



COMMONWEALTH OF AUSTRALIA

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## SENATE

SELECT COMMITTEE ON SUPERANNUATION AND  
FINANCIAL SERVICES

**Reference: Financial Sector Legislation Amendment Bill (No.1) 2000**

TUESDAY, 11 JULY 2000

SYDNEY

BY AUTHORITY OF THE SENATE

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**SENATE**

**SELECT COMMITTEE ON SUPERANNUATION AND FINANCIAL SERVICES**

**Tuesday, 11 July 2000**Tuesday, 11 July 2000

**Members:** Senator Watson (*Chair*), Senator Sherry (*Deputy Chair*), Senators Allison, Chapman, Conroy, Hogg and Lightfoot

**Senators in attendance:** Senators Allison, Conroy, Hogg and Watson

**Terms of reference for the inquiry:**

Financial Sector Legislation Amendment Bill (No. 1) 2000.



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**Committee met at 8.40 a.m.****ANDERSON, Dr Michaela, Director, Policy and Research, Association of Superannuation Funds of Australia****EL HASSAN, Mr Zein, Legal Representative, Association of Superannuation Funds of Australia**

**CHAIR**—I declare open this public hearing of the Senate Select Committee on Superannuation and Financial Services. On 28 June the Senate referred the provisions of Financial Sector Legislation Amendment Bill (No. 1) 2000 to the committee for inquiry into the provisions in respect of the proposed changes to the Superannuation Industry (Supervision) Act 1993. The committee is required to report to the Senate on 16 August 2000. The proposed changes relate to enforcement powers and offence provisions as they apply to a trustee, custodian or investment manager of a superannuation fund and the application of the criminal code to the SI(S) Act. Although there is only a short time available for the committee to conduct this inquiry, the aim of today's hearing is to take evidence from some key organisations and interested parties on the provisions of the bill.

All of the witnesses who appear before the committee are protected by parliamentary privilege with respect to the evidence given before the committee. This means that they are given broad protection from action arising from what they say and the Senate has the power to protect them from any action which disadvantages them on account of the evidence given before the committee. The committee prefers to conduct its evidence in public. However if there are any matters which you wish to discuss with the committee in private the committee will consider your request.

I would like to welcome to today's hearing Dr Michaela Anderson, Director, Policy and Research; and Mr Zein El Hassan, partner, of Corrs Chambers Westgarth, solicitors. I invite you to make an opening statement, at the conclusion of which the committee will ask some questions.

**Dr Anderson**—The Association of Superannuation Funds of Australia, ASFA, welcomes this opportunity to comment on this bill, which was introduced into parliament and which proposes changes of a fairly substantial nature to the treatment of breaches of the provisions of the Superannuation Industry (Supervision) Act. In particular, schedule 3, part 2 of the bill has raised considerable concern for this industry. The provisions of this bill were placed before the parliament without any consultation with industry or provision of any policy rationale—and this is a real problem for us. As the bill represents a complete change to the penalty regime in superannuation, it would seem fairly logical that the industry be consulted.

The bill introduces a diversity and a complexity into the treatment of superannuation offences. It also represents a shift in the cost, with limited justification for the direction which has been pursued. Probably most importantly, it appears to undermine the representative trustee system in superannuation, and this is what is causing a lot of worry for trustees of superannuation funds.

ASFA is not aware of any real evidence to suggest a failure in the superannuation system which would warrant such a change in the penalty regime. That is the first question that we

would ask: why is the change occurring? Equally, any concerns of the regulator in relation to its enforcement powers have not been made public. Indeed, the first time ASFA became aware of the proposals was when the bill was introduced into parliament. ASFA notes that the policy rationale for the change from a fault based regime to a strict liability scheme is not apparent from the explanatory memorandum or from the minister's second reading speech.

Independent investigation by ASFA has indicated that APRA says that it has experienced unspecified difficulties in taking action under the current provisions of SI(S), particularly in prosecuting acts of omission. Despite the purported prosecution difficulties facing APRA, a convincing case has not been made for substantial change to the penalty regime.

**Senator CONROY**—Did they indicate that in writing or privately?

**Dr Anderson**—No, it was just a rumour. That is all we have. The industry has not been consulted to ascertain the extent of any problem, either. If there is a problem, we do not know the extent of it. Therefore, we cannot actually see whether the provisions in the bill are appropriate to deal with whatever the problem is. It is a question of: we do not know what the problem is, so we do not know if you are fixing it.

The bill, as you would be aware, applies strict liability—from our count I think it is 34 provisions. Most of them previously carried fault liability; 11 were previously under the intentionally or recklessly terminology; 11 were under without reasonable excuse; and 12 have been reclassified as two-tiered offences. The change in the tone and the direction of the penalty regime is quite apparent as strict liability, in contrast to fault liability, does not require the prosecution to prove intent to commit the offence. The bill's wording thus introduces the application of penalties beyond the existing actions which were intentional or reckless and it raises the possibility of penalties being imposed for inadvertent breaches. The complexity that is there too with the one-tier and two-tier strict liability offences is a problem. It seems that if APRA looks at a case, it will decide which one it will use. If it has not got the evidence to go in itself for the reckless and deliberate action then it could use the other provisions.

The bill changes the onus of proof such that the fault elements, which may serve as a defence, must be made out by the trustee, rather than the element of an offence which needed to be proved by the regulator. The regulator need only demonstrate the existence of a contravention as a question of fact to place the trustee in a position where it must seek to prove that it is not guilty. This reverse of the onus of proof creates, as the cynics would say, a cost saving for the regulator. But it also passes that cost back on to the fund and—as I think one commentator has said—now with the criminal code it will mean that you are probably always looking for legal advice, which may be more costly, just to work out what it all means.

I said at the start that one of the real problems is that the nature of representative trustees is seen by trustees at the moment as under threat. They see themselves as being potentially heavily penalised under this regime. The potential risk of criminal prosecution will be seen as a risk and a disincentive to employer and employee trustee involvement. I think that this is one of the strongest parts of our regime in terms of prudential supervision. It is supervision by those most concerned and I think that if we put that in danger then we have a real problem.

ASFA agrees that it is important to have proper processes in place when you are running your fund. The SIS penalty regime should be supportive of and encourage industry best practice and good governance. There is some contention that what this bill is aiming to do is to make trustees more aware and to make them take on their role and introduce good fund governance. It seems to me that if that is its intention then it is a very heavy-handed way of doing it. There are much better ways of bringing about good practice. In fact, I think we are working very well towards a very high level of best practice with trustees. If this comes along and disrupts that movement into really excellent practice in fund governance, it will be a real problem for the retirement provisions of Australians. If passed in its current form, the bill will be a strong disincentive for funds being able to source persons to serve as trustees as well as a likely barrier to retaining those who serve in this capacity at present. ASFA would strongly encourage discussion with government and would welcome discussions to identify ways of tightening any perceived weaknesses to the penalty regime without threatening the representative trustee platform on which much of SIS is based. My colleague might like to comment on the question that Senator Watson placed before us on the time problem.

**Mr El Hassan**—Michaela and I just discussed briefly before proceedings commenced whether the strictness of the penalty regime would be softened by conferring some sort of discretion on the regulator in relation to the time within which trustees are required to undertake certain actions. That would certainly be welcomed. The question then would become: how does the regulator exercise those discretions? From the trustees' point of view, it would be preferable if there were guidelines in relation to how the discretion would be exercised so that there was some certainty. If appropriate discretions were conferred on the regulator with appropriate guidelines, it would certainly make the regime a little more palatable for trustees.

**CHAIR**—Obviously there are certain parts of the bill that I presume you do agree with. We want to try to isolate those areas which you find unpalatable. For example, under item 33, are you happy about offences of \$5,500 to apply to persons who falsely hold themselves out to be auditors or actuaries? Does that seem unreasonable?

**Dr Anderson**—No, that does not.

**CHAIR**—What about the point that says:

- discretionary powers for APRA to disqualify certain persons from acting as trustees, investment managers or custodians of superannuation entities. This would be consistent with ASIC's powers under the Corporations Law ...

Are you happy with that one?

**Dr Anderson**—I do not see any problem if the criteria for disqualification are prescribed.

**CHAIR**—What about:

- enabling APRA to accept enforceable undertakings from trustees. Such powers are currently available to the ACCC and ASIC and have been found to be effective in restraining or remedying less 'serious' contraventions. It would be particularly useful if APRA could make trustees undertake corrective action when problems first surfaced, and not have to wait until significant breaches have occurred;

Do you have any problems with that?

**Dr Anderson**—We have no problem with that one.

**CHAIR**—Then there is the statement:

... a 'contribution freeze' which could be invoked when APRA has concerns with the operations of a fund/trustee that falls short of the trigger for trustee replacement. At present, this power exists only where funds do not have equal employer-employee representation on the trustee board.

**Dr Anderson**—That is fine.

**Mr El Hassan**—The point we are making is that for certain inadvertent breaches it seems unnecessary to have a strict liability regime; for example, failing to lodge annual returns.

**CHAIR**—We are coming to that one. The major problem therefore does appear to be changing the certain fault liability provisions to strict liability provisions.

**Dr Anderson**—Yes.

**CHAIR**—Most of the offence provisions require proof beyond reasonable doubt and that the contravention was reckless and deliberate. I think that is where APRA have obviously had some problems getting proof. What is your suggestion to make sure that we are going to raise the bar somehow? We are trying to find solutions.

**Dr Anderson**—Our problem is that we would like some evidence. We would like to see what APRA has seen. That is it. We are not convinced that this is a problem that needs to be fixed with this form of—

**CHAIR**—I can assure you, and all witnesses, that the committee will call either the minister or his representatives, and maybe even APRA. It may be difficult for APRA in terms of policy issues, but in terms of providing examples I think they will be able to provide those examples before we conclude our report. We will be issuing them and we will be seeking those examples. I think we should assure you of that.

I am impressed with your solution about guidelines as to how the discretion is to be exercised. I have asked for that in terms of the Income Tax Assessment Act in areas where the income tax commissioner's discretion is required, so I think it is entirely appropriate we have them there. Would you like to fill it out just a little bit more before I go to other committee members?

**Mr El Hassan**—With a strict liability regime where you are imposing criminal penalties, monetary penalties, on individuals, where we have member representatives and employer representative trustees and a strict liability regime for inadvertent breaches—for example, failing to lodge annual returns—you are talking about employees who are effectively volunteers. Having monetary penalties at \$5,000, for example, being imposed on an employee who is not necessarily being paid for being a trustee and for which they cannot obtain insurance. So if you disclose that—

**CHAIR**—Do basically all your funds insure their trustees when acting in good faith within the scope of their duties in the statute?

**Mr El Hassan**—Not for criminal penalties. You cannot get insurance for criminal penalties.

**CHAIR**—Not for criminal penalties, but for ordinary penalties they can, can't they?

**Mr El Hassan**—I am not quite sure that they can.

**CHAIR**—Michaela, can you answer that one for us? My understanding is that one of the requirements of trustees is to seek that insurance, not for criminal penalties but for other areas, if discharging their responsibilities.

**Mr El Hassan**—They can certainly obtain insurance. Invariably, trustees do have insurance. The question is whether they can actually obtain indemnity insurance for criminal penalties.

**CHAIR**—No, I ruled criminal penalties out.

**Mr El Hassan**—That is what we are talking about.

**Dr Anderson**—We are talking about criminal penalties.

**CHAIR**—We are trying to get a distinction between those items that should be criminal penalties and those that should be for fault things. We are saying that being two minutes late or a week late in lodging your return should not have criminal type penalties. That is why we are trying to get a demarcation line and where we should draw it.

**Mr El Hassan**—My understanding is that they cannot insure against any penalties imposed under the criminal code.

**CHAIR**—That is right.

**Mr El Hassan**—And that is what we are talking about here.

**Dr Anderson**—And at the moment this bill imposes those.

**Mr El Hassan**—So you are talking about an employee who is a volunteer—

**Senator CONROY**—Imprisonment as well.

**Mr El Hassan**—Not just imprisonment; we are talking about the fines which are imposed under this code.

**CHAIR**—We are trying to find a middle way, to get some solutions to the problem. It is suggested that there could be a two-tier approach—for example, if you are late for a week or if you are late for a month. When you get to six months, isn't that then getting over the line a little bit?

**Senator CONROY**—I think the point they are trying to make is that, if the action is taken under civil provisions and it is a fine, yes, you can insure against it, but if they take it under criminal and it ends up being a fine, it does not matter whether it is one minute late or six months late, you cannot take insurance out.

**Dr Anderson**—Yes, and that is the problem.

**CHAIR**—But in order to protect the trustees, can we not have a cut-off line if you are late for two minutes, one week, one month or something? When it gets to three months or six months, do you not think the severity of the penalty should jump up quite significantly?

**Dr Anderson**—But under this bill, it doesn't.

**CHAIR**—That is what we are trying to tease out. There must be a line where—

**Senator CONROY**—If a company does not lodge its annual reports, are they subject to criminal sanction?

**Mr El Hassan**—There are penalties under the Corporations Law.

**Senator CONROY**—Are they criminal?

**Mr El Hassan**—That I have not looked at.

**Senator CONROY**—I would be surprised if they were criminal; possibly they are not.

**Senator ALLISON**—Can you spell out what you think these guidelines would do? Dr Anderson, you talked about time lines for the guidelines. Was that the lateness question for the period of time?

**Dr Anderson**—Yes, that was the question that Senator Watson asked before the hearing: how would you deal with that? It seems to me, as Zein has said, that discretion could be built in there. At the moment, what we would have under this bill would be that the regulator would take no action if they did not think it was worth it. That leaves trustees in quite a strange place. You are dependent on the regulator. It is a sort of 'trust me' situation. That is where we started to talk about whether you had a discretion or whether you had this no action. You really need some guidelines about how the regulator is going to be acting when you are a bit late or a lot late.

**Senator ALLISON**—Should there be guidelines, too, about whose fault it is that you are late? As I understand it, if employers are also late in getting information to trustees, they are not in a position of being at fault. What does this legislation do in those circumstances?

**Dr Anderson**—I think you would be left with a regulator who had an option of taking no action or taking action. You are nicked—that is it. Is the regulator going to take any action because you actually have breached or are they just going to use their enforceable undertaking powers?

**Senator ALLISON**—Does the legislation, as far as you can see, allow APRA to regard it as a criminal offence for employers not to provide the information? In other words, does it go beyond trustees or can APRA look to see where the fault has been?

**Dr Anderson**—I do not think you can, no.

**Mr El Hassan**—No. Basically, the legislation says you must lodge your annual return by X date. If the trustees does not they are strictly liable for a criminal penalty and then it is a question of the regulator going off to court to prove the existence of the breach beyond reasonable doubt. But then that is it. Then there is a penalty imposed or one that can be imposed. What Michaela is talking about is that if, despite the technical breach, it is somebody else's fault that they have not complied, then the regulator could take no action. But that is not as a result of any specific provision of legislation; it is just a practice. Therefore you end up with a situation where the trustees may technically be liable for a criminal offence for which they have no insurance, so they are personally liable, and they rely on the regulator to take no action. But getting a letter from the regulator which is effectively non-legally binding and having a technical criminal offence hanging over their head is not a satisfactory situation.

**CHAIR**—You mentioned earlier that the industry is essentially run by trustees who put up their hands and are actually volunteers. This creates some concerns out there in the community. What sorts of standards are expected of these trustees if they put up their hands and say, 'We want to volunteer'? As a committee how can we be assured that these people have reached certain standards expected of reasonably prudent people in understanding balance sheets, particularly in an environment where an increasing number of trustees are making decisions not to place the members' funds in pooled superannuation trusts but are going out for direct investments where they really have to rely on understanding balance sheets, et cetera?

What are the requirements here? Some lawyers, for example, suggest that perhaps they should not show the pathways of how they have come to their decision. I would hope you are not one of those. It just raises some concerns perhaps from the committee's point of view and we want to make sure that these funds are reasonably professionally run, that the trustees do take good advice, that they do check the advice that they are getting from their chairman or their manager or someone like that.

**Dr Anderson**—The SIS legislation and trust law have fairly solid trappings around them to make sure that they actually do act well and we do not have any evidence of failure that would warrant this.

**Mr El Hassan**—SIS effectively codifies trust law and creates civil rights of action for beneficiaries for breach of their trust law duties. And it goes further than trust law so that these volunteers have got a stricter standard of care than under the common law, which was the position before. That was the entire purpose of SIS, that it gave certainty to members in relation to their rights as against the people who were running an investment—the money in the fund.

**CHAIR**—We thought that until we got to Queensland. The lawyers told us elsewhere that they were entitled to rely on ordinary trust law—apart from specific provisions—and it was all right basically for people who had an interest at arm's length, so long as they disqualified themselves and did not vote. I put to you that we require perhaps a higher standard of trustees

under superannuation law, because we are protecting nearly \$500 billion worth of assets. We do not want the corporate crooks in. What I am trying to say is: we have got to raise the bar, but how do we raise that bar? That is the issue, is it not?

**Mr El Hassan**—I would have thought that trust law is probably some of the strictest regulatory regime you can impose on people who are investing people's money. It is trust law, so that you are talking about people who have to act in the best interests of the people on whose behalf they are investing the money. That is a fairly onerous set of regulations and obligations which they need to discharge in their day-to-day running of the funds. But what we are talking about here is imposing personal liability, criminal liability, on individuals who have a fairly strong code of regulation already imposed on them under trust law and SIS, which codifies trust law.

**CHAIR**—APRA are telling us that they are having trouble getting the prosecutions. In fact, it took this committee to press ASIC to take some action. To their credit, they have now done so.

**Dr Anderson**—But we would still like to see a list of all of the times that they have failed, because we just cannot see it. Everyone talks about the Queensland example—

**CHAIR**—Examples.

**Dr Anderson**—examples—but that is it. Where are the rest?

**CHAIR**—With respect, I think it might be fairly difficult. I have raised this with the regulator. I said, 'Are you prepared to come to the table and put these names on the table?' and they said, 'Quite frankly, I do not want to finish up in Goulburn jail.'

**Dr Anderson**—I do not think we want names, but if they—

**CHAIR**—This is the problem that the regulators are facing in terms of putting these—

**Senator CONROY**—You could give us a case study of the details without revealing who it is.

**Dr Anderson**—Yes. You do not have to reveal who it is. But if they could actually say, 'Here are the difficulties,' we could actually appreciate then where changes might need to be made—either through different practices or changes in the law. But we cannot tell whether this is appropriate. At first glance it looks very inappropriate.

**CHAIR**—We will certainly get to the bottom of it, will we not, Senator Conroy?

**Senator CONROY**—I think we will. Could you just take me through your concerns about the reversal of the onus of proof.

**Dr Anderson**—In a sense, the act happened and that is all that the regulator has to prove. Then—these are my layman's terms here—the trustee would have to defend themselves by, really, showing that they had every reason to believe that everything was okay: they had been

diligent in the way they looked after their fund; they had everything in place that would allow them to reasonably believe that things were okay. That—in my layman’s language—is how it works under this bill. Before, the regulator would have had to have proved that they acted intentionally or recklessly. So it has put the onus onto the trustee to defend themselves.

