regulators do have those mechanisms.

**Dr Tham**—I suppose the broader point I make is that there needs to be a mixture of internal and external accountability measures. The need for external accountability measures is especially important in this particular case because the flows of information will be secret because of a tipping-off offence. Reporting entities cannot notify the customer when information is passed on to AUSTRAC and on to ASIO or AFP, which means that a person cannot complain in a normal, traditional sense to the internal ombudsman of whatever organisation it is. So there need to be other executive agencies, alongside parliamentary oversight, ensuring that the practices are appropriate and in conformity with the law.

**Senator MURRAY**—The Commonwealth Ombudsman has a formal responsibility in a number of areas such as those you have described. Tax and the police are two of them. Are

you suggesting that the committee should consider as a protective device the Ombudsman taking on this role or are you more open-minded about it?

**Dr Tham**—I am open-minded about what the external oversight body should be. I think the Commonwealth Ombudsman can be one candidate. The Ombudsman does tend to operate on a complaints mechanism, so that is not going to work in most instances in this situation because of the secret flows of information. So if the Ombudsman is to perform an oversight role, it has to be more by unilateral investigation and not something that is dependent upon complaints.

**Senator MURRAY**—If I look at the list of things you are concerned with, you say Liberty Victoria submits that the bill is unjustifiably based on overly broad financing of terrorism offences, which could mean that somebody inadvertently is caught up—in other words, it is too broad. Let us use again the taxation example of the anti-avoidance provisions. They are extremely broadly based. If exercised in an unjust fashion, the Ombudsman gets involved. In that area I cannot conceive of an outside organisation that would be more likely than the Ombudsman because the parliament does not have the investigative ability. The next one you say is: poses the risk of discrimination based on race, religion and nationality. That would seem to be HREOC.

**Dr Tham**—That is correct.

**Senator MURRAY**—The next is: eroding the rule of law. We have discussed that. Let us go to: undermining privacy. That would be the Privacy Commissioner, I suppose.

**Dr Tham**—That is correct.

**Senator MURRAY**—And: fails to ensure that the AUSTRAC CEO is democratically accountable. That one is the parliament. The reason I am taking you through these is you have only suggested one firm recommendation, which is that the parliament has oversight. But it is open, isn't it, on your submission, for us to formally make recommendations that the Privacy Commissioner, HREOC and the Ombudsman take up a formal responsibility in this area—is that accurate?

**Dr Tham**—That is a fair reading of the submission.

**Senator MURRAY**—Would you support that?

**Dr Tham**—I would support that. Alongside the recommendations for parliamentary oversight, we do specifically recommend that HREOC and the Privacy Commissioner have an involvement in terms of the oversight of AUSTRAC's activities.

**Senator MURRAY**—You have covered those. So the only one I have added, really, is the Ombudsman.

**CHAIR**—Thank you very much, Dr Tham, for assisting the committee. I reiterate my thanks to Liberty Victoria for the detailed submission. There are some matters which Senator Murray has raised with you which you have said you will come back to the committee on. There are a couple of matters from Senator Ludwig as well. We appreciate your assistance.

[11.40 am]

**BATTEN, Mr Richard, Partner, Minter Ellison**

**SPITERI, Mr George, Senior Lawyer, Minter Ellison**

**CHAIR**—Welcome. We do not have a specific submission from Minter Ellison for the inquiry. However, we have been provided with a copy of your submission on the second draft of the bill, which you made, I understand, to the Department of the Attorney-General in August this year. Would you like the committee to accept that document as a formal submission to this inquiry?

**Mr Batten**—I would, but I would like to indicate that we will be putting in a further submission. We have not had time to do that, unfortunately.

**CHAIR**—I understand completely. Thank you very much. I am grateful for that and, having read it, I think it provides a good basis for the committee to speak with you today, and we will read your further submission when it comes in. Mr Batten, would you or Mr Spiteri like to make an opening statement?

**Mr Batten**—Yes, I am happy to make a brief opening statement. Thank you, Madam Chair. I suppose I should make it clear that I am not purporting to speak on behalf of the legal profession, the industry or my clients. That is the normal disclaimer. I really want to focus, therefore, on some technical issues and I suppose generally, as no doubt as you have had with other submissions, on the structure of the proposed regime and some of the issues that might arise from that. As you have mentioned, we have made a previous submission on the second draft and we had made a submission on the original consultation draft. We are working through the latest version of the bill and intend to make a further written submission to the committee.