**Senator CONROY**—The only other example of this that I can think of is the recent amendments to the Trade Practices Act—the Corporations Law—arising from price exploitation, and the desire by the government and Allan Fels to have a sort of shame file, whereby they get to publicly shame companies over price exploitation. You would not be concerned that Mr Thompson would get involved in any shame file efforts, would you?

**Dr Anderson**—That would be most inappropriate and also we would have some problems with even enforceable undertakings being made public the first time. If people actually go about fixing things, there is no reason why you would want to name and shame them at that point. If they do not fix things quickly, then you might.

**Senator CONROY**—I am thinking in terms of if they are found guilty as opposed to just being accused of being guilty, whereas it seems that this sets up the provision to prejudge, even before the case is heard. Most times we operate on the basis of presumption of innocence until guilt is proven. I know Mr Thompson does not like cameras in the same way as Mr Fels, but it is always a possibility. I would just be concerned about this ongoing trend of reversing the onus of proof as something that has been largely not a practice followed by governments of any political persuasion over the years.

**Dr Anderson**—It certainly leaves the door open to quickly jumping in and saying that it is an offence, listing all the offences and at least looking as if you are a very active regulator.

**Senator HOGG**—In response to Senator Allison you were talking about a set of guidelines. Who would compile those guidelines? When should they be compiled by?

**Dr Anderson**—Any time we talk about guidelines we always think of them as being something that should be done in consultation with industry because that is how they get to be useable guidelines and not somebody’s wish list. They would be the kind of guidelines that government would produce in consultation with industry.

**CHAIR**—I thank the witnesses for appearing.

[9.14 a.m.]

**RYAN, Ms Susan, President, Australian Institute of Superannuation Trustees**

**CHAIR**—I welcome former senator Susan Ryan. It is good to see you back at the table—

**Ms Ryan**—Thank you, Chairman.

**CHAIR**—but in another capacity this time. We invite you to make an opening statement.

**Ms Ryan**—My opening statement is on behalf of the 700 or so superannuation trustees who are members of the institute. While we agree with the objectives stated in the Financial Sector Legislation Amendment Bill (No. 1) 2000 explanatory memo—namely, that the aim of the legislation is to protect the savings of people investing in superannuation funds—we are totally opposed to this legislation. I had the benefit of listening to some of the remarks by my former colleague Dr Anderson, from ASFA, and I found myself in agreement with much that she was saying. Our institute, of course, focuses on trustees specifically, and it has been the mission of AIST to raise the standard of fiduciary performance by trustees through education, training and seminars. Indeed, in that capacity the institute has had a great deal of cooperation from this committee, for which we are grateful.

Our first position is that the government has made out no case for the very dramatic changes that are in the bill. To the best of our knowledge and, I believe, of the committee's knowledge—from listening to the committee's deliberations—only a tiny proportion of serious breaches of SIS have occurred. It is our view—and our belief in practice—that trustees act in good faith and take their fiduciary duties seriously. In our experience, they avail themselves of the wide range of education and training opportunities offered not only by AIST but by ASFA. Since the introduction of SIS in 1992, many thousands of training courses have been undertaken by trustees.

In making the presentation to the committee, AIST has made available to the committee a legal analysis of the bill. Our position has not altered from the time when we prepared that. We are also in the process of preparing a much more detailed analysis particularly in relation to the reversal of onus of proof provisions. We will have that available for the committee after we have had the benefit of briefings from APRA. We took the view that we could not deal comprehensively with the bill because we really did not know what it was about or we did not know why it had come into the parliament at this stage. I am pleased to say that APRA has agreed to provide our trustees with briefings towards the end of the month. With the benefit of the background that we will get from APRA we will finalise our position. At this stage I could draw the Senate committee's attention to an article by me, which has just been published in *Super Review*, headed 'Trustees: the new criminal class'. In that article, of which copies can be made available for committee members if they are interested, I take the view that we seem to have invented a new criminal class of superannuation trustee.

**CHAIR**—Only if they contravene.

**Ms Ryan**—If they are late with reports, late in defining a process for appointing a member representative or late in collecting tax file numbers, which in any event are not compulsory. These things seem to us to be totally inappropriately dealt with by criminal code provisions.

We have also had a lot of discussion amongst our trustee membership about the practical effect on trustees and super funds should these provisions come into effect. The effects are all bad. There will be a huge increase in the cost of compliance by funds. In fact, one of the clear effects of the bill is to transfer the cost of prosecuting breaches from the regulator, where it currently sits, to the trustee board, the fund itself. That will mean huge costs in gathering together evidence that the trustee was not guilty of the breach which has come to APRA's attention. But, in terms of day-to-day compliance arrangements, funds will have to set up a lot more systems for checking and so forth than they already have. We object to that because we are always cognisant of the fact that the purpose of superannuation funds and of the regulations and legislation surrounding them is to provide retirement income for the members, not to pay out huge compliance bills.

The other immediate effect would be that trustees would be seriously constrained in doing their best for their members. They would need to put their own protection ahead of focusing on how to maximise retirement income. I listened with interest to your discussions with Dr Anderson about insurance for trustees. It is my understanding that you cannot be insured against breaking the law. You can be insured against a member suing you, taking you to court over decisions that the member is unhappy with. Certainly as a director of a company, which I am, I am aware that if I break the law my director's insurance is irrelevant. I believe it is the same for trustees.

**CHAIR**—Like a speeding ticket.

**Ms Ryan**—I could survive a speeding ticket. That is right. Speaking of speeding tickets, I might divert for a moment to answer this question: what other courses of action are open to the parliament in the event of the regulator becoming aware of more breaches than we are currently aware of? I refer the committee to the fact that in 1998 there was an announcement that there would be changes to the regulatory regime. At that time it was believed in many quarters that the new penalty regime would probably be designed to alleviate the severity of the tax treatment of non-complying funds to be taxed at 48.5 per cent on the value of the funds' assets less undeducted contributions, or would provide alternative penalty provisions in SIS. The announcement did state that under the new structure of superannuation penalties:

... penalties will be calculated in accordance with the severity of any breach of the rules. This was seen by some to flag the introduction of a system under which a sliding scale of pecuniary penalties would apply to contraventions - a "speeding ticket" approach which would have effect that despite a contravention of SIS and the imposition of a pecuniary penalty, the compliance status of the fund would not be under threat.

Indeed, many of us were encouraged to believe that that would be the approach—fines according to the severity of the breach—because this type of penalty approach was introduced in respect of penalties for non-compliance with the new eligible termination payments provisions in the income tax regulations in June 1998. In October 1999, this type of penalty provision was introduced into SIS in relation to the new powers of APRA or the ATO to require the trustee of a fund to disclose whether or not the fund is a self-managed superannuation fund. So I think there is a whole gamut of fines which could be introduced. When you look at the list

of contraventions which we have listed in our first submission to you, many of them seem much more appropriately dealt with by a fine than as a criminal offence.

The issue of maximising retirement savings leads us to the issue of investment. We are very concerned that, should the criminal code provisions come into effect, trustees would feel much more constrained in looking for unusual but high value investments. Right now many people in the parliament are asking why super funds do not invest more in development capital in new start-up companies and why they do not invest more in the massive infrastructure projects which the country needs, particularly in rural and regional areas.

To move away from the absolute conventional wisdom of blue chip shares, a little bit overseas and so forth, trustees do have to take more risks. We believe that the way the legislation is drafted, if trustees took that risk and the risk failed, which can happen despite sincere assessment of the risk, they may feel themselves further exposed. The end result of this would be much more conservative investing and therefore much lower returns for members and, as a side effect, less investment in areas in the Australian economy which we know need investment. It is hard to believe that that is the result that the parliament would really want.

The other source of confusion and concern to trustees is that, as a result of this bill, impositions on trustees would be very much more severe and very different from impositions on directors found in breach of their duties. We are aware that recent amendments to the Corporations Act have mitigated some of the problems. Directors, for example, now have the business judgment defence available to them. They take an entrepreneurial decision, it does not work, but if they have taken it honestly and with appropriate information and so forth, that knowledge that they pursued that business decision properly is a defence. Trustees are being pulled in the other direction. We wonder why it is that the thinking about directors and the decision to make it more practical for honest directors to act commercially is not also available to trustees who similarly have the requirement to maximise the retirement savings of their members.

Many of the breaches specified in the bill are internal management matters: lodging of annual returns, recording changes of trustees, procedures for appointing member representatives and collecting tax file numbers—as I said, not even a compulsory thing. AIST believe all of these tasks should be performed as required in a timely and accurate fashion. Of course we believe that. We cannot see, however, that a failure to do this should result in a jail sentence.

I must inform the committee that, amongst our membership, the more suspicious are asking, ‘What is the real motive of this? Is this bill really designed to destroy the trustee system?’ We hope it is not because we believe the trustee system has been a boon to the superannuation industry and that trustees by and large perform their duties honestly and well. We have to look only at the growth in retirement savings in super funds to see that the main objective of setting up the whole system is being met. We believe members are by and large satisfied that the trustees are looking after their interests appropriately. If a trustee or someone contemplating becoming a trustee read this legislation, they could be forgiven for saying, ‘I cannot be a trustee.’ We are seriously concerned that, should the bill come into effect, many of our current trustees will feel they cannot continue because they are just too exposed, and the task of finding new trustees to take their place will be almost impossible.

The suspicion some of our trustees have that this is really all about getting rid of representative trustees entirely is aggravated by the additional provision in the bill which gives APRA a new unspecified opportunity to designate a trustee an unfit person. Again, we have no background that would justify that. There are already a number of criteria which would exclude a person from being a trustee—a criminal record and so on—and we do not know why an additional unspecified capacity to declare a trustee an unfit person is included in the bill. I can only advise the committee that that adds to the general feeling of suspicion and concern amongst trustees. So, in short, we do not believe that the bill should proceed.

**CHAIR**—Thank you very much for adding the presentation from IFS Fairley. I think that has added a lot of value for the committee. Thank you for going to the expense of having that prepared. I think it is a good summary. You raised some quite interesting points in terms of trustees' members. You almost in a sense indicated that trustees in the past have been a little bit too conservative and that in order to lift the returns they should be embarking on more risky investments. Given the concerns of a lot of your members for opting for the less risky type profiles, do you think that is really what is required under superannuation? Is it not a very steady return over a long period of time uninterrupted by the highs and lows which would be inevitable when you introduce a concept of greater risk associated with a higher level of return?

**Ms Ryan**—Of course, every investment has risk. If there were risk-free investments, I suppose we would all be much more affluent than we are today. Every investment has a risk. The conventional wisdom has been that blue chip shares are the least risky. Indeed, the bulk of superannuation investments go there. But trustees, like everyone else involved in the financial sector, cannot assume that that will always be the case. I was rather taken aback by a piece by an economics writer whom I respect very much, Ross Gittens, of the *Sydney Morning Herald*, whose piece last Saturday was really challenging the conventional wisdom that shares in the long term always go up. He did some very interesting calculations and predictions. Maybe it was a little academic flight of fancy and maybe he is wrong, but there is an assumption that all you have to do is put about 80 per cent of your investments into blue chip shares and then you will not have to worry about anything. I think, Senator Watson, you have recently reminded an AIST seminar of how fatal that approach to blue chips can be.

Trustees realise that they have to constantly revisit their investment strategies and their asset allocation and continue to try to get the best for their members. Currently, ironically because of the very strong performance of the stock market over the last 10 years, trustees have a new challenge. How are they going to keep getting these very high returns? If Ross Gittens is on the right track—and others who have voiced similar scepticism about the future of shares—that they cannot simply keep on doing what they are doing and receive those nice returns for their members, they are going to have to look at other forms of investment. Other forms of investment will have their own risks and, in some cases, as in the case of venture capital and start-up companies, there is definitely a higher level of risk. But if they do not do that and shares start performing at a lower level, they will find their members saying 'What is going on? Last year we had a 10 per cent crediting rate; this year we have a five per cent rating. What has happened?'

The task of the trustee, even with all the advice, the investment managers, the asset advisers and so forth, is still a very active task. That again brings me to the question of a reasonable defence: intentionally and recklessly, and so on. A company director can have as a defence the

fact that he or she took all the reasonable advice, examined what management proposed, took independent advice if necessary and then made the decision. A superannuation trustee needs to have that same defence available. Obviously, because of the way in which the trustee system operates, trustees are undertaking their duties on a part-time basis and are often unpaid. They are not living and breathing the markets 24 hours a day, so they have to take advice. They do take advice and they believe that, by that process of seeking and taking advice, they are providing themselves with protection—and, therefore, their members with protection—against investment failure. But with strict liability and the criminal code applying, it would seem that that defence that ‘We took the best advice possible and things still failed’ will not be available to trustees. To return to the point about how a trustee will go about finding fruitful investments, that becomes a very much more difficult task under the legislation.

**CHAIR**—Thank you. Do you see your institute as having a critical role in maintaining or raising standards for superannuation trustees over and above what you do now?

**Ms Ryan**—It is the mission of the institute to ensure that trustees can carry out their duties at the highest possible standard, and that is always a shifting target, too. There are always new issues for trustees to have to become expert in so it is a task that is never finished. We, of course, are not the only providers of training and support to trusts. ASFA is a very large and effective provider but we focus particularly on trustees. The practice has been to survey our trustee members annually to try to identify where the new issues are arising and what sort of assistance the institute should be giving. Yes, we do see it as an ongoing role. We do not assume that every single trustee has nothing left to learn. We see it as a task that we have to continually redefine and reinvigorate.

A whole raft of new issues are facing trustees at the moment. For example, there is a new and, I think, strong interest in what is called ethical investing. Our trustee members are saying to us, ‘What is this? Is this something we should think about? Is this practical? Should we be looking at our investments in terms of the environmental or social effects of the companies in which we invest?’ I know that is something Senator Allison has raised in an AIST forum. This is something that 10 years ago a trustee would not normally think they had to take into account. But some of them now are asking the institute to provide them with some assistance in coming to grips with these issues. So the answer is, yes, we do see that the question of stewardship—to use your own term, Senator Watson—is one that about which there has to be constant vigilance and constant activity in terms of providing support and assistance.

**CHAIR**—Most trustees would meet at least on a quarterly basis. Could you give us some idea of the amount of time that your trustees on average would spend in terms of attending to their trust responsibilities—and I am not just referring, for example, to attending the quarterly trust meeting. Nowadays, they are also required to be members of an audit committee, a compliance committee—maybe audit and compliance—certainly an investment committee, corporate governance committee and a number of other committees. How many hours within that fortnight would your trustees, the people who put up their hands and say, ‘I want to volunteer to become a trustee,’ be spending reading those papers, going through them, asking questions, et cetera? Could you give some idea?

**Ms Ryan**—It is a good question, Senator Watson. I am not aware that the AIST has actually attempted to measure that through surveys—but having been prompted by your question I think

we will. Of course, different trustees approach their tasks differently and come with different backgrounds and skills to be able to deal with the mountains of documentation you have to deal with, but I would think it would not be less than the equivalent of a working day out of a fortnight. In my own experience as a company director I would be looking at something like that.

**CHAIR**—So you are saying it requires something like six days?

**Ms Ryan**—In a quarter. I would think that would be an average. As I said, I am prompted by your question to go and survey our trustees. I will be able to do that quite quickly and get a response for you.

**CHAIR**—Thank you.

**Senator CONROY**—Certainly, my experience from being involved in some of the committees of the trustees of a superannuation fund I was involved with, between the claims committee, the audit committee and all those sorts of things, certainly one day would be set aside for all the committees and half a day for claims and things like that. So, certainly, just on the bits that I was involved in, as opposed to the whole broad board—

**CHAIR**—I am just referring to a trustee in terms of all your responsibilities.

**Senator CONROY**—I think that the figures Ms Ryan—

**CHAIR**—I would say six days would be a very responsible sort of allocation of time.

**Senator CONROY**—Yes.

**CHAIR**—Do your members have trouble finding that sort of time? You are drawn between the employer groups who have to take time off from their legal business or their engineering business or accounting business. Do the employers say they are happy about that allocation, about releasing employees so they can go home and do this work?

**Ms Ryan**—Again, the answer varies. I am very well aware that when AIST put on seminars and briefings and things of that kind that they always go to a lot of trouble to try and find a time in the day when trustees can get away from their other commitments. So they try breakfast meetings, evening meetings and lunchtime meetings. It is a constant struggle and the response is often, ‘We would like to come. We cannot get away from work.’

So I think that for trustees who have a regular job—be they employed in a business that has a corporate fund or they might be a trade union official—it is very difficult. The trustees who are better able to make time available are those, for example, who are in big employer organisations where there is a good infrastructure of support and their role on a major industry fund is seen as part of their job. I think they manage these things more easily.

**CHAIR**—I asked that question because of the big decline in the number of companies offering their own in-house superannuation. That has been directed to master trusts essentially.

A number of the employers are moving into industry funds. Part of the reason is this—‘It’s not our core business; it’s taking too much time; it’s taking too much resources.’ So I am asking the other question about those people who are sitting on all of them as trustees. Are there any pressures in terms of the time?

**Ms Ryan**—I believe there are quite serious pressures.

**CHAIR**—How do we overcome that while at the same time lifting the bar? If the amount of money is just so high, approaching \$500 billion, the standard of care of looking after that, I submit, is perhaps a lot higher than just looking after a few hundred thousand dollars, so we have to match this with keeping people’s confidence in super. We have done it very well so far.

**Ms Ryan**—Yes.

**CHAIR**—The only confidence concern is the problem of frequent changes of legislation and that sort of sovereign risk. From our committee’s point of view, we want to maintain the highest standards but not at the same time be so unreasonable as to drive out of the industry people who might otherwise be good trustees.

**Ms Ryan**—I suggest that the legislation we are discussing today would have precisely that effect of driving people out of the industry who would otherwise be good trustees because not only would they have to come to terms with the normal traditional work of trustees; they would have to familiarise themselves and protect themselves against criminal convictions.

**CHAIR**—Do you think trustees should be looking for one or two technical experts who can guide them in certain matters in relation to law in relation to investment decisions?

**Senator CONROY**—We do that now.

**Ms Ryan**—I think one of the effects of the complexity of the system is that trustee boards do have to buy a lot of services—legal advice, actuarial advice—and, of course, they buy their administration services and insurance advice. They are very dependent on such technical advice.

**CHAIR**—As to what I am suggesting, do you think that, rather than just buying advice, they will want to take it on board and have it within the trustee network rather than having to go outside and buy it? It would be like having a lawyer on the board.

**Senator CONROY**—That is the very thing that the safe harbour provisions, the business judgment rules, sought to protect company directors from. They are now able to say, ‘We got the accountant’s advice. We got the actuarial advice. We are a hands-off operation. We’ve accepted their advice without exercising any independent judgment.’ It is the very thing that the government has been seeking—reasonably successfully—to pass for company directors, which is the point that Ms Ryan made earlier. My concern is that we are trying to set a higher test for trustees and that you cannot look at this for directors.

**CHAIR**—We already have it.

**Senator CONROY**—If this bill were for directors, Ian Dunlop and the Institute of Company Directors would be in here screaming from the rooftops. That would be if we were trying to do this to company directors.

**CHAIR**—What I am submitting is that we already have that higher standard for trustees than for company directors because, so far as a trustee is concerned, even under current law, if you go over the top your private assets could be at risk.

**Ms Ryan**—I do not think ratcheting up the penalty regime in the way that this bill envisages will have any positive effect on trustees. I think trustees will be concerned. Some of them will leave. They will need to spend more of their members' money on taking advice.

**CHAIR**—Is that a bad thing—taking advice?

**Ms Ryan**—It is a bad thing if members' money is spent where it does not need to be spent. I think everyone understands that there is an administration cost and there is a cost of getting advice. One of the big debates in the super fund industry over the years, and particularly from the trustees' perspective, has been how to keep fees and charges down. We ask: are we paying the investment managers too much and are we paying the asset consultants too much? There has been probably more success in keeping administration fees down, but some people even question whether they could be lower and could be better provided. To have a whole new drain on members' savings via what we would consider at this stage to be unnecessary new compliance arrangements is something that is quite repellent to trustees.

**CHAIR**—I mentioned to the colloquium of university researchers yesterday—and this was taken from evidence given by Mercers to this committee—that a 25 per cent drop in admin or insurance and those sorts of things has only a minimal impact in terms of your ultimate return. However, an extra one per cent return on the investments makes tens of thousands of dollars worth of difference.

**Senator CONROY**—That is not an excuse for having higher fees, is it?

**CHAIR**—While I am all in favour of keeping your MER—your management expense ratio—low, I agree with you that the focus really has to be that constancy of return. If you can get a one per cent or a two per cent return over your rivals, your members are going to enjoy such a better retirement than with another fund.

**Senator CONROY**—One of the things I have been proudest of, in terms of the superannuation regime we have in Australia, is that question of participation of the trustees and the much broader spread of individuals that have been drawn into this. One of the concerns I have with the legislation is that it is not just a question of legally being driven out, it is that those who will possibly replace them will be from a much narrower section of Australian life. This is about superannuation for everybody and trying to involve people in their retirement and in providing for their own retirement. Do you see that as an area of concern?

**Ms Ryan**—I do see it as an area of concern. I am very committed to the idea of a participatory democracy, whether we are talking about our political system or our financial system. Certainly, via the superannuation trustee arrangements, more Australians have been able

to participate in financial decision making. The evidence is that that has been successful: funds have grown, investments have been in the interest of the Australian economy generally and jobs have been generated. To narrow that down would be a backward step in terms of our civic culture.

**Senator CONROY**—I am trying to educate people about their—

**Ms Ryan**—People need to be financially literate these days. We are fast approaching and becoming what a number of our political leaders have seen as desirable: a nation of shareholders. For that to be a successful transition, there needs to be a higher level of financial literacy. Certainly anyone who becomes a trustee of a super fund and does their duty conscientiously becomes very, very aware of a whole lot of issues about investment, the global economy, and safeguards and regulations in a way that he or she would never have been, and that is valuable information for that trustee to have.

I have heard some of our very worried trustees saying, ‘Oh look, this is really a plot to get rid of the representative trustee system that is participatory and democratic. Trustees will leave.’ What will happen is that the corporate trustee arrangement will come in and the big commercial trustee businesses which have their systems and their experts will manage everything. The individual representative trustee will be a thing of the past. That would be a loss to our whole society.

**CHAIR**—Not if you do your job.

**Ms Ryan**—We are trying, Senator Watson. We hope you will help us.

**Senator CONROY**—Despite the impediments.

**Ms Ryan**—We hope you will help us.

**CHAIR**—I believe in the trustee system; it is just a question of how we raise that hurdle of trustees’ understanding in terms of coming to grips with the new challenges.

**Ms Ryan**—We appreciate any assistance. Indeed, I should note that we have, and hopefully will continue to have, assistance from members of your committee in educating and informing trustees. But it is, as I said, a never ending task.

**Senator HOGG**—Can you fill us in on the level of consultation with your organisation on this particular piece of legislation?

**Ms Ryan**—There was no consultation prior to its appearance in the parliament, and that was quite shocking.

**Senator HOGG**—Has there been any since?

**Ms Ryan**—We have sought consultation and I am happy to report that we have had it. I had a meeting with Senator Watson, I had a meeting with Minister Hockey’s advisers and, at their

suggestion, with Treasury officers. As I said, APRA have now agreed, as a result of our meeting with Minister Hockey's advisers, to provide briefings on the background. At this stage we are getting the consultation, but it was a great shock to trustees that the legislation just appeared without any prior consultation—I believe with the industry generally, not only with the trustee institute.

**Senator HOGG**—As a result of those consultations, have your views about the legislation changed in any way?

**Ms Ryan**—If anything, my fears about it have intensified.

**Senator HOGG**—The other question I want to raise is about the compliance costs. Are you able to quantify for us in any way the order of increase of compliance costs as a result of the measures that are in the bill?

**Ms Ryan**—I would need to take that question on notice.

**Senator HOGG**—I understand that.

**Ms Ryan**—I cannot give you dollars.

**Senator HOGG**—If you could give us some idea, I think that would be helpful. The other matter you raised was the ability of the regulator to disqualify a person as not being fit and proper. As I understand it, there is no criteria in the bill at this stage as to what would constitute exercising that discretion.

**Ms Ryan**—That is right.

**Senator HOGG**—Also, there is no right of appeal, as I understand it. Is that correct? Once they determine that you are not fit and proper, given that you are not going by the norms now—you are going by their discretion—there is no appeal mechanism. Is that correct?

**Ms Ryan**—I am not sure. I rather thought you would be able to appeal to the AAT. I was given that advice by a public servant, but I have not had time to check it out. Even if there is such an appeal provision, it is a great blow to the common law to provide a regulator with the opportunity to say, 'We don't think you're fit and proper; you're out.' This is a serious penalty, a great embarrassment to the person, a great black mark against them. We could not possibly agree with that unless we were persuaded by APRA that there are a whole lot of trustees running around who are criminals.

**Senator HOGG**—That pronouncement, having been made, is then hard to reverse.

**Ms Ryan**—That is right.

**Senator HOGG**—Once the mud is there, you can get rid of some of it—

**Ms Ryan**—Absolutely. A person's reputation could be seriously damaged for the rest of that person's life. These matters are always very public, and to be told that you are not a fit and proper person to be a trustee would be a terrible destruction of a person's standing. We are very agitated about that. We are looking forward to hearing from APRA the reasons why they think it is necessary to add to the current capacity to be regulated into squalor by a trustee. But on your dollar question, I will come back to the committee.

**Senator HOGG**—I appreciate that.

**CHAIR**—After speaking with APRA, if your concerns are allayed would you mind putting in a supplementary submission to us?

**Ms Ryan**—We would very much welcome that opportunity. As I said, we are having some more work done on the implications, particularly on the onus of proof provisions. We are concerned that there has been a trend in legislation in recent years for reversals of onus of proof to come in. We are aware that various senate committees have been highly critical of this tendency—the Scrutiny of Bills Committee has pointed to these defects—and we would expect that the same scrutiny will be applied. We also believe that the bill will not survive that scrutiny at this stage.

**Senator ALLISON**—I just wanted to raise a matter that has not been discussed so far today, and that is the position of delegation. What is your understanding of the implications of the legislation in terms of trustees relying on delegation? And, in your understanding, to what extent do they currently do so?

**Ms Ryan**—Of course, they do rely on delegation to a very large extent to appropriately qualified advisers. And in practical terms it can be no other way. A trustee—given the way in which a trustee works—must delegate, first of all, to the fund secretary, to the service providers, a whole range of tasks. At this stage we believe that a trustee having made those delegations and then been faced with news from the regulator that a breach has occurred will require the regulator to prove that the trustee had intentionally or recklessly allowed or caused the breach to occur. Under the current arrangements the regulator has to establish that there was something wrong—in fact, something illegal—in the way in which the trustee relied on those to whom decisions and tasks have been delegated.

We believe that under this proposal those delegations in many cases will have to be brought back to the trustee board. If you look at the list of offences—things like collecting tax file numbers, preparing annual reports and so on—those things which are accepted as delegated tasks now may not be. Should there be an untimeliness or an error in an annual report or something of that kind, the trustee will not be able to rely on the fact that he or she delegated, and will be liable. So delegation will be reduced. The burden on the trustee will be greater. The likelihood of breaches perhaps will increase, rather than reduce.

We did have in an additional note—which I think we provided to the committee—again, a discussion of the delegation that is allowed to company directors. A director is able to rely on the opinions, information, advice and actions of another, and a director is able to delegate his or her functions to another. The reliance on this delegation must be reasonable in the circumstances, and so on. This capacity for company directors to rely on delegation again stands

in stark contrast with what is being proposed for the trustees, and we consider that to be unfair and dangerous.

**Senator ALLISON**—I have just one other question. Your advice lists a whole lot of provisions to which the criminal code will have no application. Would you recommend to the committee that through the legislation we simply add the sorts of examples you have given us—tax file numbers and so on—to this list? Is that a way to go?

**Ms Ryan**—I must say that since we prepared and submitted this analysis I had some discussions with a Treasury officer, who advised me that it was in fact the intention of the government to cover all breaches of SIS by the criminal code, that there would be a later bill.

**Senator ALLISON**—So all of these would be swept up in that bill?

**Ms Ryan**—Yes. I do not know whether Senator Watson has any knowledge of this, but—

**CHAIR**—I would be surprised.

**Ms Ryan**—that was the advice that I was given: that there will be a second bill that will cover all breaches of SIS.

**Senator CONROY**—Why do the government hate superannuation?

**Ms Ryan**—It is a great mystery—

**Senator CONROY**—You do not have to answer that, Ms Ryan.

**Ms Ryan**—No. As I have said, some of us do fear that the trustee system itself is under attack here. If anything, we expect the legislative impost to increase.

We are not saying that the breaches we have listed—those that currently are covered by the new legislation and those that are not covered by the new legislation—do not matter, that they are slight, that they are trivial; we are not saying any of those things. But we are saying that they are breaches that are dealt with appropriately by the current regulatory regime. Where the regulator becomes aware of a breach, where there is an education/negotiation process and where the regulator believes that the breach is not corrected and continues, then the regulator gets together the evidence for a prosecution. That seems to us to be an appropriate way of dealing with what is happening. To the best of our knowledge, that has been effective.

I am aware, Senator Watson, of the three Queensland funds. I think you have done the superannuation industry a service by drawing attention particularly to the EPAS1. But in a way, they are the exception that proves that the ongoing practice is successful.

**CHAIR**—On the other hand, it can dent the public's perception of superannuation severely if it is not perceived that we have a system that will stop those practices very quickly. Superannuation is really built on people's confidence.

**Ms Ryan**—I agree with that. I would comment though that we now are nearly but not quite 10 years into this new regime and it has resulted, I think, in greater confidence than there was, say, five or six years ago. When I first took up my position at ASFA, public confidence was very low. It was a great challenge for the association to try to provide information, public discussions and so forth to raise the level of confidence. But now that the system, to a large extent, has settled down with members getting their returns, and as there has been no case of a major fund of hundreds of thousands of members having suffered a collapse or a fraud or a wrongdoing, I think people do feel quite confident.

**CHAIR**—But we have to protect those 10,000, 5,000, 2,000 or 20 members who may not come under the smaller umbrella. There has to be a robust regime that is robust right across the spectrum—

**Ms Ryan**—There does have to be a robust regime.

**CHAIR**—because it does mean a lot to those people who lose their life savings.

**Ms Ryan**—Absolutely, and we do not disregard the distress of the people in those Queensland funds at all. But, looking at the whole system and the vast numbers of people, funds, trustees and advisers that are involved, we believe that we should be focusing on the strengths and that, where there does need to be regulatory or legislative change, it should not be this scattergun approach of, ‘Well, we’ll catch it all up into the criminal code and we’ll introduce strict liability for failing to get a tax file number in on time.’ We feel it should be a much more careful focused weeding out of problem areas and then designing of a legislative solution.

**CHAIR**—I do think that APRA, in terms of its audits, is playing its part in focusing on the more vulnerable element of the industry at the present time, and I think this is to be welcomed.

**Ms Ryan**—Perhaps APRA could carry out that important work more if it had more resources available to it.

**CHAIR**—Are there any further question. If not, we will adjourn for morning tea for 15 minutes.

**Proceedings suspended from 10.05 a.m. to 10.21 a.m.**

**BYRNE, Ms Ann, Convenor, Industry Funds Forum, and Chief Executive Officer, Superannuation Trusts of Australia**

**CHAIR**—Welcome, Ms Byrne. Perhaps we should take this opportunity to congratulate you on your new appointment. I understand that you will be heading up the superannuation funds for about 47 of Australia's universities. From my discussions with a number of people involved in university fund administration, they certainly welcome your appointment. Congratulations and best wishes for the future. I now invite you to make an opening statement, at the conclusion of which the committee will ask some questions.

**Ms Byrne**—Thank you. Firstly, let me apologise to the committee because we have not put in a written submission. I therefore want to speak on a number of points today. Probably one of the reasons we have not put in a written submission is that we have all been doing our duties as we should as people who work for superannuation funds—that is, making sure that we abide by all of the regulations and legislation and that all of the members of our trustee boards are up to date with all regulations.

I would like to thank the committee for inviting us to speak to it on this matter. To be able to come to a Senate committee to raise issues and talk about points of legislation that are coming through parliament and to be able to talk about general issues in the industry is, I think, a very positive thing. It allows organisations like us to put our view to you and for you to then ask us questions. I think it is a very good process.

The Industry Funds Forum is a group of 23 industry funds and we think those industry funds represent about three million Australian workers. The forum comprises the public officers or the fund secretaries of the various funds. We get together every two months and the major focus of the forum is to talk about issues of common interest. Each of the funds has equal numbers of employer and employee representatives. The public officers or the chief executives come together and we talk about regulations and issues within the superannuation industry and try to keep each other up to date. We also discuss issues that might be to do with the future of the industry, things that may be occurring at the Superannuation Complaints Tribunal or any other matter.

The Industry Funds Forum has also been involved in setting up a group for funds that are public offer funds. The compliance officers from all of our various funds also get together as a group to ensure that all of the funds are complying with the various regulations. We recognise the need for regulation and we also think there is a need for APRA and the regulators to have some power to be able to pick up trustees who are not fulfilling their fiduciary duties. For us, however, this legislation was a surprise. We could not understand where it came from and why there was such a fundamental proposed change, which will affect all superannuation funds. We would like some explanation—we know there have been some instances of fraud—and some greater disclosure and discussion as to why the regulators felt the need for this quite significant change. We think criminal codes impose an additional onus of proof on the trustees. It appears from my reading of the legislation that people are guilty until they can prove themselves innocent, which is very different from any other circumstance.

The other issue that we want to raise is that potentially it will discourage people from becoming trustees. They will look at the legislation, they will look at the criminal code on the various actions and they will say, 'I am not sure that I actually want to take on the responsibility of a trustee if I in fact have such penalties on me.' These penalties are for what appear to be very necessary parts but, if you are late for the lodgment of your annual return, you could in fact be either one day late or 12 years late and you could have the same penalties. So my concern is that people who would be excellent trustees, those who have all of the required qualifications and who have the representative nature, may be discouraged from taking up the positions of trustees. That is all I want to say and now it might be better if people actually asked me questions.

**CHAIR**—Thank you very much. The concept of penalties on trustees for inadvertent breaches or inadvertent acts of omission: it has been suggested by earlier witnesses that perhaps we should have some guidelines issued before the legislation passes the Senate to assure trustees as to how the regulator is going to apply the new rules if they come into force.

**Ms Byrne**—I think that is definitely a good idea, but APRA already have a whole range of guidelines. They put out some years ago their best practice guide, which went out to every superannuation fund. I know that at the fund that I manage we actually have that now as one of our particular checklists when we go through our audit process. So there is a range of guidelines and there definitely needs to be so in the future for the legislation.

**CHAIR**—Do you think that should be built into legislation rather than just have that almost as an aide memoire?

**Ms Byrne**—I do not necessarily know what is the more effective way of doing it—in legislation or in regulations that actually require APRA to give those guidelines to super funds.

**CHAIR**—But you lose a bit of flexibility, though.

**Ms Byrne**—That is my understanding of the process that APRA goes through, having been through a number of reviews. Also, all of the members of the Industry Funds Forum have been through reviews with APRA, which I think they are now trying to do every two years. They are concentrating on the larger funds because they can actually see that those are the ones with the largest groups of members. So they are looking at those particular areas. Any issues that they have with the funds they raise with those—and they have been corrected. So I think there is already a quite good process of review that APRA goes through, but I know that all the trustees that I deal with take that extraordinarily seriously.

**CHAIR**—Do your funds give the investment managers an investment mandate?

**Ms Byrne**—Yes, we are required to. They all have an investment management agreement and an investment management mandate.

**CHAIR**—What sorts of things does that investment mandate spell out?

**Ms Byrne**—It would totally depend on the type of manager. If it were for Australian equities managers, it would spell out their guidelines for investment. If they were active managers, it

would give them guidelines as to their level of activity. If they were index managers, they would have a very different mandate. So it also gives them all those guidelines, but all super funds also have agreements with those managers which actually outline the responsibilities of a manager and the responsibilities of a trustee. Most agreements would also spell out with managers their use of derivatives and what levels of cash they should be able to hold if they are in an active mandate.

**CHAIR**—That is very good. Senator Allison?

**Senator ALLISON**—I am wondering whether you could comment on the submissions which draw attention to the differences that this legislation would apply between trustee based funds and others? The submission by the Institute of Chartered Accountants points out that it is an anomaly to impose a level of responsibility on the auditor of a superannuation fund, some of which have assets as low as \$100,000, when the standard is not applied to auditors of large corporate entities. In this legislation, what do you see as the differences which would apply to trustee based funds compared with, say, master trusts or other sectors of the superannuation industry? That is a point about auditors, but perhaps you could respond in terms of other provisions too.

**Ms Byrne**—I could be mistaken, but it was my understanding that the legislation would affect all superannuation funds, not just trustee boards. It would affect the trustee of the industry and master trusts as well.

**Senator ALLISON**—Okay.

**Ms Byrne**—They are currently managed differently and, in fact, it probably is a trustee company within the master trust, but it was my understanding that they would have to comply with the same level of responsibility. The difference is the corporate structure, therefore, where the responsibility lies in a master trust it is with that corporate entity, whereas with a trustee based fund, it lies with the trustee company, which then can directly be attributed to the trustee board.

**Senator ALLISON**—So the argument that that is an attack on industry super funds does not have any—

**Ms Byrne**—I did not say that.

**Senator ALLISON**—No, I know you did not say it, but it has been said already.

**Mr BYRNE**—I feel like I might have missed something.

**Senator ALLISON**—That is fine; it just needs clarifying.

**Ms Byrne**—It is increasing the compliance for all superannuation funds. It was my understanding that all superannuation funds would be treated equally under this legislation.