Overall our observation at this stage, in the light of the progress of the bill that we have seen, is that significant improvements have been made and it certainly has the flexibility to deal with situations as they arise. Our major concern at this stage is the lack of final versions of rules, and rules in certain areas. We certainly recognise the hard work that AUSTRAC has been doing in attempting to consult with industry and develop rules, but the time frame that we have seen for the legislation in recent months has I think significantly affected the ability of industry and other interested parties to actually make submissions to AUSTRAC in relation to the latest set of rules and the ability of AUSTRAC to actually even consider any of those submissions. Certainly we have not seen any further draft of the rules since the second version of the bill. That obviously creates a lot of uncertainty within the industry and makes it very difficult to assess the impact of the bill for industry.

Another issue that we are—I would not say concerned about but certainly interested in—is that the operation of the bill is very dependent on the rules in many senses, and I know that the government has made much of this. It is very much a framework piece of legislation. It does delegate powers to the regulator to a much wider degree than I have previously seen, and that obviously adds to uncertainty as well. The concern there at the moment, very specifically, is around transitional periods. If it is proposed that the bill be proclaimed, for example, on 1

January—and I have not heard a proposed proclamation date—if we do not have basically final rules at that point in time we are effectively shortening the transition period that has been proposed by the government, and that will be a major area of concern for industry.

I know that previous submissions have made the point around parliamentary oversight as well. That is also a matter with which we are concerned, given the wide scope and broad nature of the rules and rule-making power and also the very wide powers that AUSTRAC has to modify. Obviously the flexibility that those modification and rule-making powers give is welcome to the extent that that will allow the regulator to modify inappropriate applications of the regime, but it does mean that the exercise of those powers needs to be very carefully considered and there does need to be appropriate parliamentary oversight. We have raised a number of issues in our previous submissions. I know that you have them so I will not restate them. There are a number of technical points that I can touch on now if that would be of use.

**CHAIR**—Please do.

**Mr Batten**—To some extent the wide modification powers of AUSTRAC mean that these technical issues can be changed outside the framework of the bill and—except to the extent that parliament is reviewing the actions of AUSTRAC—without the same degree of parliamentary oversight. So the points I am making, I recognise, can be changed by AUSTRAC in the course of implementation of the bill.

One point that we would like to make is that the imposition of civil penalties means a lower burden of proof. While I suppose it could be seen to be a positive that these things are not criminal offences, the reality for the large financial institutions that we are dealing with is that the threat of prosecution in any case would be enough to make most of them modify their behaviour very quickly. A lower burden of proof is, if anything, likely to lead to more risk-averse behaviour by institutions. I suppose, from the point of view of anti-money laundering or counterterrorist financing, that could be seen to be a good thing but, given the risk based nature of the regime, risk-averse behaviour by institutions is not necessarily an appropriate outcome.

Another concern we have is in relation to making the AML/CTF program a legal obligation. Effectively a breach of the program by any of the institutions gives rise to the possibility of a civil penalty prosecution. That is a very high standard and much higher than the standard that is normally applied for that sort of obligation in other regimes. Again, I think it is going to pose challenges for organisations in the way they formulate those documents. There will be a strong inclination to remove any specific provisions in the program that will be potentially infringed, but there will be the countertension that AUSTRAC will require the program to deal with things in an appropriate manner. I think that will pose challenges for industry and I question whether they are actually necessary. The obligation to have a program may well be appropriate; the requirement that it be effectively a form of law vis-a-vis that particular institution, I would question.

We still have some concerns around the tipping-off offence. As an example, one concern we have is that within corporate groups there still does not seem to be any recognition that there can be disclosure within the corporate group—to other companies within the corporate group. There can be disclosure only to other reporting entities. The difficulty that may pose is

that most corporate groups run these sorts of programs as an across-the-group function. It may be difficult to identify in a particular instance whether information is being provided to a particular person as a representative of a holding company, or in some other capacity in a holding company, which may well not be a reporting entity. That could cause difficulties within the group and also could cause difficulties in the ability of a holding company, for example, to exercise effective oversight of subsidiaries. So that is a concern.