**CHAIR**—Would you agree that there are some good features in the legislation? Let us go through some of them: a new requirement for a former trustee, a trustee replaced by the regulator to assist the new trustee in locating and transferring the property of the fund. Does it not make sense to have that there?

**Ms Byrne**—Yes.

**CHAIR**—That is a provision.

**Ms Byrne**—I am sure there are some. I am not into the detail of all of the relevant parts of the legislation, Senator.

**CHAIR**—Falsely holding oneself out to be an auditor. We have had cases of that.

**Ms Byrne**—Yes.

**CHAIR**—Or even an actuary.

**Ms Byrne**—No, I am sure there are very good parts of the legislation, but I think what people are concerned about is, in fact, what is a fundamental change in—

**CHAIR**—The strict liability.

**Ms Byrne**—Yes, strict liability on trustees when the trustees recognise that they must do all these things and are bound to do these things. They feel as if they must have been doing something incorrectly and there is a lack of understanding.

**CHAIR**—Why I am asking these questions is that people have generally come to us and said, ‘I disapprove of the bill.’ I am saying, why don’t we look at the good features of the bill, retain those and then try to work our way through those issues—inadvertent breaches and all those sorts of things, timeliness problems and how we can overcome that, whether we use the IFS Fairley concept of the speeding ticket, a concept introduced in 1998, which Susan Ryan referred to. As a committee, we have to try to work our way through the legislation to see what is good and what we can have.

For example, concerning the extension in time limits within which prosecutions can happen—this is always a contentious one—particularly in a criminal area, don’t you require sometimes extra time, other than what is outlined at the moment, which is pretty tight, in order to be able to trace some of the actions through the system? Is the government being unreasonable in saying APRA or ASIC need extra time?

**Ms Byrne**—To trace the actions of super funds that they feel are in breach?

**CHAIR**—Yes. That is a movement in the bill.

**Ms Byrne**—I think APRA should be able to operate as speedily as possible if there has in fact been a breach. As superannuation funds are unique in that they look after other people’s

money, I would have thought APRA would want to operate at a greater speed if they thought there was some contravention to protect people's benefits.

**CHAIR**—This was addressed in our income tax law quite some time ago—and I think the Labor Party introduced this concept—in terms of wayward directors and officers of companies not producing the books for the tax office. Similar circumstances can arise in superannuation in terms of failure to produce books. The derivative use of immunity means that a person subject to investigation under SI(S) 'will no longer be able to claim privilege in respect of the production of books or any other information document or other evidence obtained as a direct or indirect consequence of that person making an oral statement or signing a record of interview'. In terms of a lot of money being involved—approaching \$500 million—if people are not going to have some sort of compulsion to produce the books if something is wrong, the regulator is going to be in a difficult area, is he not?

**Ms Byrne**—That is right. It seems to me, from reading behind the legislation, that the regulator must be having some difficulty in these areas.

**CHAIR**—That is right.

**Ms Byrne**—I would suggest that most of the superannuation funds that are regulated have been given a clean bill of health or have had minor issues dealt with by APRA. Therefore, it seems to me that it is a very large mechanism that has been brought about that will affect everybody who has acted as they should—as a prudent trustee. That is the major concern, to differentiate—

**CHAIR**—I just want to try to tease out those issues which you feel should be retained and those issues that may be explained better or even modified. From what we have been told today, there are some alternative approaches which would perhaps achieve the same—or maybe, as some witnesses have suggested in their submissions, an even better—outcome.

**Ms Byrne**—It would be good if it was tied into more frequent payments of the superannuation guarantee because that would increase compliance in other areas as well. That might assist APRA and the tax office.

**CHAIR**—We have certainly mentioned that in our last two or three reports—at least to a quarterly basis, as an intermediate step.

**Ms Byrne**—There are other things, such as the payment of members' contributions. When a voluntary contribution is collected from a member, that must be put into their superannuation account within the required time. If that is not done, that is a very serious breach. Employer contributions should also be placed and invested in a very timely manner.

**CHAIR**—One penalty for breach—that is, non-compliance—results in virtually half the assets being taken away. That has always seemed to me to be terribly harsh and unfair on the members. If we are moving down this direction of stricter penalties and harsher provisions, don't you think it is perhaps time that we looked at this provision? A non-complying fund has almost a tax rate of about 50 per cent, which means the members are going to lose their assets.

**Ms Byrne**—I thought there had been moves to make some changes for that in recognition of the fact that it was not the members who were at fault; it was in fact the trustees who were at fault. I have not known of any super fund upon which that the penalty has been imposed because of that.

**CHAIR**—It is still there.

**Ms Byrne**—That is unfair on the members.

**CHAIR**—Perhaps it should be taken off the statute books if we are going to go down an alternative higher regulatory regime. I put it to you for your comment.

**Ms Byrne**—I would agree with you that it is unfair to penalise the members who have had no party to the decision making of the trustee. To impose those penalties on them is unfair.

**CHAIR**—That is one of the criticisms of the current bill, that a lot of these penalties will actually fall on the fund, which means it will fall on the members of the fund.

**Senator ALLISON**—Ms Byrne, presumably you have raised this in your forum so far; or have you not?

**Ms Byrne**—We have not as yet. We have a meeting in two weeks time, so we will. If you are still operating then, we are quite happy to provide greater information to you.

**Senator ALLISON**—Have you had any discussions with the minister or government?

**Ms Byrne**—No.

**Senator ALLISON**—Would you expect to?

**Ms Byrne**—The minister is coming to the next industry funds forum. We have highlighted with him that this is one of the things that we would like to talk to him about. We actually do support the submissions of both ASFA and AIST. They have done much more extensive work than we have because of their resources.

**CHAIR**—I also suggest you might like to read the one from Mercers. It is a high-quality submission which has just hit the deck.

**Senator HOGG**—I have a question that I asked before about the capacity of the regulator to disqualify a person for not being a fit and proper person. Do you have a view on that? There are no guidelines or criteria in the bill as to how they would determine who was not a fit and proper person.

**Ms Byrne**—I would think there would have to be guidelines so people could establish whether or not they were fit and proper. I think there are some guidelines at the moment for public offer funds, for them to have satisfied the fact that the trustees have not been disqualified. It is mostly to do with whether you have been bankrupt or financial—

**Senator HOGG**—But as I understand it, this is in this bill to give greater discretion to the regulator rather than things that are quite obvious, such as someone who has been bankrupt or has participated in a crime or something such as that. This goes on a far wider scope, as I understand the briefing that has been provided to me.

**Ms Byrne**—I would think there must be guidelines. Even if there were not guidelines in the legislation, which I think there should be, there would have to be guidelines developed within APRA as an organisation so it could have a decision-making process about who was fit and proper. You could not have it based on my personal view of who was a fit and proper person, or your personal view. They could be wildly different.

**Senator HOGG**—Mine would be a very good view on this.

**CHAIR**—Could this be an attempt to bring all trustees under the same sort of rules as for public offer fund trustees who, before each meeting, must effectively sign a declaration that they have not been subject to a similar offence since the last meeting?

**Ms Byrne**—If that were the purpose, I actually think that is a—

**CHAIR**—Is that unreasonable?

**Ms Byrne**—No, that is not unreasonable, if that was the purpose. I think industry are asking what the purpose is and would like some information. STA, the fund that I manage, as a public offer fund, has that process at the beginning of every meeting, and twice a year the directors complete a form which is a declaration of their status. I do not think that is onerous.

**CHAIR**—So, in a sense, doesn't this appear to be just an extension of that sort of principle from public offer fund responsibilities of trustees to all trustees, whether they are master trusts or industry funds?

**Ms Byrne**—If that is the intention, I think that is probably a reasonable thing. Everyone also is required to do that, to have a federal police check—

**CHAIR**—That is right.

**Ms Byrne**—which verifies that in fact there are not any charges.

**CHAIR**—If police checks et cetera do produce results that show a person is not fit and proper, is it not unreasonable that that person does not sit on a fund which is administering lots of money?

**Ms Byrne**—As long as there are guidelines as to what the police check does and the fact that it is about being a trustee and it is about financial matters. There would be, I would suggest, some trustees who have dealt with other matters that have nothing to do with being on a trustee board that would make them not a fit and proper person.

**Senator HOGG**—It is just that the current information is that there is no criteria in this legislation. If that is an area that needs to be clarified, then it should be clarified. I may well have missed it, but did you clarify the issue of consultation?

**Ms Byrne**—We have not actually consulted with the minister because this all came very quickly. The industry funds have been in discussion with both ASFA and AIST. We just happen to have the senator coming along to our next meeting, which is in early August, so we will consult with him.

**Senator HOGG**—But there was no consultation prior to the legislation hitting and there has been no consultation since the legislation has been through the House of Representatives.

**Ms Byrne**—No, there has not, but neither have we sought consultation, until our next meeting.

**Senator HOGG**—You haven't sought consultation either.

**Ms Byrne**—Yes. We thought we would leave it till our next meeting.

**Senator HOGG**—Would you have expected that, with such a dramatic change in terms of the criminal codes amendments, that you would have been consulted in some way?

**Ms Byrne**—I would have thought that the industry would have been consulted and we would have worked in a consultative way to actually develop what was seen to be appropriate legislation, which is my understanding of what has occurred in the past on a whole range of other issues.

**CHAIR**—You have given us a brief, and it would be good to put it on the public record at the present time before we actually hear APRA. According to the brief, a case has arisen where the Director of Public Prosecutions rejected the former ISC's recommendation to prosecute a trustee that had flagrantly breached the rules relating to the provision of information to members. We as a committee are aware of that particular problem—significant events have occurred and they have not been passed on to members. This does raise a lot of issues because if a court action is going to recover money who does get the proceeds—the people at the time the event occurred or the subsequent members? This can give rise to pretty severe litigation. Members may well bail out of a fund in the event of significant transactions not being conveyed to the members. It is a real worry that there are too many funds that are not conveying information in a timely manner in terms of significant events, or even at all in the case of a particular one that is under investigation at the present time.

**Ms Byrne**—I think the legislation does require you to notify of a significant event.

**CHAIR**—Of an auditor, yes.

**Ms Byrne**—Yes, or any significant event. If you are making a change to the fund that will in fact affect the benefit of the members, you must notify them in advance if it is an adverse effect or you must do so for any other significant event within six months.

**CHAIR**—But the problems that the DPP has run up against have been because of the difficulties of obtaining evidence of intention in the absence of an admission—nobody will admit to it; that is the problem—by a responsible officer or corporate trustee of recklessness in the absence of evidence from an independent person. The regulator has been having some difficulties because when things go wrong all the defences in the world come up. We have to make sure that at the end of the day members do not suffer unduly.

**Ms Byrne**—That is right, and also to make sure that in the development of any legislation you are not punishing a small number for the greater good. It would also seem to me that unfortunately there are people in our community, no matter what the legislation, who will take no notice of it. Unfortunately, some of those may be trustees of superannuation funds. By having all of these criminal codes you are not necessarily going to catch those people, because they disregard the law of the land in all areas.

**CHAIR**—We have the case of a responsible director, an officer, a corporate trustee, who was actually removed by the former ISC for mismanagement of a fund but who was still able to establish a phoenix fund effectively circumventing the ISC's enforcement action. I think they are some of the things that perhaps the government had in mind in terms of trying to keep the industry as clean as possible, squeaky clean perhaps.

**Senator HOGG**—I have one further question that I would expect you to take on notice. The witnesses put to us that there will be increased compliance costs as a result of the criminal code applying. Could you give us some idea of what your members would see those compliance costs amounting to in real terms?

**Ms Byrne**—Would you mind if I get back to you on that?

**Senator HOGG**—Yes, that is what I am saying: take it on notice; I am not asking for a response now. I just want to find out how significant an amount it is and how you see that impacting on the final returns to the members.

**Ms Byrne**—Okay. Thank you very much for your time.

**CHAIR**—Thank you.

[10.50 a.m.]

**COLEMAN, Mr Anthony, Vice President, Institute of Actuaries of Australia**

**MARTIN, Mrs Helen, Vice President, Institute of Actuaries of Australia**

**CHAIR**—Mrs Martin would you mind making an opening statement? We have your submission, thank you.

**Mrs Martin**—I am not sure that we have anything in particular to add. Our main comments and issues are set out in the brief submission. We would like to give you an opportunity to ask us questions and to elaborate on any of our comments.

**CHAIR**—We understand from your submission that you support the stated objectives of the bill as indicated in the second reading speech, ‘to help ensure the safety of superannuation savings by strengthening the enforcement provisions of the SI(S) Act and enhancing the operations of the Banking Act’ and that you support the clarification of retrospectivity of the ability of APRA to provide actuarial services during the period that the Government Actuary was part of APRA. You do have some reservations. You say that you broadly support the increasing powers given to APRA to issue directions to relevant body corporates in a wider range of circumstances, but you are concerned also about a non-actuary. You are happy about the penalties there, but some of the penalty regime problems you feel are a little hard. On page 4 of your submission, you suggest the proposal to change from fault liability to strict liability be reconsidered especially for breaches of standards where the trustee may be reliant on third parties. Could you tease that out a little bit for us?

**Mrs Martin**—At present under the SIS legislation there is obviously a range of regulations that need to be complied with, but most of those provisions are fault liabilities so that there has to be ‘reckless intent’ to breach those legislations before penalties are imposed. We have some concern about the number of provisions that are being changed from fault liability to strict liability, particularly where the trustee is reliant on, say, an insurer, an administrator or another service provider for compliance with that legislation. To some extent, that is beyond control, so that you may get an inadvertent breach of SIS. The penalty is then imposed on the trustee when the trustee had no reckless intent to breach and was in effect caused to breach by the actions of another party. Those are our most significant concerns.

The other point that we make there is that we would expect these changes to have some impact on the representative trusteeship system that we have in place at the moment. Most funds would say that they have some trouble getting people to stand as member elected trustees. That will be more difficult in future if there is a perception that the penalties for even just inadvertently breaching the legislation are going to be quite harsh, as they appear to be in this legislation. We understand the desire for the regulator to be able to deal with the reckless breaches of the legislation, but we have some concern that this particular bill may have gone too far in trying to address that problem and that perhaps there is some compromise in the range of amendments that might achieve the regulators’ objective but not place such an onus on trustees.

**CHAIR**—Would it be too much to ask of the institute to go away and give us a supplementary submission outlining those areas where you think the strict liability may be inappropriate? At the same time, we do not want to reduce the responsibilities of trustees in any way.

**Mrs Martin**—Yes. We can certainly do that.

**CHAIR**—So we acknowledge—I am not sure about Senator Allison and others—that there may be cases for criminal liability and even reverse onus of proof, but there are other areas where that imposition may appear to be a little too harsh, and you have said that yourself. Now we are saying: give us some guidance as to where the break-off lines are and whether there should be graduated penalties in terms of fault—for example, where people do not lodge returns on time, signing audit certificates, actuarial certificates, or whatever it might be—in terms of a one month, two months, three months, over six months sort of approach, to make sure that the same offence does not apply to a minor breach as to an issue which is outstanding for, say, six months where there is no good reason as to why it should be outstanding. If the regulator gets his information speedily he is more likely to pinpoint some problems. I know there is an issue, particularly in relation to this year, that the tightening of those time frames is coinciding with a major review of the tax system, and some auditors have expressed concern. But in the long term would we not all have to agree that the tighter time frames are going to be really good for members' protection as opposed to a very wide or extended time in which obligations have to be fulfilled?

**Mrs Martin**—We would agree with that. Certainly it is in the interests of members to have information in a more timely fashion. The distinction we made in our submission was the example of someone being perhaps a week late in terms of getting a report in versus someone just not providing a report at all. There needs to be some distinction between those sorts of offences, and there does not appear to be in the bill the way it is drafted.

**Senator HOGG**—You spoke about groups where the liability is one removed from the trustees. How often would that occur?

**Mrs Martin**—It would be typical, I would think, for most superannuation funds to have some outsourced services—administration, insurance, investment.

**Senator HOGG**—So how would you see that fitting into this bill and being handled?

**Mrs Martin**—There are provisions in SIS already in terms of the requirements for those service providers.

**Senator HOGG**—In terms of the proposed penalties—because the penalty falls solely on the trustees.

**Mrs Martin**—As proposed in this bill?

**Senator HOGG**—Yes.

**Mrs Martin**—I think there are provisions for penalties on the service providers under SIS—not in this bill but already in place. So if there is a breach of the legislation in terms of the information that a service provider has to give to a trustee, then that is the place to impose the penalty. The trustee, in terms of considering whether it should be penalised, should be able to say, ‘We would have complied, except that we did not get the information from our service provider in the time frame required.’

**Senator HOGG**—I note that in your submission you speak of difficulty in getting members of funds to act as representative trustees. That is currently, without—

**Mrs Martin**—That is right.

**Senator HOGG**—What is causing that difficulty?

**Mrs Martin**—It is probably a range of things. Partly it is the complexity of the superannuation system and members feeling that they do not have sufficient understanding of the system to act as trustees. It is probably partly a time commitment. The primary role of most employees is to do their job for the employer, so adding trustee responsibilities to that may not always be a possibility. But I think there are also significant concerns amongst members that there is a risk of them getting it wrong and being subject to penalties or prosecution for doing that.

**Senator HOGG**—What is the trend there for involvement? Is it getting worse, or has it stabilised?

**Mrs Martin**—It is hard to say whether there is any particular trend.

**Senator HOGG**—I am just interested because it would seem to me that it would be one area where people would be clamouring to have a say. Obviously, there seems to be a number of gaps in a number of funds.

**Mrs Martin**—It varies quite significantly across the range of employers and the size of funds and whether there is an active industrial interest in superannuation at a workplace. I speak from the perspective of Towers Perrin and the sorts of large corporate clients that we advise. Very often when there is a call for nominations for member elected trustees, they have to encourage people to stand. There is often not a need for an election because they only have enough candidates to fill the positions that are vacant.

**Senator HOGG**—If that were only the case for politicians. There are two other issues that have interested me. Were you consulted on the legislation prior to it going to parliament?

**Mrs Martin**—No.

**Senator HOGG**—Have you been consulted since the presentation of the legislation to parliament and during its passage through the House of Representatives?

**Mrs Martin**—No.

**Senator HOGG**—Have you sought any consultation with the relevant body, the government or the department?

**Mrs Martin**—No.

**CHAIR**—You say in your submission that you have to discuss this further with APRA.

**Mrs Martin**—I only became aware of this particular piece of legislation myself last week when I was asked to appear at this hearing. At that point, I researched the legislation and identified the issues. We will particularly discuss the issue of non-actuaries holding themselves as actuaries. We would propose to discuss that with APRA but we have not sought to do so yet.

**Senator HOGG**—I can understand why you have not since you have just found out about it. The other thing that interests me is that you speak of the additional burdens and costs on trustees. Would you be able to quantify in some way what those increased costs will be? I do not expect you to do it today; you can take that on notice.

**Mrs Martin**—Yes.

**Senator HOGG**—Can you give us some idea of the magnitude of the increased costs that will be faced by funds?

**Mrs Martin**—We can certainly endeavour to do that.

**Senator HOGG**—If this regime went through as it currently is.

**Mrs Martin**—It may well be difficult to quantify because in essence it is a bit of an unknown. But we can certainly see what we can provide.

**Senator HOGG**—There must be increased legal and administrative costs to ensure that one is not breaching the laws and not in contravention of the act.

**Mrs Martin**—That is right and also the change in the burden of proof from the regulator to the trustee will increase costs.

**Senator HOGG**—And there will be some one-off costs and some ongoing costs, I would presume. If you can identify those, even if you cannot quantify them overly accurately, it would be helpful indeed.

**Mrs Martin**—Certainly.

**CHAIR**—In regard to non-actuaries holding themselves out as an actuary, could that be, for example, a person who is registered in another jurisdiction, who may well have qualifications not recognised in the Australian jurisdiction or by the Australian Institute of Actuaries?

**Mr Coleman**—That would be unlikely. The main reason for that is that we have fairly recently entered into mutual recognition agreements with most of the other major actuarial

bodies around the world which means that, under certain conditions, we will mutually recognise each other's qualified actuaries. There has been a procedure in place for some years where, under certain conditions, someone who is qualified overseas can seek formal recognition from our institute here in Australia if they are resident in Australia.

**Mrs Martin**—It would depend on where they were coming from, I guess.

**Mr Coleman**—Yes, possibility, but most of the common countries you would think of in the first instance that might be the source of such people would be covered.

**Mrs Martin**—The mutual recognition agreements are in place with the UK, US and Canada.

**Mr Coleman**—Via the UK the whole of Europe, the whole of the US and, to a large extent, most of Asia de facto because most of Asia is recognised by one of those two.

**CHAIR**—I just want to make sure, because in other areas the AMA, for example, have a very strong hold in terms of registration. We have countless examples, I think you will find, of highly qualified doctors coming from certain countries that have practised and been accepted in the United States and Great Britain but when they hit Australia the AMA rules them out. No matter what the minister's recommendations might be the AMA's recommendation holds the line. This is a matter of some concern to us, particularly in trying to get medical practitioners into remote and decentralised areas of Australia. I just want to make sure that—

**Mr Coleman**—It is not an issue.

**Mrs Martin**—That is not an issue for us. Our main concern would be people who do not have any actuarial qualifications, either in Australia or overseas, who hold themselves out to be actuaries.

**Mr Coleman**—There have been isolated cases in the past of people who might have done half the actuarial exams who then tried to hold themselves out as an actuary or call themselves an actuary. Sometimes they call themselves an associate actuary. We would obviously be keen to avoid those sorts of people being able to be recognised as actuaries.

**CHAIR**—But, at the same time, if they did that the risks in terms of action against them are terribly high if they got it wrong, are they not?

**Mr Coleman**—Presumably.

**Mrs Martin**—But an individual consumer is not necessarily going to know the distinction between a fully qualified actuary and a partly qualified actuary. So we need to make sure that that is controlled and managed.

**Senator ALLISON**—What is the extent of the problem that this legislation addresses in terms of actuaries?

**Mr Coleman**—Do you mean the recognition question?

**Senator ALLISON**—Yes. Is it something you have been advocating for a long time, for instance?

**Mr Coleman**—No, not at all. I am not aware of the origin of this.

**Mrs Martin**—I am not sure what prompted the inclusion of those provisions in the bill. Perhaps APRA does have some concerns about that issue. The Institute of Actuaries are not aware of any serious issues that have arisen in people presenting themselves as actuaries when they are not.

**Mr Coleman**—Put it this way, APRA has not brought it to our attention.

**Senator HOGG**—Would you expect them to?

**Mr Coleman**—Yes, I would, actually.

**Senator ALLISON**—Would you in the normal course of your going about your institute business expect to know if there were substantial worries in this respect?

**Mr Coleman**—I would think so, yes.

**Senator ALLISON**—It seems to be one of the less contentious parts of the bill, I might say. I am just interested to know what its genesis is.

**Mrs Martin**—We have no problem with it being changed, and we have no problem with the inclusion. The area where we do have a question mark is what constitutes someone holding themselves out as an actuary: do they have to actually use the actuarial qualification letters when they are not entitled to, or is there some other way in which someone could hold themselves out as an actuary when they are not? They are the sorts of issues that we would like to talk further with APRA about.

**Senator HOGG**—Do you think they run round wearing a sign saying, ‘We’re the Dodgy Brothers,’ or something? They are not going to do that; that is the problem.

**Mrs Martin**—No, but an example may be someone who works for a firm that does employ actuaries providing advice in an area that would normally be provided by an actuary when the particular individual within that firm does not have an actuarial qualification. That may be an example that we might be concerned about.

**Senator ALLISON**—What about the provision that the Institute of Chartered Accountants draws attention to when they say that the same standard of responsibility on the auditor of a super fund—even with assets quite low, \$100,000—is not applied to the corporate sector. Do you want to comment?

**Mrs Martin**—I have not seen the accountants’ submission, so I am not sure what you are particularly—

**Senator ALLISON**—I will just read this paragraph:

Our concerns with the Bill relate to Schedule 3 Part 2, which relates to the introduction of criminal penalties where a fund fails to comply with nominated Superannuation Industry Supervision Act (SIS Act) provisions; in particular, the imposition of criminal penalties for the failure to provide an audit report within the required period. It would seem to be an anomaly to impose this level of responsibility on the auditor of superannuation funds, some of which have assets as low as \$100,000 ...

**Mr Coleman**—Is this in comparison with the obligations that auditing companies have generally?

**Senator ALLISON**—Yes.

**Mr Coleman**—I see.

**Mrs Martin**—It is difficult to respond to that without having considered it previously.

**Senator ALLISON**—Okay.

**Senator HOGG**—Why don't you take it on notice and come back to us with a considered view?

**Mr Coleman**—I guess an off-the-cuff response would be it depends really whether you believe superannuation funds are in a special category such as life insurance companies or general insurance companies. Clearly, there are obligations on auditors of those companies, as indeed there are on actuaries responsible for those companies in a prudential regulation sense where there are high standards met by audits of those entities. Some of those are not necessarily very large, either. It may be a higher standard, yes, than a general public company, but if you are talking about a financial institution such as a bank or insurer or whatever, then perhaps there is an argument even so that there should be a difference there. But that would be the obvious counter argument, I guess.

**Mrs Martin**—Again, you might want to draw the distinction between missing the deadline by a short timeframe versus flagrantly not providing the audit report at all.

**Mr Coleman**—I think at the end of the day one has to keep this thing in context, too. Really what you are obviously concerned about in all of those situations is the protection of the people who are dealing with the financial institution concerned. What you have to be focusing on is what penalty is appropriate if they fail to do the job they should have done and what does that mean to the protection of those interests of the members or the people dealing with the insurance companies or the depositors of the banks. It is the same general principle.

**CHAIR**—Do you think we have high level standards required for auditors in terms of what they have got to report? Should we be more specific in our legislation on the issues that they have to draw the members' attention to?

**Mrs Martin**—I guess my personal view is that it is very difficult to be completely comprehensive in legislation. I think the legislation at the moment does address the major issues that need to be dealt with in audit reports, but the legislation is then supported by more detailed

pronouncements by APRA, guidance from the accountants and auditors themselves in much the same way as we have actuarial professional standards and guidance notes that elaborate on the requirements of the legislation. Again, I have not considered the issue in detail but my general feeling would be that the legislation does focus on the major areas that should be identified and focused on by auditors.

**CHAIR**—On page 4 of your submission to us you say the trustees should not be penalised for acts or omission of service providers. But, at the end of the day, shouldn't the trustee ultimately be responsible for making sure that all the fund's legislative responsibilities are met? One of the problems under the old trust legislation was that there was a problem of who did you run to: do you run to the manager or do you run to the trustee? That legislation has been clarified. But if you are suggesting that we should move away from ultimately pinning the responsibilities, I suggest that maybe we are undermining the very foundations of SIS.

**Mrs Martin**—I do not believe that is what we are suggesting. What we are suggesting is that trustees should not be penalised when they have taken all reasonable steps to comply but the compliance has been out of their control because a service provider has not provided the information that they needed. So ultimate responsibility does rest with the trustee and the trustee has to take appropriate action to ensure that they comply, but there comes a point at which the trustee cannot.

**CHAIR**—Do you think there is an regulatory overload on trustees?

**Mr Coleman**—There is a distinction between responsibility. They still have to be responsible. Obviously, they cannot shed that.

**CHAIR**—Earlier witnesses have said trustees comprise a lot of people who put their hands up and volunteer. Do you think there is a regulatory overload in relation to trustees at the present time? We are told that it takes a trustee about six days to prepare for all the requirements of meeting trustee meetings and their subcommittees or whatever form they might be. Is there a regulatory overload? And how do we overcome that problem?

**Mrs Martin**—By simplifying the superannuation system so it is less onerous to comply with.

**Senator HOGG**—Good answer.

**Mrs Martin**—It is potentially an issue. Most trustees would have appropriate procedures and processes in place that would allow them to spend a not over-the-top amount of time in having to deal with it.

**CHAIR**—But there are checklists that they have to go through and tick off, otherwise they are not really discharging their responsibilities fully unless they go through these procedures at each meeting or at each subcommittee meeting which might be relevant.

**Mrs Martin**—That is true, but there would normally be either the chairman of trustees or a fund secretary who would take the main responsibility for doing the bulk of that and then would just brief the other trustees. Obviously the other trustees need to satisfy themselves that

everything has been checked and complied with, but it is not every single member of the trustee board that has to go through that process.

**CHAIR**—Are you aware of incidents where trustees may have been led by dominant chairpersons or fund secretaries or fund managers or even fund administrators?

**Senator HOGG**—Or dominant employers?

**CHAIR**—Yes, in the corporate side, yes—or dominant employers. It is quite a long list.

**Mrs Martin**—Not personally, no.

**Senator HOGG**—You should come and talk to me.

**CHAIR**—Thank you. Are there any further questions?

**Senator HOGG**—This is a question right out of left field. Do either of you support Carlton, by any chance?

**Mr Coleman**—Afraid not.

**Mrs Martin**—No.

**Senator HOGG**—That is all right. Okay. I will show why that is a relevant factor later on.

**Senator ALLISON**—I have just one question. I have noticed in the submission the criminal liability offences applying to employers who do not remit contributions in time. What is your understanding of how that works? Is it the employer who is liable or is it the trustee who is liable? This seems to me to be a major problem where there are problems—that is, employers not remitting. Is there a need for us to boost the SI(S) Act to make employers more liable?

**Mrs Martin**—I think the liability should and does rest with the employer for non-payment or late payment of contributions. I think that provision already exists in the SIS legislation. My understanding is that this bill increases the level of liability—

**Senator ALLISON**—To make it criminal. Is that warranted?

**Mr Coleman**—That makes it criminal rather than civil.

**Mrs Martin**—Yes.

**Senator ALLISON**—Is it warranted in that case? I can see there is a good argument for minor breaches such as failure to lodge on time but I think it is a substantial breach for employers to not make contributions on time, even on day one.

**Mrs Martin**—I agree. Again, I think I would draw the distinction between being a little late and just flagrantly not complying and not contributing at all or after such a substantial time period that there was a significant loss of interest, for example.

**Senator ALLISON**—Would you give greater weight to that question of employers failing to remit contributions on time than, say, lodging annual returns or keeping proper minutes of meetings?

**Mrs Martin**—Yes. I think that is a more significant issue.

**CHAIR**—Talking about the SCG and late payment, I think the committee is very concerned about the legislative prescriptions and the cumbersome way in which late payment has to go through all these unnecessary processes before they get back to the fund.

**Mrs Martin**—In terms of the superannuation guarantee charge and the—

**CHAIR**—Superannuation guarantee charge, yes. Are there any further questions? Thank you, Mrs Martin and Mr Coleman.

[11.20 a.m.]

**JEREMIAH, Mr Robert John, Chairman, Technical Committee, Small Independent Superannuation Funds Association Limited**

**McDOUGALL, Mr Graeme Robert, Chief Executive Officer, Small Independent Superannuation Funds Association Limited**

**CHAIR**—Welcome. Would you like to speak to your submission or make an opening statement?

**Mr McDougall**—I will just make a few opening remarks and then I will pass over to my colleague to make a few further comments and certainly we are interested in inviting you to raise questions. Let me start off by referring to the explanatory memorandum which states that the amendments will facilitate prosecutions or contraventions of SIS and assist in ensuring that superannuation entities are administered prudently and superannuation savings adequately protected.

Two observations must be made at the outset in relation to this statement. Firstly, there is no evidence that the current offence provisions of SIS are inadequate or that the regulator is experiencing any difficulties in prosecuting intentional or reckless breaches of the legislation even though, I might add, I continually hear you, Mr Chairman, keep on referring to lifting of the bar. The introduction of strict—

**CHAIR**—You don't object to that, do you?

**Mr McDougall**—I wonder why the bar is needing to be lifted. That is the reason I am asking the question in relation to your reference to that point—

**CHAIR**—The quantum of money invested and the need to protect members' interests. The higher the amount of money, the greater the attraction to the possible criminal elements moving into the system.

**Mr McDougall**—I understand your concerns and I understand what you are saying but I come back to the point that we have raised that there is no evidence that the current offence provisions are inadequate or that the regulator is experiencing any difficulties. I think that has been expressed here today by other witnesses quite considerably.

Secondly, the introduction of strict liability and consequential removal of fault as an element of any offence does not assist in ensuring the prudential management of superannuation funds. An inadvertent breach of the relevant provisions is not a threat to the integrity of the superannuation savings. I might just add that we believe that the government has established no grounds on which it could be argued that the powers of enforcement currently contained are inadequate, as I said earlier. Given the potentially serious consequences of the provisions of this bill for trustees and auditors, it is extremely disappointing that it was introduced without any industry consultation or without the presentation of any evidence to highlight the insufficiencies

in the current regime. Industry consultation should take place to discuss any of the problems, if any, being encountered by the regulators and to discuss appropriate solutions. I would just like to ask my colleague to add some further comments.

**Mr Jeremiah**—I would like to amplify, if I could, to the committee a number of those points that Graeme has made. Firstly, on the question of the lifting of the bar, on the general notion of trustees' obligations and general duties under the common law of trustees' obligations, what comes to mind, and came to mind from some of the discussions earlier this morning, was the case of the trustees, executors and agency company decision of about 25 years ago.

**CHAIR**—We have to be very careful here in applying the common law of 25 years ago because that has been augmented by the SIS regulations which put much more onus requirements on trustees than, in fact, the whole of the industry. I have difficulty accepting this common law application of trustees.

**Mr Jeremiah**—To take your point that, yes, there is a stricter code now but, even without that stricter code, the position from a long time ago was that, in that particular case, the person did not obtain any benefit at all in relation to the handling of individuals' money and went to gaol for a few years—a person who was one of the directors of the company. The law, as it is and always has been in relation to a trustee's duty, is very strong. That has been added to, if you like, by SIS and we now have a specific codification of that which has placed stricter requirements on the obligations of trustees in carrying out their duty.

All I am saying in making the point is that we have very strong trustee laws. One of the worst things somebody could do in society is to breach the trust that somebody else has placed on them. We do not have any evidence to date that there is a significant degree of difficulty. Discussions earlier today with some APRA people indicated that they have had a lot of difficulty in investigating breaches of SIS and one of the reasons, it seems from this brief discussion, that these changes are being sought is that there is difficulty in policing the legislation. But is that really a reason to making the change and changing it to strict liability?

Do we go to a situation that we have in France of guilty until proven innocent? This is going a long way from the circumstance where somebody inadvertently breaches the provisions to one that if you do something you are automatically in breach. And to take your point from before, Senator, it seems unreasonable in many instances for the members to suffer a 50 per cent loss of funds with this legislation if it is passed. Unless the regulator makes a declaration that the fund is a complying fund it will be a non-complying fund and there will be a loss of 50 per cent of the assets of the fund from the members.

Further to the question of Senator Hogg when he made his comments before and asked the question about the immediate effects of a disqualification and what these provisions provide in the new section 120A: it will have immediate effect. As soon as the person breaches and a declaration is made there is no right of recourse and no defence to this. It has immediate effect. It will only be where the regulator, and in the case of small superannuation funds that is the Taxation Office, considers that it is highly unlikely—and they are the words used in the new section—that the person would not breach SIS.

To go to that sort of regime seems to me—and seems to SISFA—to be dangerous to the extent that I would have thought that somebody in a public position would be very unlikely to place themselves in a position where they were to declare someone to be highly unlikely to breach the provisions. So we have almost emotive language being used in the legislation, which seems to me to be dangerous.

Among the sorts of minor breaches that are talked about here and have been mentioned this morning there is another one I would like to raise. We have talked about the failing to seek a tax file number within 30 days. There is the obligation in the provisions, and we would certainly support there being obligations, and if those obligations are breached knowingly and recklessly we would support that there would be penalties that would flow and in the main we would have no objection to any of the penalties that are provided for in the legislation. If we are talking about small superannuation funds and individuals being trustees of those funds, if it is a single member, a single trustee of the fund, the obligation is that the trustee must record every resolution, every decision that is made and retain the reasons for that decision for 10 years. And if the person does not do that, that is one of these breaches under the strict liability under the code. That would seem to me to be most unreasonable to say the least. And to have a situation where that can result in the fund again losing half its assets would seem to me to be unfortunate.

Last night I was at a Rotary—I am in a Rotary Club—and I was at a food handling course to learn the new law as to how we should cook sausages for people, as we do on a Sunday morning, and I was speaking to the principal of an agricultural college who is also a member of the club. I said, ‘I am off tomorrow morning to Sydney to appear before a Senate select committee.’ He said to me, talking about superannuation, ‘In every instance with superannuation now it seems that people are being forced to obtain an expert’s opinion and the cost of that is driving people away from superannuation, such is the complexity of it.’ This was a person expressing this to me last night. He said that it seemed to him to be most unfortunate for the regional areas and from the regional perspective. Are we trying to drive people out of superannuation? From a regional perspective people would be seeking to still invest in their local community and in their local area and they regard that as the sensible thing to do. But if we have this notion of strict liability from a trustee’s perspective—and that has been mentioned many times earlier today—there will be people who are less prepared to take on the possibility of finding themselves suffering a strict liability without any opportunity to defend themselves. That is probably all I have to say in relation to this area of strict liability.

There are a large number of funds. Certainly SISFA’s focus is in relation to self-managed superannuation funds. I understand there are 210,000 funds and, from Graeme this morning, about \$62 billion under management, which seem to me to be large numbers. I have not heard the evidence of how many breaches there are and to what extent there is a problem for APRA and the tax office in policing the provisions. One other thing I would like to add is the Holloway case of about six weeks ago where APRA had some success in prosecuting under SIS. A recruitment accounting firm in South Australia attempted to avoid the provisions. Since this legislation was first thought of and drafted it has now been found that APRA and the legislation do have some teeth. I am wondering whether it is really a matter of getting our act together and making sure that we adopt the appropriate policies with regard to investigating breaches. And I wonder whether we need this strict liability.