We are also concerned that there are still designated services that do not include a business requirement. An example of that is item 17, which relates to issuing promissory notes. The mere act of issuing a promissory note is a designated service. There is no requirement that I am aware of that this is in the course of carrying on a business. That can trigger regulation in circumstances in which a business might not necessarily expect to do it—when they are just doing it as part of some kind of internal exercise or part of some transaction, for example, that is not really an ongoing activity.

There are also difficulties around the ability to rely on another reporting entity. That ability is obviously welcome, in that where another reporting entity is doing the collection exercise in customer identification you can rely on the fact that that reporting entity has done it. The difficulty is that you can apparently do it only if that reporting entity itself complies. That may mean that the second-tier reporting entity needs to consider in each instance to what extent the base level reporting entity has complied. If that is the case, it will undermine to some extent the effectiveness of that ability to rely on another reporting entity engaging in that exercise and it could pose challenges in the relationship between those reporting entities.

We are still looking at the issues around AFSL holders, which is a new area where AFSL holders arrange for services. It will pose some interesting questions about how that actually operates in practice. I know that parts of the industry have welcomed it and other parts of the industry have obviously questioned it.

One concern we have—this is not necessarily a concern that is shared by other sectors of the industry—is that not everybody that is in the same kind of position as, for example, a financial planner, will necessarily hold a licence. For example, mortgage brokers may not hold a licence. You may have origination trustees who effectively are relying on mortgage brokers to do a very similar exercise to that of financial planners in collecting identification information relating to trustees. Obviously mortgage brokers themselves may not necessarily want to be treated as reporting entities, but I think it raises the question: is it appropriate to confine in that way the application of the regime of AFSL holders in that particular area? Are there other structures where something similar should be considered?

Another problem for AFSL arrangers is that they cannot participate in a joint AML/CTF program. We certainly have institutions where there is a financial planning operation within a group and you would normally expect such a group to have a single program covering the entire group. There does not seem to be any particular reason why the AFSL holder, if they wanted to, could not opt into that corporate group's program, obviously in the limited way that they would need to for their own particular purposes.

There is also an exception for companies—we focused on this only recently—issuing shares in themselves, which is obviously welcomed. A listed company, for example, and other

companies will not be treated as providing designated services, as we understand it, where they issue shares. That does not extend to other entities. An example of that, which seems odd, would be listed trusts. If you have some kind of listed trust structure or a stapled structure where you have a listed company vehicle and a listed trust stapled together, for example, the listed company part of that operation would appear to be able to rely on that exception but the listed trust part could not. That seems a bit inconsistent and I am not sure whether it has been raised before.

Finally, in terms of technical points, we are concerned a little about the day-one implications of the transaction record-keeping requirements. Although they inherently seem innocuous to the extent that people will just have to do what they would have to do in any case in terms of keeping records of transactions, those requirements are subject to the rules and we have not seen the rules in that area. Obviously, that partly depends on the proclamation date. But if that were to be proclaimed, for example, on 1 January—which now would seem unlikely for that particular requirement—it would cause a lot of difficulty for entities that are not currently regulated anyway. They are the points that I wanted to make.

**CHAIR**—You have been very comprehensive. Mr Spiteri, do you wish to add anything at this point?

**Mr Spiteri**—My only additional point—I think this reinforces the point made earlier by Richard about the AML/CTF programs—is that, whilst I suppose the intent of creating a special AML/CTF program was to limit AFSL holder arrangers to only the identification requirements of the AML/CTF program, the indirect consequence of creating this special category of AML/CTF program that they must comply with is that those AFSL holder arrangers cannot have a joint AML/CTF program within the designated business group. That could pose some potential problems as well.

**CHAIR**—Thank you both very much and thank you for the documents we have received already. Mr Batten, if I go back to the point you were making about transitional periods, you obviously emphasised the need for the final rules to be available at the time of royal assent.

Another point that has been raised with us in relation to the staggering of the transition implementation is that certain sections obviously are not in the 24-month, 12-month category but would be instantaneous, on the face of the bill, at time of royal assent. Another point is where they need IT systems changes, and I think IAG made the point about staff training, for example. These are basic but nevertheless fundamental to making sure that this works properly. They are going to have a severe impact on participants if it is immediate.

**Mr Batten**—Yes. I think any of the immediate obligations to the extent that they impose systems based requirements are problematic. Certainly the one that we were most conscious of was around that transaction record-keeping requirement. A lot of the other provisions in the bill seem to be more administrative or definitional. But certainly that is an example of one. We probably have not fully fleshed out all of the negative circumstances of a day-one application, but that is one that we are aware and we are concerned about that sort of immediate application. I suppose, again, it depends on the delay. If there is a longer delay on proclamation—if it was 1 July, for example—and we had that final set of rules, say, by the

end of this year, which seems highly unlikely, we would effectively be getting an additional six-month period for that part and that would help to some extent.

**CHAIR**—We can talk to AUSTRAC and the Attorney-General's Department about that next week. As you say, AUSTRAC have been working very hard yards to get to this point, but there are still some outstanding areas which are of concern in relation to the rules.

**Senator LUDWIG**—I will deal with the broader issues first in terms of your organisation's requirements to comply. Lawyers will mostly be dealt with in the second tranche. Are there services that Minter Ellison provides now that will have to be addressed?

**Mr Batten**—We are certainly not conscious of that at this stage in terms of our organisation. We are mainly focused, I suppose—although we are not purporting to represent the industry—on the issues that we are aware of or would expect to apply within an industry context.

**Senator LUDWIG**—Has your organisation looked at any immediate issues?

**Mr Batten**—No. To my knowledge, in terms of the particular transactions, given the nature of our business which is very commercially focused at a corporate level, we are not aware of any immediate implications of the bill for our organisation, at this stage.

**Senator LUDWIG**—Have you started consultations with the Attorney-General's Department with regard to the second tranche?

**Mr Batten**—I am not aware of any consultation having started in that regard. If it has occurred, it would have occurred presumably at the level of the Law Council or the law societies. I am not aware of that consultation yet.

**Senator LUDWIG**—The original submission you made in August in relation to the second exposure draft made 22 recommendations.

**Mr Batten**—Yes, that is correct.

**Senator LUDWIG**—How many of those have been addressed? Is there a balance sheet as to the ones that are still outstanding? Did you get feedback from the department as to which ones they were looking at and which ones they rejected?

**Mr Batten**—Most of our interactions with A-G's have been through industry forums. We have not had any direct contact with A-G's ourselves. We did not receive any response from Attorney-General's in respect of our submission that I can recall.

**Mr Spiteri**—We simply received a confirmation that the submission was received.

**Mr Batten**—They have been busy, I am sure. We have done a very quick exercise of just looking at those submissions and certainly a number of our recommendations have been picked up in different forms or the proposals have significantly changed. For example, at least three of our recommendations in relation to agents are effectively redundant now, given the fact that the concept of internal/external agents has been taken out of the bill. So we would welcome that particular change; it gives the relevant level of flexibility that is required. In terms of some of the particular points, we had concerns around reporting within a group, that perhaps the tipping-off offence may apply down the chain if you did feel the need to communicate to an agent, for some reason, in relation to your suspicions, or the fact that you

might be reporting it. I think that is conceivable, and that would seem to be precluded by the tipping-off offence. So those kinds of concerns we had around agents, for example, have not been picked up. I think, just having a very quick look at it—and I am afraid I have not had a chance to fully analyse that at this stage—

**CHAIR**—It might be easier to do that on notice, Mr Batten, if you are going to make a submission anyway in relation to those 22 items.

**Mr Batten**—I think it probably would be easier.

**Senator LUDWIG**—That would be helpful.

**Mr Batten**—We will do that.

**CHAIR**—Thank you.

**Senator LUDWIG**—I understand the amount of work that people have contributed to it, so we do appreciate that. I note that you also alluded to the concept that designated services can be amended. I guess it is a Henry VIII clause, where regulations can amend the statute as we go. You saw that as a positive but I guess it could also, in some respects, be a negative as well. You could find that certain services that you thought were out were now in, and the reporting requirements would then start but you would not have had an opportunity to have a phase-in period, or were to be dealt with in the second tranche, where you might also have expected a phase-in period.