**CHAIR**—Mr Jeremiah, I was concerned about your suggestion that you do not think we should take seriously the issue of not recording the reasons for a decision and those processes because that would imply that there were escapes for lack of due diligence. I would suggest this is not appropriate for the superannuation industry. I also remind you that, under the new regulator of the Superannuation Complaints Tribunal, unless there is that recording of the reasons for coming to the decisions in the case of matters coming before the Superannuation Complaints Tribunal, if you do not go through that process, you are not likely to get a very favourable outcome as far as they are concerned.

**Mr Jeremiah**—I am not suggesting that that should not be a penalty. With all of these provisions, though, I am suggesting that, if somebody inadvertently fails to record a particular decision that has been made, then that is a breach under the strict liability provisions. Not for one moment am I suggesting that the person should not go through the process in making the decision and recording it. It is really the matter of how it should be—

**CHAIR**—If that process did not find its way into the minutes for some reason, for example?

**Mr Jeremiah**—Yes.

**CHAIR**—I take that point.

**Senator CONROY**—I would like to ask Mr McDougall, given his vast experience, why he thinks the government is going down this path. I know you have been listening to most of the witnesses before you and heard that no-one seems to have an explanation at all as to why the government is pursuing this agenda. I am just wondering if you, with your extensive contacts, have any better idea than any of the other witnesses?

**Mr McDougall**—Thank you, Senator Conroy.

**CHAIR**—Mr McDougall is no longer close to government.

**Senator HOGG**—He is very influential.

**Mr McDougall**—This piece of legislation along with a few other pieces of legislation that have come into the superannuation industry in the last couple of years appear to be based on a perception, a notion, that there is something wrong. In each of the cases that we have been involved in—either through a Senate hearing, in discussion through a workshop or whatever it has been—we seem to come up with a common thread; that is, that there does not appear to be any evidence or reason given as to why this sort of legislation is brought forward. I think it has been fairly said here today by others that, if there is a concern or a perception that there is something wrong, then it would be thought that the best port of call would be to have some discussions with the industry first to see whether or not there was a problem and to get some response. But to lead immediately into legislation into the House and into the Senate, even in non-draft form, seems to me to be a very heavy-handed way of going about a problem.

I pass this comment to both the political process and, also, to the bureaucratic process. I have had these discussions with the new regulator in relation to self-managed funds, the ATO, on the basis that we encourage the regulator, if they perceive that there is a problem, to come forward

and discuss it with us and maybe there will not be a necessity to go forward into legislation which ends up at a hearing like this, and like a hearing a couple of weeks ago, where there seems to be some uniformity from the industry in relation to the reaction to the perceived problem. So I think it is a matter of communication that we are having a problem with rather than dealing with the specific and I think that communication problem could be overcome very simply.

**Senator ALLISON**—Let me ask about disqualification. You say there needs to be guidance within the legislation as to when a person is considered to be not fit and proper and that there is already SIS legislation which allows APRA to act in the case that somebody is acting in a manner which is not fit and proper, thereby designating them as such a person. Is there, in your view—and if you could answer this from the perspective of DIY funds—a class of person who is not fit and proper to be a trustee?

**Mr Jeremiah**—Somebody who in a general sense has been guilty of a specified number of breaches, for example, would not be a fit and proper person.

**Senator ALLISON**—Breaches of the SI(S) Act you mean?

**Mr Jeremiah**—And other people. If somebody robbed the bank and committed those sorts of criminal offences; if somebody had been prosecuted for a breach of trust, a breach of SIS, a number of breaches of SIS, such a person would not be considered a fit and proper person. It may be that one minor breach may not be sufficient, I would have thought, for the person to be disqualified.

**Senator ALLISON**—But that provision, as you have pointed out, is already there in the SI(S) Act. If there has been several breaches of the SI(S) Act, APRA can act—is that not right? I am just wondering whether there is a class of person, that is, someone who has been convicted of a criminal offence, and whether that should not simply be in the legislation rather than giving the enormous discretion to APRA.

**Mr Jeremiah**—Yes.

**Mr McDougall**—I think there is another point there, Senator Allison. We go back to SLAA 3 and the new requirement under SLAA 3 for all members of self-managed funds to be trustees. We are dealing here with a difficulty in that in encouraging people to come in and develop some sort of retirement income structure for their future we are encouraging them to go into the superannuation stream because it locks up funds for the long term.

**Senator CONROY**—And look forward to someone suing himself.

**Mr McDougall**—And we have this problem now that the same requirement would disqualify a person from being a trustee should this legislation go through, but would not disqualify that person from having a superannuation fund. I think that is a very obvious point and I think we have got to deal with that before the legislation is put forward, not afterwards. In this case, we are going to have to deal with it afterwards.

**CHAIR**—That raises a very interesting point. If under SLAB 3 these members have to be trustees and in their youth they were a little bit reckless somewhere along the line, or they were in Europe—and I am aware of one case—and they were a little bit naughty when they were 18 or 21 and then they came back and at age 40 they want a position, they could be in trouble. But the issue that I am raising is a very relevant one under this requirement for all people who have to be trustees: how do we get on in a situation where one of these people has had a criminal record and is now forced to be a trustee?

**Senator CONROY**—He will not be allowed to be after this piece of legislation.

**CHAIR**—They will be in breach of something though, won't they?

**Senator CONROY**—They will be in breach of one of the two laws.

**Mr Jeremiah**—That is right, and that is a matter for our submission. We have included that in our submission and have alluded to this problem.

**CHAIR**—It is a good point. Thank you. Maybe I made a little flippant remark which a reader might take the wrong way, Mr McDougall, so lest that happen, in terms of your influence with government, I should point out that Mr Graeme McDougall was a former distinguished member of the House of Representatives who is now the Chief Executive Officer at SISFA, and I just thought perhaps the record needed that sort of explanation regarding my use of that flippant term.

**Senator HOGG**—Sensitive new age guy.

**Mr McDougall**—Not required, Mr Chairman.

**Senator HOGG**—Does your organisation consider itself part of the superannuation industry?

**Mr McDougall**—Absolutely.

**Senator HOGG**—Were you consulted on this piece of legislation before it went to the House of Representatives?

**Mr McDougall**—No, we were not.

**Senator HOGG**—Were you surprised that you were not consulted?

**Mr McDougall**—In normal circumstances, I would say yes; in the recent couple of years, I would say no.

**Senator HOGG**—One other question: have you sought any consultation with the government on this piece of legislation?

**Mr McDougall**—No, we have not.

**Senator HOGG**—Do you intend to seek any consultation with the government?

**Mr McDougall**—I think it is fair to say, after today and after listening to the evidence given, that we will certainly be putting our comments forward.

**CHAIR**—To whom?

**Mr McDougall**—Both to the regulator and to the government.

**Senator HOGG**—The other issue that has been raised at this hearing is the increased cost burden that will be brought upon funds as a result of the criminal code amendments. Do you have any idea of what the increased cost burden to funds will be as a result?

**Mr Jeremiah**—I think the answer to that question is no, Senator.

**Senator HOGG**—If you could take that on notice and give us some idea, I think it would help the committee.

**Mr McDougall**—Yes.

**Senator ALLISON**—I have another clarification. In your submission under ‘Result of breach’, you say that a trustee who inadvertently fails to request a tax file number by the due date will be placed in the position of having to convince the regulator, et cetera, or if he or she fails the fund will lose 47 per cent of its assets and be taxed in future as a non-complying fund. Will you just expand on that? I think this is the first submission we have had that has pointed to this.

**Mr Jeremiah**—That was the point that I actually made before, Senator, that for these minor breaches, unless the regulator provides or exercises its discretion to determine that the fund is in fact a complying fund, as a result of the breach it would be a non-complying fund. And if the fund is a non-complying fund, automatically—

**Senator ALLISON**—So it is a non-complying fund by virtue of the trustee being dismissed from that role. That is what you mean by that.

**Mr Jeremiah**—Breach of the provisions, yes.

**CHAIR**—Are there any further questions? No further questions. We thank you, Mr McDougall, for coming down from Brisbane, and also Mr Jeremiah.

[11.45 a.m.]

**HAJAJ, Mr Khaldoun, Researcher, Financial Services Consumer Policy Centre**

**CHAIR**—The committee welcomes Mr Hajaj from the Financial Services Consumer Policy Centre to today's hearing.

**Mr Hajaj**—Chris Connelly sends his apologies as he has very recently had a new addition to his family.

**CHAIR**—Please pass on the committee's best wishes to him and his wife. Would you like to make an opening statement?

**Mr Hajaj**—Yes. Thank you for this opportunity to comment on this part of the bill. In general, the Financial Services Consumer Policy Centre and consumer movement in general do not take much of an interest in the prudential aspects of superannuation regulation. Indeed, we tend to be much more interested in item 18 of FSLAB No. 1 than this particular item. However, we still thank the committee for allowing us to appear. We think that this has some general implication on the provision of public policy. Indeed, while supporting the overall thrust of this effort to bolster APRA's enforcement powers or APRA's powers in general, we also empathise with aspects of the industry that think this is all a bit sudden and that the lack of consultation may very well affect the provision of good public policy in superannuation. While in general agreeing that strict liability should be enforced on the range of issues which are put forward here, we empathise with the industry in that we do think it is a bit sudden. We certainly have not had much time to look at it at all. We have had less than a week to really tackle it. While we cannot go into the ins and outs of the various sections that are proposed, we do think that a more prolonged inquiry and consultation process would have been somewhat more helpful.

Be that as it may, on the face of it, it does seem that certain proposals are quite good in terms of enhancing consumer protection and, as such, we welcome them. Our only caution and hope is that they do not have an adverse impact on superannuation fees and charges, which new research has shown can easily blow out to much more than has been enunciated on first key feature statements. Besides that, we really do not have a lot to say on this and I am happy to take various questions. As I said, our only interest in this comes as a result of our interest in seeing that good public policy provisions are forwarded. We do not think it is within our area to comment in terms of the legal framework of this and the impact that it has on trustees, but we do think it is our task to comment on the impacts that it will have on consumers. So I am happy to take any questions on this.

**CHAIR**—Do you know if it is likely to have an adverse impact on fees and charges? Do you think there is maybe a greater likelihood of trustees wanting to run off to their solicitors to get opinions on more matters than they would have in the past to protect themselves?

**Mr Hajaj**—It seems that most trustees are amateurs to begin with anyway and not many decisions are taken by them to begin with. While they do make the final decision—

**CHAIR**—They are not amateurs in their approach I hope.

**Mr Hajaj**—No, not in their approach. We are confident in the ability of most trustees, but it seems that most of the major decisions are outsourced to begin with. However, we do think that this may potentially adversely affect good investment decisions in that there may be a more overcautious approach towards the management of their funds which may in the long term—

**CHAIR**—What is wrong with that?

**Mr Hajaj**—There is nothing wrong with being cautious in terms of managing a fund, but we do think that being overcautious may actually impact negatively on retirement incomes. As such, we do not think that is a good thing.

**CHAIR**—Would it be better to be overcautious in terms of people's superannuation, given that people tend to opt for the most cautious approach?

**Mr Hajaj**—People tend to opt for the most cautious approach in general through a lack of understanding of the various aspects of superannuation. But given that we think that there is going to be a push for greater consumer education as a result of impending changes to the regime, it may very well be that we will have far more educated consumers of superannuation who will demand better returns on their investments.

**CHAIR**—For the first time today we have seen a number of witnesses putting their hands up and saying, 'We've got to protect the amateur status of trustees.' This is a little bit of a laugh suddenly coming after all these years. They are regarded, certainly by their members, as having acquired some expertise—

**Senator CONROY**—Senator Hogg is a former trustee of one of the largest funds in the country as an amateur.

**CHAIR**—Senator Hogg has got quite good qualifications to be a trustee with his academic background and his experience.

**Senator HOGG**—Thank you.

**Senator CONROY**—He is just an amateur senator.

**CHAIR**—No, I am saying this is the first time before this committee we have had this issue of amateurism and people putting up their hands as volunteers. This may be true, in a sense. I think members perceive their trustees having acquired, over the years, a lot of experience and a lot of knowledge. It worries me just a little bit that people are suggesting that perhaps we have got to roll it back a little bit because after all we are all amateurs. I think we are more than amateurs, actually. I think we appreciate the role of trustees and the experiences and the skills that they have acquired.

**Senator HOGG**—Everyone has got to start somewhere, I think.

**Mr Hajaj**—Perhaps they are voluntary as opposed to amateur. However, we have various problems with the way the whole trustee process, including the appointment of trustees, takes place while there is a perception that trustees—

**Senator CONROY**—The election—

**CHAIR**—That is a good point, actually.

**Mr Hajaj**—Yes. There is a perception that having a trustee system is conducive to good employer-employee democracy, but we have to ask if that really is the case. What is the likelihood of a shop floor sort of person ever becoming a trustee? The reality of course is that most trustees are political appointments as opposed to professional appointments. I can point out many examples of trustees who either work for industry bodies or, alternatively, trade unions, and that seems to be the case across all industry boards. As I said, those are democratic organisations, but I do not know whether the process itself is that democratic. Perhaps—

**Senator CONROY**—That is an argument for greater member participation, like quota shareholder—

**Mr Hajaj**—Yes, indeed. It may very well be the case that the provision of more professional trustees may actually be good in the long term.

**CHAIR**—Mr Hockey has promoted a concept of greater use of proxies—‘greater activism’ was the phrase used a moment ago—on behalf of the shareholders and the funds—

**Senator CONROY**—He has talked about it a lot.

**CHAIR**—which means that the trustees have got to give some directions for investment matters. Do you think there is a need, for example, to have an annual meeting or something equivalent to that for the members? The members get their statements. You are a consumer representative, and so we would like to tease this out with you.

**Mr Hajaj**—I do think that there is a need. We had the argument with Senator Sherry the last time I appeared before this committee about whether or not it is a monopoly. The reality is that workers have no choice as to where that money goes, and given that circumstance the least we can do is provide them with an avenue where they can express their opinions. Considering that they are in what is, for all intents and purposes, a mutual society, they should have an opportunity to express their desires on how—

**CHAIR**—How do we overcome that problem of being a mutual admiration society?

**Senator CONROY**—Do not let him put words in your mouth.

**CHAIR**—I do it all the time.

**Senator CONROY**—He did not actually say that, Senator Watson. I would not want you to put words into witnesses’ mouths.

**Mr Hajaj**—I am an amateur Carlton supporter.

**Senator HOGG**—My theory is blown out of the water.

**Mr Hajaj**—In terms of involvement, we think it is a good thing and it should be encouraged. It does engender better fund management. We have actually supported the various progressive causes which have sought to encourage trustees not to invest money in certain agencies. We have done some work with the Minerals Institute of Australia, which is basically an environmental protection organisation that has been lobbying consumer organisations on limiting superannuation investment in environmentally unfriendly causes like mining, uranium mining and various other chemical companies. We have supported that. This is one example where consumer activism does play a positive role. There is no reason why, for example, consumers would not be concerned if they saw that their fund was putting a lot of money into R.J. Reynolds and Philip Morris, who are perceived to be unethical.

**Senator CONROY**—The Tobacco Workers Union would not have much of a problem.

**Mr Hajaj**—Yes.

**CHAIR**—Doesn't Philip Morris have a wide spectrum of investments? It is not only cigarettes, is it?

**Senator CONROY**—It is Kraft Foods.

**CHAIR**—Yes, foods.

**Mr Hajaj**—Yes, but they are famous for being big cigarette makers, above all else.

**CHAIR**—But they are reducing their investments all the time in cigarettes and lifting their investments in other areas. I do not disagree with the concept because a lot of university funds in America withdrew their funds from companies that had links with South Africa because of the apartheid regime. It is not a new concept.

**Mr Hajaj**—We do not support aggressive consumerism; we support social consumerism in our approach to consumer activism.

**CHAIR**—Perhaps you might like to distinguish that for the record.

**Mr Hajaj**—Consumerism per se is basically what we understand consumerism to be, which is the purchase of products for consumption. Social consumerism or social activist consumer practice is basically what we have here, which is about enhancing the social structure of the society as a whole through activism in the consumer area. And, as such, in terms of what we do in banking advocacy, we do not always support the complete reduction of fees and charges because—

**Senator CONROY**—You do not welcome the move in England to a new government which will abolish fees and charges on ATMs?

**Mr Hajaj**—No. We do welcome that and we are happy to see that that has now happened. I am saying that our council do not just purely lobby on behalf of better, cheaper products. We do take an environmental view of things and we do take a social perspective of things. We think as much about bank workers in branches which are being closed as we do about the consumers who are being affected, and that is what we mean by social consumerism.

**Senator HOGG**—Can I ask a question I have asked every witness today. Were you consulted on this piece of legislation?

**Mr Hajaj**—No.

**Senator HOGG**—Would you expect to have been consulted?

**Mr Hajaj**—Yes. We have taken a proactive approach to superannuation.

**Senator HOGG**—But, prior to the presentation of the legislation in the House of Representatives, you were not consulted?

**Mr Hajaj**—No, we did not know.

**Senator HOGG**—How did you find out about the legislation?

**Mr Hajaj**—Through the secretariat.

**Senator HOGG**—So, if you had not been contacted by the secretariat in respect of this inquiry, you would not have known about the legislation even now probably.

**Mr Hajaj**—No.

**CHAIR**—It is getting the balanced approach.

**Senator CONROY**—Don't tell anyone.

**Senator HOGG**—I just like how people tell us they are always consulted.

**Mr Hajaj**—After speaking to various industry people about this, they seem to think that this process is far more political than it is practical. The perception out there is that they do not want people to know that APRA does not have many powers, that perhaps APRA is perhaps a toothless tiger. We do not know whether or not that is the case because we do not deal with APRA, but this is apparently the perception out there.

**Senator ALLISON**—As a consumer organisation, can I ask you whether you perceive there to be any problems with the current system? One of our difficulties here is in getting some evidence as to why the legislation ought to be changed. You would be in a fairly good position to know whether consumers were dissatisfied with the efforts of the trustees on their behalf.

**Mr Hajaj**—We have not seen any feedback of there being any malpractice by trustees at all. It is not an issue that generally comes up with us. The only instance of any problem with trustees, that we are aware of, comes from the EPAS case in Queensland, which is a \$10 million case which involves ASIC. We only know about it through ASIC—but no, we are not aware of there being any problems.

**Senator ALLISON**—Is that part of your role, as a consumer centre, to assist people with making complaints? What do you do if someone rings up and says, ‘The trustees have got it wrong on my account?’