**Mr Batten**—I should perhaps qualify that statement, then.

**Senator LUDWIG**—I am not sure that was your statement, but that was the impression that I got.

**Mr Batten**—I will qualify it then! I do see benefit, obviously, in having flexibility in the regime in a broad sense. To the extent that it allows for inappropriate application of the regime to be remedied I obviously welcome the flexibility; I am concerned to some extent about the breadth of those powers and the ability, as you have suggested, to amend something to add, effectively, to a designated service.

**Senator LUDWIG**—By regulation you can amend the designated service to include, at a threshold, or delete, as the case may be, by regulation, which can be promulgated by the minister at any time.

**Mr Batten**—I would submit that, in general, it would be preferable to have full parliamentary consideration of the scope of a regime, particularly a regime with such a dramatic impact on business as this one has. I do have concerns—although I am torn, because I have also practised extensively in the financial services area and in that area we have found the need to have wider powers for the regulator, at least in ASIC and in making regulations to be able to modify the regime to deal with inappropriate application of that regime. So I certainly recognise the benefit of flexibility in that sense.

I suppose the concern I have is at two levels. Firstly, I think that, at this stage, the regime probably has not had sufficient consideration, despite the fact that it has been in progress for a year or two. The actual application of the bill, of the detailed provisions, has had relatively limited consideration, particularly in the absence of rules, so it is difficult to assess it. My

preference would be that we had a very clear regime that people could understand, that was on the table, that people could respond to, with the flexibility maybe to be able to pull back from parts of the regime in particular cases. But I would agree to some extent with your concerns around the ability to add burdens to business without having to pass an act of parliament. I do note that, in relation to AUSTRAC's specific modification powers, they are required to consult with industry, and that does give me some comfort. It is good to see that in the legislation.

**Senator LUDWIG**—What that clause means is that you could, in terms of the second tranche, introduce it by regulation.

**Mr Batten**—Without having heard that the government intend to do that, I would assume at this stage that they may well do that.

**Senator LUDWIG**—I will have an opportunity to ask them whether that is their intention, or whether it is simply to deal with a second tranche by regulation as they see fit.

**Mr Batten**—To the extent that they identify the bill as being a suitable framework for other areas, it would be my assumption at this stage that they would intend to do it by regulation. I cannot see why they would not intend to do that. I am not necessarily concerned about the extent to which there is appropriate consultation in relation to that. If the consultation process is good, the means by which it is conducted is of less concern, except at the broader principle of whether there should be appropriate parliamentary oversight of that process.

**Senator LUDWIG**—I think our Scrutiny of Bills Committee has a view about these sorts of clauses in legislation.

**CHAIR**—It certainly does.

**Senator LUDWIG**—The other areas which you might have to help me with is the designated services for managed investment schemes and the investor directed portfolio services and managed discretionary accounts. I do not think I have any of those. Can you run through briefly what the concern is here and how this legislation will impact on these areas?

**Mr Batten**—It is quite clear that managed investment schemes are to be regulated now. That clarification was made in the last version of the bill; it is one area that has been sorted out. The concern that we had in relation to investor directed portfolio services, IDPSs, or wrap accounts, is that they are a structure by which people get access to managed investment schemes—wholesale schemes or wholesale funds typically. At the moment, it is not clear to what extent a wholesale fund would therefore be able to rely completely, perhaps so completely that they really should not be in the regime at all, on the fact that the IDPS operator is actually conducting these activities in respect of the retail clients. Arguably, the wholesale fund should be interested only to the extent of dealing with the operator, in the sense that the wholesale fund manager would not have any direct contact with retail clients at all. The same would apply to the custodian: the operator would have all of that contact.

An IDPS, according to ASIC at any rate, is a managed investment scheme. If ASIC is correct about that—and there are exemptions based upon that supposition—the IDPS scheme itself would be regulated. But there is uncertainty about that because, although ASIC has

given an exemption from the requirement to register a managed investment scheme, it has never necessarily been conceded to what extent that is technically required, given the nature of an IDPS scheme.

**Senator MURRAY**—Is it clear to you as to when the responsible entity will also be the reporting entity, with respect to managed investment schemes?

**Mr Batten**—Subject to the ability to rely on another reporting entity, so to the extent that the responsible entity of the wholesale scheme could rely on the IDPS operator as the operator of the IDPS scheme, and subject to its not having to check what the IDPS operator is doing in that regard and making sure that it is actually complying with those requirements, then it would seem that the wholesale fund manager could rely on the IDPS operator to that extent. I suppose the concern is: to what extent does the wholesale fund manager still have other obligations outside the pure customer identification obligation that may still arise?

**Senator LUDWIG**—I think you made some comment on the penalty regime, particularly about the size of the civil penalty regime and the threshold, on balance of probability, where you could accrue a \$2 million plus penalty. Is it comparable to or greater than ASIC or company law?

**Mr Batten**—This is off the top of my head, I am afraid, because I have not done the specifics—

**Senator LUDWIG**—Could you take that on notice?

**Mr Batten**—I will take it on notice. My feeling is that it is significantly higher, because a civil penalty regime is much more limited in the Corporations Act. It applies in particular contexts; it does not apply in the same wide range of regulatory contexts. An obvious example of that is the Financial Services Reform Act. It does not have civil penalty provisions; it has criminal offences. I am not sure how relevant it is really but the amount of the penalty for those offences is typically much lower, but given it is a criminal offence—

**Senator LUDWIG**—It is hard to make a comparison in that respect.

**Mr Batten**—Exactly.

**Senator MURRAY**—Mr Batten, I am picking up from you—and correct me if I am wrong—a cultural fear. What I am interpreting you to be saying is that ASIC have a culture of practical pragmatism and will adjust their guidelines and rules according to the circumstances of individuals and industry sectors, and that you can be confident about the manner in which they will approach that; you might not always agree with it, but you can be confident of how they will do it.

**Mr Batten**—Yes.

**Senator MURRAY**—You are saying that you do not have that experience of AUSTRAC and, therefore, at least whilst this is being bedded in, you want it to be more rules based and less flexible, discretionary and pragmatic. Have I interpreted you correctly?

**Mr Batten**—There is certainly a concern about the way that AUSTRAC will exercise that power. Obviously we have no real knowledge of that. We have seen some draft rules, the initial versions of which were very prescriptive and the later versions of which were much

more sensible. There is a major concern around the way that that organisation will operate. Again the AUSTRAC CEO is required to take into account, when he exercises his powers, certain matters which are positive from the industry point of view in terms of economic efficiency et cetera; that is all positive. My concern at the moment is that these powers are much more wide-ranging than I have seen before. I suppose you could say that ASIC—

**Senator MURRAY**—Do you mean they are wide ranging in discretion, or wide ranging in extent?

**Mr Batten**—Extent in particular.

**Senator MURRAY**—Not discretion?

**Mr Batten**—More extent at this stage. It is difficult to comment on discretion, given that we have not seen how they will exercise that discretion.

**Senator MURRAY**—The reason I am going back to this area which you have covered previously in your engagement with Senator Ludwig is that, where you have difficult and expansive new laws, I think you are better placed for the regulator to have discretion to exempt classes, to partially exempt classes, to adjust regulations and to adjust guidelines and rules. I base that on my extensive experience with ASIC.

**Mr Batten**—Yes.

**Senator MURRAY**—Is there an alternative to the route that, as I understand it, you are suggesting? Should that alternative be for AUSTRAC to introduce rules and guidelines on a discretionary basis only in conjunction with those regulators who have specific experience in that area? For instance, I have a good opinion of APRA. I think the reconstituted APRA is a very capable regulator. In the insurance field, they would be the obvious body to consult, interact and design things with. With respect to financial services providers, I would have thought the body would be ASIC. That would give me as a legislator more comfort in giving the regulator discretion.

**Mr Batten**—Yes.

**Senator MURRAY**—I am afraid that, if you make the legislation too rules based, you get a very rigid structure, and it might not be the time to do that. How do you react to that approach?

**Mr Batten**—I think we should impose an additional requirement to consult with the relevant regulators, where they exist. Presumably, the same observation could be made in relation to the gambling industry, as no doubt there are appropriate state based regulators that it may be appropriate to consult with in that regard.

**Senator MURRAY**—I am going further than 'consult'. As you know, the government can be required to consult with you or with us and take absolutely no notice of us whatsoever. I am thinking more of the design and final format being approved by a company-regulator. AUSTRAC would have primary responsibility, but it would need to be signed off.