**Mr Hajaj**—We do not have that kind of service. Superannuation is only a subsidiary to what we do; we mostly do banking research. But in general, if there is a push by our subsidiary organisations to actually research into trustee issues, we will do it, within the bounds of our resources. But if there are complaints, we generally refer them on to various agencies which are better equipped to deal with that. But we have not had any, and it is not the kind of issue that comes up in what we do. The major issue for us is superannuation around the SG guarantee and compliance with the SG. We have made submissions to this committee about that. We take a pro-active approach to that kind of debate around superannuation choice. We have not got many problems or any issues—

**Senator CONROY**—You have got less funding than ASIC. They do not have much.

**Senator ALLISON**—The comment about APRA being a toothless tiger: do you think that has some substance? Where did it come from?

**Mr Hajaj**—It just came from general industry people. I will not name people, but the perception is that the reason why this whole thing has been hushed and there has not been any consultation is because they did not want to create a perception that APRA really needs those powers, because they do not have them.

**Senator ALLISON**—So it is APRA’s own perceived role that this is coming from. The fear is not that other people will think APRA is toothless.

**Mr Hajaj**—No, this is an aspect of industry thinking that APRA does not have many powers. They have been winging it for six years or so, and that is not a good perception considering that there is half a trillion dollars at stake now.

**Senator ALLISON**—Do you share that concern that APRA does not have sufficient powers?

**Mr Hajaj**—As I said, we do not really have an expertise in prudential regulation, so we do not really know, but we certainly are not aware of APRA prosecuting any trustees, in the same way that ATO does not do much.

**CHAIR**—Under the new rules, APRA does not do the prosecution; ASIC does the prosecution. So perhaps APRA has been taken to the cleaners a little bit more than it should have, because in terms of the prosecutions now—

**Mr Hajaj**—ASIC certainly are prosecuting EPAS—

**CHAIR**—Also, ASIC is responsible for consumer protection, which is an issue very close to your heart.

**Mr Hajaj**—ASIC certainly are taking the lead on the EPAS case.

**CHAIR**—In every case from now on, they have got to do the prosecution, or bring it about.

**Mr Hajaj**—In general, in terms of the various points put forward under this bill, from what we have seen in terms of there being a shift to intent as opposed to strict liability, most of the points are pretty straightforward. It seems to us that they are pretty much best practice. If anything else, it may bring them in line with the managed investment act.

**Senator ALLISON**—Criminal provisions, you are talking about.

**Mr Hajaj**—Yes, criminal provisions and strict liability. We do not think that they are onerous at all. From what we have seen in this list, it does not seem that, for example, strict liability about lodging annual reports on time is particularly onerous or that the duty of trustees to keep minutes and records punctually is particularly onerous; it is just that there is a culture right now which seems to give trustees a lot of room to move. This limits that room.

**CHAIR**—That has got to be a good point; hasn't it?

**Mr Hajaj**—Yes, absolutely. We will not have a problem with that.

**Senator ALLISON**—What about the case, say, where a trustee is not at fault but employers have not provided the information on time? Shouldn't there be some flexibility and some sense of the degree of the problem of the misdemeanour?

**Mr Hajaj**—There is. In here not everything has gone towards strict liability; some of these are two tiered. On the really contentious issues, like perceptions of insider trading, it does not give a strict definition.

**Senator ALLISON**—Is that a problem?

**Mr Hajaj**—On insider trading, definitely. If there is any evidence of insider trading, that should be prosecuted immediately strictly to the law. But in general most of the provisions here just seem to be about the efficient running of the fund, and we cannot really understand why people would oppose that. What we do have a problem with is part of the process. As for the process of consultation, we do empathise with people who say they have not been consulted, and this might potentially adversely affect this policy. But, in terms of what this policy is proposing, we do not see any problems with it. Our only potential problem is an increase in fees and charges because compliance costs may increase. It has been pointed out to us that superannuation funds pay a levy to APRA to actually oversee the smooth functioning of the system and here APRA are offloading—

**Senator CONROY**—Surely the choice legislation is going to provide a much greater jump in fees and charges than this.

**Mr Hajaj**—Are we going to get into that?

**Senator CONROY**—No, I just want you to be consistent; that is all.

**Mr Hajaj**—We do not think that choice is going to increase fees and charges.

**Senator CONROY**—I promise not to tell Senator Sherry that.

**Mr Hajaj**—We will privately discuss this issue—and he agrees with us.

**CHAIR**—You make the point that there seems to be a culture developing that it is okay to have minutes late, and there are some other issues. What warrants that sort of statement that there is a culture that appears to be developing and that this does need some sort of rectification? Obviously, it would be of some concern to the committee if that were the case. As it is coming from your perspective, we would like you to develop that a little bit more.

**Mr Hajaj**—Criminal intent is incredibly difficult to actually prove in most cases and often it is not worth the time of APRA to actually investigate issues which may revolve around \$10,000, \$20,000 or what have you. So, when trustees know that to be the case, they may very well be less diligent, not necessarily lax but less diligent with their responsibilities. Simply, they may know that it is not worth the while of APRA or the ATO to actually pursue an issue which revolves around only a small sum of money

**CHAIR**—Are there any other questions?

**Senator ALLISON**—The point has been made over and over again today that trustees are pretty hard to come by, that you will get two vacancies and you will have two applicants for them. As a consumer organisation, wouldn't you be concerned if the difficulty in getting people to put their hand up to be trustees became worse? Will this make it worse?

**Senator CONROY**—It is less likely to lead to reservations.

**Mr Hajaj**—Sure. We do not envisage there being a situation of that many trustees putting their hands up just as a result of this, because, as I said, this merely enforces good practice. If trustees are going to be scared off as a result of them being expected to do their job properly, that is fine; perhaps they are trustees that the industry can do without. But, as far as we can see, it is pretty hard to become a trustee even if you wanted to. I would like to become a trustee in my fund but I do not think I have any chance even though—

**Senator CONROY**—You have got the numbers.

**Mr Hajaj**—Exactly. I guess it is like becoming a politician. There are a lot of complaints about how difficult it is, but you fight tooth and nail for it.

**Senator HOGG**—That is the second person who has commented on politicians today.

**Senator ALLISON**—You being the first.

**Senator CONROY**—How is Bankwatch going?

**Mr Hajaj**—It is going very well. Our phones are running really hot. We are getting massive publicity around Australia on a national basis and we are looking at establishing national outposts in WA, Queensland and SA. And everywhere else, it is proceeding way beyond our expectations. We are getting many people to join. Individual consumers hear about us on the radio and read in various newspapers that this independent organisation tackles some of the problems around banking. It has been very positive, way beyond our expectations.

**Senator CONROY**—I thank the chair for his indulgence there.

**CHAIR**—Thank you for appearing before the committee. Your comments about a changing culture will find their way into the report.

**Proceedings suspended from 12.11 p.m. to 1.40 p.m.**

**FRENCH, Mr Philip Gardner, Senior Policy Manager, Investment and Financial Services Association**

**RALPH, Ms Lynn Susan, Chief Executive Officer, Investment and Financial Services Association**

**Ms Ralph**—You have our submission. I want to make a couple of introductory remarks. You see from our submission that our membership is generally supportive of these amendments. Our members believe that those who look after other people's money should meet the higher standards regardless of whether that money is in super or non-super investments. Our members already meet and are subject to equivalent provisions. We have not found them a problem to comply with. They are serious provisions and we believe that the regulator would apply them sensitively and not lightly. Aside from that, I am happy to take questions about our submission.

I did want to make a personal observation. In addition to being a fund manager for many years and a super trustee for some time I have been a corporate regulator. I would like to offer a personal view based on that experience over the last 20 years. My view after all that experience is that strict liability turns the well intentioned into the well focused. We have seen that in the Corporations Law changes early in the 1990s and more recently with the advent of the Managed Investments Act, where very strict and focused liabilities, clearly pointed at the individuals involved, have really helped to focus people's attention on compliance matters. For that reason I personally feel that these provisions are suitable for the environment we are talking about. We are happy to take questions.

**CHAIR**—Thank you. This morning we heard evidence from the non-public offer type fund regime which seemed fairly critical that the legislation was overkill. They were worried that a number of funds may have difficulty getting members to put up their hands and volunteer. It was emphasised that it was very much a volunteer role, it was an amateur role. Another consumer organisation was concerned about a changing culture, perhaps not being focused enough. It is interesting your transformation from a 'well intentioned' to a 'well-focused' environment. That is an issue that we would like you to address.

**Ms Ralph**—Some of the most basic duties this legislation would cover in terms of ensuring that the money is being well run—keeping minutes and records, keeping accounts properly—are absolutely essential. If anything should go wrong in a superannuation fund the regulator or whoever else has to step in then, not just to find the guilty but also to ensure that in the future the records are kept and the members are paid the right amounts. These obligations are fundamental and should not necessarily also be difficult to comply with. These are the sorts of duties which under Corporations Law company directors must achieve. In this country we have a broad range of company directors, from those managing very large companies to those managing very small businesses. We expect them all to comply with those basic premises to ensure that the operation they are running has those records, minutes and accounts for a variety of purposes. I see no reason why we would exclude superannuation trustees, who in some ways are entrusted with even more important issues and issues that impact even more on a small businessman running a small company. Whilst it is fair to say that IFSA had not been approached about these changes, when we saw them we were not necessarily surprised. By and

large they just bring the obligations of those super fund trustees in line with the Corporations Law and the Managed Investments Act. From our point of view we did not think this was necessarily an unusual move that the government would want to make to line up those liabilities and provisions.

**CHAIR**—The Institute of Chartered Accountants and the Institute of Actuaries had some concerns about inadvertent breaches which may result in very severe penalties being imposed. Mercers draw attention to the fact that specifically we do not attach criminal liability to offences of failure to lodge or return, failure by the employer to remit contributions on time, failure to keep proper minutes, failure to keep records of changes of trustees, failure to keep copies of reports, failure to establish rules for the election of member representatives. Basically they felt that perhaps strict criminal provisions should not apply to those sorts of offences. Do you agree? If you do not agree, can you give us some alternative that might be more acceptable to the industry?

**Ms Ralph**—We accept those sorts of obligations when we write money under the Managed Investments Act, and we see no reason why super should be treated differently. I think the argument that people may be somehow thrown in jail for inadvertent technical breaches really misreads the way the law works. We have all accidentally sped over the speed limit by five kilometres, but we know that the policeman will pull us up and say, ‘I think you were probably five kilometres over. Did you realise it?’ He does not write you a big ticket for the five kilometres over—he assesses the situation and your intentions, and he has a chat to you.

The regulators in this area tend to work similarly. We believe, because of the experience we have had with both ASIC and APRA, that the regulators do tend to apply these sanctions very appropriately and very sensitively, and I think it would be highly unlikely we would see a superannuation trustee thrown in jail because the minutes were not up to date. I just do not think the regulators would apply the law. If they started to do that, I think we would very quickly have an inquiry into the regulators, in the same way if the police were to write you a ticket for your being five kilometres over the speed limit, we would very quickly have an inquiry into whether the police were being insensitive. Because the industry has a positive and open dialogue with the regulators, we feel confident that we are constantly talking about where the key issues are and how they should be applied. We have not seen that the argument that some minor inadvertent breach would result in some sort of criminal conviction is a realistic proposition in reality.

**Senator HOGG**—If they are not going to apply the law for those minor misdemeanours, why have it so strict? I hear your argument about the speeding. It might vary from state to state—in a number of states you get 10 kilometres—and it all depends on whether the senior sergeant had a bad night the night before or woke up on the wrong side of the bed, or whatever, as to whether or not you do get pulled up or whether there is that extra leniency there.

**Ms Ralph**—I will use the car analogy just to start with. The officer may pull you up for going five kilometres over because he had a bad night, but if he finds that your tyres are bald, that your car is unregistered, that you have no green slip and that you have also been drinking, he is probably going to throw the book at you, including for the five kilometres over. My experience is that when regulators have to use provisions such as these—failure to keep books, records, accounts and all those things—there are probably also combinations of problems. You

would apply those provisions in cases where there is probably a combination of breaches. Sometimes they are the easiest ones to prove, and sometimes you can use those to at least get the initial convictions against trustees who have committed a whole package of breaches. That is what I am trying to say. I think it unlikely that a regulator would pull you up on only one of these provisions, but they are very useful tools for the regulator to be able to use as part of a package of powers. We operate under Corporations Law as well as under the Managed Investments Act, under similar liabilities, and we have not obviously found those costly burdens.

**CHAIR**—Could you just draw that out a little more? You have under investment hundreds of millions or billions of dollars, so I am sure this committee would want to make sure we have a level playing field—that where an offence has occurred under a collective management vehicle or under the superannuation regime there are similar types of penalties for similar types of offences. Are you saying to us that these laws of strict liability apply under the Management Investments Act?

**Mr French**—Absolutely—strict with respect to every duty of a responsible entity, a trustee of a managed investment scheme.

**CHAIR**—When they were introduced did you have concerns raised about the problems that it may create?

**Mr French**—Managers were pretty terrified, basically. But the argument was—and the Law Reform Commission spelt it out very clearly in its report—that it is other people's money, and we are talking about very large amounts of money, and a regulator in particular has to be able to go in and pin somebody quickly, not go through all the hoops of having to prove intent with respect to being able to keep people in line. It is just too difficult and too expensive if you are going to effectively protect consumers.

**CHAIR**—With respect, this morning we heard from ASFA, we heard from the Institute of Superannuation Trustees, who are very concerned about this and implored the committee to throw the bill out in its complete form.

**Ms Ralph**—When we went to the Corporations Law in 1991 company directors probably all screamed. It is probably fair to say, if we checked the *Hansard*, that our managers probably screamed along the way as well. But, having now lived with the Corporations Law regime, having lived with the Managed Investments Act regime for the two years, I feel that, at least from amongst our membership, we do see a greater focus on compliance than there was before there was that strict liability. We think that is a good thing for our industry, and we are prepared to wear that liability because we think in the long term it gives confidence to all participants in the sector—the investors, people who deal with the industry—and that is good for our industry. I am not surprised right now that people who would be moving into that regime would be nervous, would be concerned about it. Our experience, having gone into that sort of regime, is that the fear is worse than the reality.

**Senator CONROY**—Do you support the business judgment rule? Are you aware of it? That is one the directors campaigned for for 10 years, so that they did not have to be personally liable.

**Ms Ralph**—Business judgment rule came along with statutory derivative actions. It was sort of a package. You could have your business judgment as long as the shareholders had a way to sue you, using the company's money. I suspect we probably supported those two amendments together.

**Mr French**—We did not oppose business judgment rule. The reason for that is that we believe it is already in the law anyway. Really, it makes very little difference to have it in statutory form.

**Senator CONROY**—I would agree with your interpretation, but your argument was that the company directors opposed Corporations Law in 1991. Is that what you said?

**Ms Ralph**—Yes.

**Senator CONROY**—But they have campaigned against it to remove themselves from some aspects of it, at least in a legislative sense. This is not necessarily in my view; I agree with you in a legal sense. So they have been going in that direction and you are now supporting the law going in the other direction.

**Ms Ralph**—I guess what they are not campaigning for is to say, 'We shouldn't be liable for keeping proper books and records and accounts and minutes and all of those things.' I have not seen them campaigning against that sort of thing.

**Senator CONROY**—So if we were to propose that companies did not put in their annual returns within three months as an amendment to the Corporations Law, do you think the company directors would be sitting where you are right now having a chat about it and making it a criminal offence to put your annual return in three months late?

**Mr French**—All of these strict liability offences have very small penalties, don't they? It is pretty much like a speeding fine.

**Senator CONROY**—With a criminal offence you get disqualified. You do not get disqualified for a speeding offence. If you commit an offence under criminal law you get disqualified from being in a whole range of things.

**Mr French**—I could not find one of these that was more than \$5,500 in these changes where the regulator opted for the strict liability offence. The regulator has got the choice in quite a few of them. We are talking about a maximum penalty of \$5,500, which is an incentive to get your house in order.

**Senator CONROY**—So you would be comfortable if you accidentally got caught with a criminal charge, however minor in your view, and it would not affect—

**Ms Ralph**—I do not think that is the issue here. What I am trying to say is we do not believe that inadvertent one-off breaches would actually end up APRA laying criminal charges under this regulation. But what we do believe is that if APRA finds a pattern of conduct where they believe that trustees have not given due care, due diligence to their functions this gives APRA a range of powers to use, which the Corporations Law gives ASIC and which I think ASIC

probably also uses sensitively. They do not bar every director who has not put their accounts in, but where people are repeat offenders, et cetera, they do use that tool from time to time.

**Senator CONROY**—I am just rapt to see your organisation so strongly supporting black-letter law.

**Ms Ralph**—We believe that these laws are useful tools for the regulator. At this point in time we are convinced that the regulators use them appropriately and sensitively against those people who genuinely should not be involved in looking after other people's money.

**Senator HOGG**—Are you convinced that the regulators need the law as opposed to should have it? Do they need it? Is there a gap there that needs to be plugged now?

**Mr French**—It is hard for us to tell, I think.

**Senator HOGG**—One of the issues raised before the committee this morning was that this might be a case of legislating to stop something that is not happening anyway.

**Ms Ralph**—Correct me if I am wrong. The problems to date which we have had in superannuation funds, which, thankfully, have been few and far between, mostly have been prosecuted under Corporations Law—that is, the directors were directors of the corporate trustee and we used the provisions under the Corporations Law to effectively take action against those individuals.

**CHAIR**—Because SIS law was deficient?

**Ms Ralph**—I do not know that that is the conclusion to be drawn. We have probably had only a handful of cases, so again it is hard to draw overall conclusions, but those actions, I believe, have been taken under Corporations Law.

**CHAIR**—You meet with APRA on a regular basis?

**Ms Ralph**—Yes.

**CHAIR**—Have they spoken of the problems in bringing people to successful prosecutions?

**Ms Ralph**—Fortunately, we have not had to speak about enforcement very often with them. We have not had that conversation. I have not asked them. Because this issue arose quite recently for us, we have not really had a chance to touch base with APRA comprehensively on this particular issue.

**Mr French**—I am not aware of APRA's prosecution record with super. Being a former employee, I keep up with ASIC's and it is in the paper.

**CHAIR**—It is now ASIC. We have to use the names 'APRA' and 'ASIC' interchangeably. The actual prosecution is now undertaken by ASIC.

**Mr French**—I am not aware of APRA having had a lot of successful prosecutions. Whether that is part of this I do not know.

**Senator CONROY**—Over the last 12 months?

**Ms Ralph**—It was the ISC prior to that.

**CHAIR**—Why do you think the Institute of Chartered Accountants are concerned that inadvertent breaches may result in severe penalties—and also the Institute of Actuaries, under the signature of Helen Martin, the Vice-President? She says it is important that they are not exercised inappropriately. She agrees with you and goes on to say that she does not think, in practice, that it is an issue. Would you like to comment on her suggestion that the proposal to change from fault to strict liability be reconsidered, especially for breaches of standards where the trustee may be reliant on third parties?

**Ms Ralph**—I hate to make assumptions about what other people think and why other people have said things.

**CHAIR**—They have submitted that to us. Your evidence today is at variance to what a lot of people have told us this morning. We have to weave away and produce a report, give balance and provide some recommendations to the Senate. Obviously we have to weigh up your evidence and their evidence. I am asking you to comment on evidence that has been presented earlier.