**Mr Batten**—It is an interesting idea and one I had not considered before.

**Senator MURRAY**—Do you want to think about it and come back to us?

**Mr Batten**—I would like to come back to you on that one. In principle, I do think consultation is a good idea. The idea of approval has some merit. I suspect it may potentially be an issue from AUSTRAC's point of view, around the timing issues of being able to do what they may feel they need to do in a short period of time, but I think that is worth considering.

**Senator MURRAY**—There are normally two ways in which these things are approached in legislation. There is either a statutory provision, which sets out that you will consult on this basis or you will sign off on that basis, or, alternatively, regulators construct a memorandum of understanding between each other, which is very common between the ATO and ASIC and other regulators. ASIC and APRA have such experience in the introduction of this kind of regulatory regime that it would seem odd to let AUSTRAC develop this in isolation.

**Mr Batten**—One of the challenges for industry is the idea of yet another—it depends on how you count them— financial services regulator. We have ASIC and APRA—room for different approaches is already there. The ACCC obviously has a role to some extent, at least in relation to competition, and obviously there is also the ATO. So, effectively, we have a fifth regulator and there is a lot of concern in industry around how those regulators, each with a completely different mandate, interact. To some extent, industry might have preferred that that responsibility, at least in regard to financial services, sat within an existing regulator, which would probably have addressed that concern in any case. But, certainly, the approval mechanism would be another way of approaching that.

**Senator MURRAY**—In responding to the committee, perhaps you could consider it not just from the perspective that I have outlined but also from the perspective of minimising regulatory overlap, which is a huge concern at present and legitimately so.

**Mr Batten**—It is a big concern.

**Senator LUDWIG**—In the UK, they have the Financial Services Authority. They have taken anti-money laundering out of that area and put it into HM Revenue & Customs. Suspicious matter reporting is with the Serious Organised Crime Agency, a new authority they have structured. That I guess is the counterargument to Senator Murray in that, after experiencing the legislation for a couple of years now, I assume they have now found a better place for it.

If you recall, the UK originally had a rules based approach. They then went to a risk based approach. In doing so, they found that a number of suspicious matters were being reported. A report in 2004 indicated that it was overwhelming the regulator. They have now shifted it and changed some of the schema more broadly. Of course, everything I have said is open to conjecture, but it seems that they have now moved it to that area. In answering Senator Murray, you might also want to consider the overseas experience, but not in detail, please.

**Senator MURRAY**—I want to talk to you about financial services providers. As you know, very strong corporate entities operate in this area. It is also a highly dispersed industry with a great many agents and, effectively, franchisees operating, including licence holders. There is a question as to how reporting and advice should occur. I envisage, particularly in the early days of this legislation, a large number of smaller entities asking for advice as to whether they should or should not report something or whether they do or do not fall into the

regime. Earlier, I asked this question of the two accounting organisations we had here. Unless you have given thought to this question, perhaps you could respond to it in your further submission. I want to know whether you think the provision of advice as to how or whether you report—and support services—needs to be made available. I gave the example, for the accounting firms, of the GST. When the GST was introduced, sums of money were given to the professional associations to provide compliance implementation mechanisms and advice systems. It is a bit difficult to ring up the cops and say, ‘Give me advice about this.’ They will say: ‘Get lost. Just tell me what I want to know.’

**Mr Batten**—I imagine that AUSTRAC will need to be taking the kind of proactive approach that you would expect a regulator like that to be taking, certainly such as ASIC in particular or APRA, to be able to assist newly regulated entities—

**Senator MURRAY**—You misunderstand me. I am talking about an intermediate step. Again using the GST example, accountants who are getting into the new system would talk to their professional association often before they talk to the ATO. From the legal practitioners’ point of view, professionally, does there need to be a professional body available? Big firms like yours are big enough and ugly enough to look after themselves, but there are lots of small legal practitioners out there and lots of small financial service providers. So that is the question.

**Mr Batten**—You are talking about the relevant Law Society, for example, or the Financial Planning Association or some other—

**Senator MURRAY**—Yes, who can give advice and assistance in these matters, including, might I say, on the disciplinary side of things, which you have to keep an eye on too: will the protocols and the systems be changed? The other thing I want to ask you about is with respect to your financial services experience. As you know, in Corporations Law at present, with your formal reporting requirements you are entitled as an officer or practitioner in an entity to delegate your reporting to somebody else: to the external auditor, to the internal auditor, to a fraud officer—they are designated people. Because of the personal liability that is explicit in this law, do you think the ability to delegate off your reporting responsibility is sufficiently secured?

**Mr Batten**—I would like to take that one on notice as well.

**Senator MURRAY**—I stress I am not a lawyer but it seems to me that a primary responsibility will often be laid on somebody who may not be competent to exercise that primary responsibility.

**Mr Batten**—The reporting you are referring to primarily would be suspicious matter reporting.

**Senator MURRAY**—That is right.

**Mr Spiteri**—Is your question focused on: if I am left with the responsibility should I take that role, and do I really want to take that role of personal responsibility that falls on me under certain provisions under the bill?

**Senator MURRAY**—Let me get give you a practical example that may assist you in answering. A financial planner may have a limited portfolio which is directly related to a

particular large financial company. That is very common. That financial planner may effectively be him and his wife: she does the administration and he does the selling and the activity. Some fellow arrives whom this bill has now forced out of the laundering activities he used to do, and he sits in front of the financial planner. It looks awfully suspicious, but he does not know quite how to deal with it, although he is perfectly competent to give people financial advice. I suspect in those circumstances he will go back to the principal company.

**Mr Batten**—Assuming he is an authorised representative and not the licensee himself, then I would expect the same.

**Senator MURRAY**—But quite often they are the licensee themselves and will still have the emotional and cultural difficulties. My question is: if that person is a licensed entity—and quite often you do get single individual licensees—would they be able to in fact delegate their reporting upwards and fulfil their obligations under the law, or should they be able to?

**Mr Batten**—I think it would depend on the construction of the designated business group concept in that particular example. There could be difficulties around the fact that the AFSL holder cannot participate in the same AML program as the overall group to the extent that they only have that more limited program requirement. So that could be an issue in that particular context. But it is one I would have to take on board. I have not considered that particular aspect of that.

**Senator MURRAY**—I think that micro and small businesses—because that is what we are talking about—which are operating in that tied house relationship but are independent entities in the legal sense will experience real, practical difficulties in complying with this law. I am worried about their liability.

**Mr Batten**—I do not think they can shift the liability. One way they may be able to deal with it is to group together and form a designated business group, because they do not actually have to be related for that purpose, and possibly establish a program that covers a number of similar operations, for example, and effectively use that program as their mechanism for dealing with these sorts of problems. But they will not shift responsibility by doing that.

**Senator MURRAY**—I am concerned about the practical implementation. I am very supportive of the reporting, but I am concerned about liability. Can I give you the example of the financial reform act itself. What happened with respect to product disclosures and so on is that the obligation and liability is on the licence holder but in fact the obligation was fulfilled by the product provider. So AMP and so on have devised the product disclosure format and given it to the licence holder. That enables them to have systems which they can then tailor to the particular customer. I would envisage that you would need some sort of larger involvement in these matters of reporting—how to report advice and have more interactive systems than I can see at present.

**Mr Spiteri**—This has limited to some extent the responsibilities on AFSL holder arrangers. Some of the responsibilities, such as suspicious matter reporting obligations, ongoing due diligence and certainly the breadth of the AMLCTF program, are limited for those reporting entities. So to some extent there is some protection there in terms of the burden of responsibilities and obligations on those types of reporting entities. However, I take your

point. It would not cover those other reporting entities providing other designated services which are covered in section 6 for those smaller operators.

**Senator MURRAY**—You clearly understand the problem I have with liability for those micro and small businesses. Perhaps you can respond to us further on it.

**CHAIR**—Thank you very much for attending today and for the information that Minter Ellison has already provided to us. You have made some quite significant undertakings there, Mr Batten, about matters that you will come back to the committee on.

**Mr Batten**—Yes, I am a bit worried!

**CHAIR**—I am most impressed. But we have a very tight reporting time. We have hearings in Sydney on Tuesday and Wednesday next week and then we have to report by Tuesday of the week after, so we do have a very tight time frame. We do appreciate your help very much. Any further assistance you can provide with those responses would be greatly received.

**Mr Batten**—We will do our best.

**CHAIR**—Thank you very much. I thank all of the witnesses who have given evidence to the committee today.

**Committee adjourned at 12.29 pm**