**Ms Ralph**—All I can say—and not having read their submission I do not understand the full complexity of their arguments—is that, inevitably, those people who are not operating under a particular regime could fear the worst. We currently operate under these sorts of obligations. We have experienced them first-hand. We know they have been sensitively applied by the regulators involved. No-one has been pulled up on inadvertent one-off breaches. All I can say, based on our experience, is that we would see no reason why the same regime should not apply to people's money that is in superannuation.

**CHAIR**—Why then do you think ASFA are sending a different message to us? They say the message coming from their trustees is that it is basically an overkill. That was supported very strongly by the Institute of Superannuation Trustees. Why are they taking a more fearful position? We have to try to work that out.

**Mr French**—For the same reason, I think—coming back to the speeding analogy—if for a current speeding offence they had to prove my mental intent and they were saying, 'We're going to make this strict liability. You go over 100 kilometres an hour, you're pinged.' I would be arguing against it because I would be saying, 'That's not fair, it might be accidental.' So what? It is an offence because the community has judged that driving a motor car too fast or not looking after people's money carefully enough are very serious business. Under the MIA certainly that responsibility for the acts of agents goes all the way down the line and the prospect of it was pretty terrifying for managers. They are used to it now to the point where their contracts with their custodians and other agents reflect that responsibility—that is, 'You will indemnify me and you will do things in the following manner.' It is tied up pretty tight because they are ultimately responsible.

**CHAIR**—I can follow the logic of your argument. I come back to this other critical issue. We have one of the premier lobby groups called ASFA and many of its members are also members of IFSA.

**Ms Ralph**—Some, yes.

**CHAIR**—I find difficult that they are coming with such a strong view—‘This is the message loud and clear from our members’—and a lot of their members have a common aim and you are saying, ‘That’s not the case. We can live with it.’

**Ms Ralph**—I have not recently looked at the degree of overlap, but the overlapping membership basically are our public offer super funds who are currently members of IFSA. So the view we get from them is the view of a public offer super fund. Whilst they may have represented that view to ASFA, they do not represent the majority of the membership of ASFA.

**Senator ALLISON**—IFSA?

**Ms Ralph**—No. IFSA members are basically public offer super funds. My members who would be members of ASFA are public offer funds, but they are not the majority in ASFA.

**Senator CONROY**—One of the arguments that was put to us this morning was that it could lead to people who are currently volunteer trustees not being willing to volunteer because of the extra potential threat. Do you think that is a valid concern?

**Ms Ralph**—When the Corporations Law came in with those sorts of liabilities back in the 1990s there were a number of people in the community who said they did not want to risk their house by becoming a director, and that was often a director in a paid position. Ten years on I think our experience has been that we have no shortage of company directors. I myself am a company director of a small arts company. I do not get paid; I volunteer my time because I feel it is an important thing to do. My best guess would be that there would still be a group of individuals who currently are super trustees, not because they get well paid but because they believe in what they are doing and they believe it is an appropriate contribution to make. Whilst there may be a certain percentage of those who think these liability provisions rule them out of that function, like Corporations Law, I believe there will still be a large number of people who will be prepared to contribute because that is what is important to them. That is why they are there now and they are already taking very big responsibilities on themselves even without these provisions. I believe we would see a similar experience that we saw in Corporations Law and you would still find a good number of people who are prepared to be trustees, albeit there will be some people who, like with the Corporations Law, decide that is not for them.

**Senator HOGG**—Just on the speeding analogy and the discretion that is exercised there. It is exercised by a specific officer in a one-to-one situation. No-one else knows of the discretion that is exercised. One would imagine though that in this set of circumstances the discretion being exercised would be far more out in the open in the sense that, if a document is late being filed, it is late being filed. No-one can disguise or—

**CHAIR**—Unless it went missing in the post.

**Senator HOGG**—Yes. How does one place the tests as to when the discretion is or is not applied?

**Ms Ralph**—My experience is as a regulator, and I think it would be best for you to also ask APRA and ASIC.

**Senator HOGG**—We will. I just want your view.

**Ms Ralph**—I hope they give the same answer. We have had surveillances done by ASIC recently on the funds' compliance with their disclosure requirements under SIS. ASIC did a surveillance of a number of funds around the country to ascertain whether or not trustees were actually meeting their obligations, as per SIS, in disclosing to members in their annual statements and those sorts of things. During that surveillance ASIC found breaches where people did not strictly comply with the legislation in a variety of cases. Because of our conversations with ASIC before, during and after that surveillance campaign, we know that what they intend to do is to actually try to find out why those breaches are occurring. Is it because something went missing in the mail or that somebody was sick that week and just did not get it in time, or is it because of a pattern of sloppy record keeping and inattention to detail and then they adjust the scope of their action relative to the causes?

In almost no cases is a regulator just strictly applying a penalty because there was a breach. They are going back and trying to find out what caused it, what needs to be done to fix it, how bad it was, if it was symptomatic of something much more serious that they should investigate further or if it was a simple inadvertent mistake that they can ask the trustees to fix and then move on. In that particular surveillance campaign that is what they did. They did not name anyone; they did not name the fund. On a one-to-one basis—this is what they tell us—they asked people to rectify the breaches. Where there were breaches that appeared to be part of a more serious pattern, I think they had a closer look to make sure that the money was safe there. That, to me, is a concrete example of how the regulator is applying and enforcing the regulations. Subsequent to that surveillance, the industry—we and ASFA—are now working with ASIC to try to address how we can ensure that, across the board, trustees are more aware of their obligations under SIS in terms of disclosure and how we can assist them with that. That was also part of the follow-up of the campaign.

**Senator HOGG**—Accepting what you say, why shouldn't we legislate to encompass what you have just outlined to us rather than go that step further where it is in black and white that if you do this or that you then transgress the law and in all reasonable senses of the law should be prosecuted? Given that commonsense has to prevail at the end of the day and that we have legislated something in black and white, shouldn't we be trying to get the commonsense view rather than the black and white view?

**Mr French**—You rely on the person who is exercising the discretion, and certainly I think—

**Senator HOGG**—That is one of the things that always worries me: when I have to rely on someone exercising their discretion when their discretion is not outlined as such.

**Mr French**—But it is.

**Senator HOGG**—I do not know—

**Mr French**—Regulators these days publish the bases on which they do things. They publish their policy and their reasons because their stakeholders basically require it of them. One way or another, they publish it.

**Ms Ralph**—All I can say is that if my money was in a fund and the regulator arrived and found the books in a shambles and no minutes, I would want them to ping the guys as quickly as possible.

**Senator HOGG**—Yes, but then you would find a number of offences as opposed to a single offence such as was listed here—failing to file the annual report on time. What I am trying to get at is how should we, in a commonsense approach as legislators, view this as opposed to something that is set in black and white which says that if you have done this or that then you are pinged?

**Ms Ralph**—The law says if you go over 100 kilometres you have broken the law.

**Senator HOGG**—I do not know. I am not into the traffic law, and I do not know if there is a discretion under the traffic law to the police in applying the traffic law. I am just saying should there be some sort of special—

**CHAIR**—There is discretion there.

**Ms Ralph**—All I can say is our experience is that it is valuable for the regulator to have a full tool chest of possible provisions to use. We think they have been used sensitively in the past. We believe that if we found they were not being used sensitively in the future you would have all of us back here on your doorstep seeking some sort of change. But at this point we do not believe that, and hopefully we would not want to be back here to do that.

**Senator HOGG**—I have just two questions, Chair, if I can. They are the quick ones that I have asked already of other witnesses today. You said you were not consulted on this piece of legislation. Did you expect to be consulted, and have you sought any subsequent consultation with the government or APRA?

**Ms Ralph**—On major changes to legislation we would certainly hope and have the expectation that we would be consulted on every change to regs, et cetera. It depends on what it was.

**Senator HOGG**—This is considered a major change by some other players in the industry.

**Ms Ralph**—I guess for us it is not considered a major change.

**Senator HOGG**—So you did not expect to be consulted on this?

**Ms Ralph**—I suppose we were surprised that something like this would happen without us being called, but at the end of the day we were not dreadfully worried. On the other hand, I

would have to say that if a change like this looked small on the surface but did have a major impact, we could be back here complaining like the others have complained. So we would have liked to have been asked, yes. But we are being asked now so—

**Senator HOGG**—Yes. The second question is—and it is a bit of a tongue-in-cheek question—are either of you Carlton supporters?

**Mr French**—Certainly not.

**Ms Ralph**—Go the mighty Swans.

**Senator ALLISON**—Turning to the provision in the bill to disallow a trustee, what is your view about that and what is the comparable arrangement with Corporations Law? Should there be some sort of guidelines as to what makes a person unfit for this office? That is another issue that has been raised with us in another submission.

**Mr French**—The power to disallow?

**Senator ALLISON**—Disqualify, disallow, whatever.

**Ms Ralph**—There is a range of actions in the Corps Law under which a director can be banned or disqualified. On top of that, ASIC tends to write a policy statement which goes into more detail about when they will actually take action. From time to time, depending on the conduct they see in the market, they may focus or refocus their surveillance and enforcement campaigns on particular forms of conduct which they think might be emerging in the market which are not good. We would envisage they would work in a similar sort of fashion.

**Senator ALLISON**—But what you are suggesting is disqualification after a period of some poor performance or breaches or whatever. It is my understanding of the bill that a person can be disqualified as a class of person prior to even being a trustee—that is, they do not have to have a record as a trustee of not doing the right thing.

**Ms Ralph**—I would have to say there are certain people I would not want running my superannuation.

**Senator ALLISON**—Yes, but we are talking here about ASIC and somebody determining that: APRA or ASIC, I am not sure which.

**Ms Ralph**—And they might be people who have been banned from acting as a company director or, I would imagine, a range of other offences like that. We would expect, were this bill to come in, that APRA would probably issue a form of policy statement, there would be some discussion and consultation, one would hope, about that, and they would outline their intention as to how they would apply that.

**Senator ALLISON**—You do not think that should be in the bill, in the legislation?

**Mr French**—No.

**Ms Ralph**—I do not think it probably needs to.

**Mr French**—No, I do not either.

**Senator ALLISON**—What about a situation with the do-it-yourself funds where disqualification might in fact make the DIY non-compliant, whereas a trustee is obliged to be a trustee by virtue of his or her direction of the organisation?

**Ms Ralph**—They still have the option, I believe, to secure an approved trustee to run the fund. If that problem was caused by one of the trustees, who was not the employer but one of the employees, suddenly the fund would be non-complaint, I would suspect that, firstly, they would have the option to replace the person to get an approved trustee.

**CHAIR**—That is an exclusive process, isn't it? Because one of your employees had a record 30 years ago, under the new rules he has now got to be a trustee of the fund, where he did not want to before. But he might work for a little company of half-a-dozen people and he just happens to be in this particular fund. Isn't that a bit of an overkill expecting the company to put in an independent trustee just because of one of your employee's past records?

**Ms Ralph**—Yes, but, correct if I am wrong, the employee does not have to be in this do-it-yourself fund.

**CHAIR**—He has got to be a trustee, though.

**Ms Ralph**—He is forced into that particular do-it-yourself fund.

**CHAIR**—No, but when he is in the fund, you see, under the new rules, he has now got to be a trustee. And because of this record, he may be in a position whereby he disqualifies the fund and you then have to look for an independent trustee, which is pretty intrusive.

**Ms Ralph**—So you are saying that there is a do-it-yourself fund. The new employee arrives, who wants to go into that fund—

**CHAIR**—No, he is already in the fund. According to the new rules that came out either last year or this year, in order to tighten it up and to protect these members, they all have to be trustees.

**Ms Ralph**—Yes, that is right.

**CHAIR**—In the past as a university student or before that—

**Senator CONROY**—Maybe he smoked but did not inhale.

**CHAIR**—if he nicked some cash or something, he would be disqualified. You say the alternative is to go off and get a public trustee. That seems a bit harsh, doesn't it?

**Ms Ralph**—The alternative is that he leaves the fund. He leaves the do-it-yourself fund; the do-it-yourself fund goes on.

**CHAIR**—What happens if their principal assets are in a—

**Ms Ralph**—What if he was convicted for fraud three years earlier?

**CHAIR**—He has got to leave the fund.

**Ms Ralph**—You can make all these hypotheticals. I guess my answer is that, if the person is no longer eligible, he can move out to any other fund.

**CHAIR**—We have got to try and do that as a committee, because we have got to try and work out the consequences of our legislation.

**Mr French**—I guess it also involves the question of the extent to which we can have a double standard or multiple standards in regard to the prudential safety of people's life savings. I am extremely jealous of my life savings. If somebody was casually salting them away or losing them, I would be heartbroken, violent probably. It is very important to me, so I expect the highest possible standards. I guess the community as a whole expects a consistent standard, and that is what this is driving at. That does involve forcing change on people to some extent, I suppose, and it is easy if you are not the one having the change forced on you. We have been through the process with MIA.

**Senator ALLISON**—Is it your view that, to reach some sort of comparability across the sector, trustees ought to be paid for the task they do? Does that raise the standard, as it were, to the level that you have in your organisation?

**Ms Ralph**—I do not think we have a particular view on whether—

**Senator ALLISON**—But your trustees are paid to do that job, aren't they? That is their full-time occupation?

**Ms Ralph**—Yes. I have to say that I do not think we have had a discussion internally within IFSA about the appropriateness of remuneration for all trustees.

**Senator ALLISON**—This seems to me an important issue because you make the point, Mr French, that you want the same kind of protection for all individuals' moneys in superannuation funds.

**Mr French**—It seems to be a reasonable expectation, I think.

**Senator CONROY**—Isn't there the implication that this is currently not doing that now?

**Senator ALLISON**—Isn't there a big difference in the two sectors? They are very different in that you have got representative trustees; you have got some level of feedback to members. I do not know; you tell me. If we are talking about raising standards and making them exactly the

same, surely you would have to take that next logical step. If you do not, a criminal sanction does not seem to me to necessarily apply to this different regime where you have got voluntary trustees.

**Ms Ralph**—I do not know whether it is a case of people needing to be paid or not—that might be one aspect of it—but it does seem to me that the people who are taking on the role of trustee need to find a way to ensure that they know what their responsibilities are, that they have adequate training and knowledge to fulfil those responsibilities, and that they have adequate skills to outsource the keeping of books, et cetera, if they do not want to do it themselves. Whether they get paid for all of that or not I think is something we can look at. I am not sure that it is the answer to the question. I think that whether it is paid or volunteered people still need to fulfil those functions and that role. How they get there and whether it is with pay or without can be looked at. Typically my experience has been that to be a volunteer company director or volunteer trustee—we are not being paid—no amount of money could really recompense you for time, the responsibility and the care that you put into that job. I do not believe that people do it for the money. I think they do it because they care, because they want to do a proper job. What we are saying here is that all we are trying to do is to say to those people, ‘We want to focus your attention on some very key things that you need to get right, some very basic standards that you need to get right and that there are no excuses for getting them wrong.’

**Senator ALLISON**—But you see my point. You say those trustees have to get it right and that means training and that means the professional approach to the job. Surely it is logical to then say that they ought to be the same as your trustees: they ought to be full-time; they ought to make a career of it. They do not do it in their spare time; they do it as a—

**Ms Ralph**—Or they could be like a non-executive director who is not full-time but who does get paid some money which helps assist them to pay for their training or whatever. As I say, we have not got an official position on that. I think our official position is that, regardless of who is looking after other people’s money, they should apply the same due diligence and care and be held at the same standards—

**Senator ALLISON**—Sure. But the problem the committee has is that you are arguing comparability across the sector. There would appear to be comparability in terms of the responsiveness of trustees to their duties. We are not being presented here today with a great litany of cases where there is a problem with voluntary trustees who are not currently subject to the criminal sanctions so it is difficult for us to determine whether there is a problem. So to argue you need the comparability is difficult to make a judgment about because of this lack of evidence to suggest there is a problem.

**Ms Ralph**—All I can say is that the people who are doing it right have nothing to worry about. People who need to lift their game will lift their game because of this. I do not see that as such a bad thing. We do not expect to see a whole bunch of people in gaol because of it. We would hope that this is just one more plank in the platform upon which we continue to have very few problems in superannuation. I think this would contribute to that because I think there would be an additional focus for people.

**CHAIR**—It has been suggested to us that there is a lot of ‘amateurism’—a word used by a witness—people putting up their hands to volunteer. Do you think they are expecting an unreal world? I am just concerned that we had such a strong representation this morning saying, ‘Produce the evidence and then we might look at it.’ You produced some evidence for us this afternoon—thank you very much. You have produced some very good evidence in the fact that there should be a level playing field, that you have to comply with investment management requirements, Corporations Law. You see no reasons those strict liability provisions that you tell us are in those acts of parliament should not apply in other areas because after all in many cases you are looking after the same quantum of money.

**Ms Ralph**—I will give you another analogy. Corporations Law came in with strict liability for company directors. A whole bunch of people who were very well intentioned directors of arts organisations, who saw their appointment to the board of an arts organisation as a nice thing to do but never paid much attention to the business of the arts organisation, led over time to very poor quality commercial results in a lot of those companies. I speak from some experience in that sector.

Corporations Law came in and people did not just go to the cocktail party on opening night. People at the board table focused much more on the business of the company. It does not mean there are any fewer arts directors in the company, and they are still not paid, but they do have those liabilities and are much more focused than they were on trying to run those companies properly. They are still, in many cases, amateurs; they are not professional arts managers. They come from all fields of life. They do it because they want to do it and they feel they can make a valuable contribution. But they do focus their abilities and, where necessary—I know in the arts, the same as in superannuation—there is specialised training for people where it is not their mainstream field to assist them to comply with their responsibilities. Organisations like AIST have done an admirable job of that over many years in the environment we have already had. I think that would continue to happen, and in some ways AIST might benefit out of increased enrolments in their trustee courses.

**CHAIR**—Thanks very much. Ms Ralph, you were worried that you might use up your allocated time. Thank you for your evidence.

[2.27 p.m.]

**BROOKES, Mr Nicholas Duncan Jeremy, Secretary, Corporate Super Association**

**CHAIR**—Would you like to speak to your submission.

**Mr Brookes**—I will just give a quick introduction as to where we are coming from, our major points of concern, and then a summary. I reference the Institute of Actuaries, AIST, ASFA and several others who are, I believe, talking the same sort of language as we are. I will start off with a quick summary of ourselves. We are representing the major corporate super funds in Australia—roughly \$44 billion, 600,000 members or so. That is about 60 per cent of the whole corporate market. I am not harping on about how clever we are; what I want to say is that we are here to provide superannuation on a not-for-profit basis, on a mutual basis, with our members and their families. That is the entire and utter objective of our schemes: not-for-profit.

We are very strong supporters of prudential regulation and correct supervision of super. It is essential in order to protect those end benefits and the benefits for families. It is interesting that after great expense and time, an excellent structure called SIS was established in Australia. Australia now is the world leader in terms of superannuation structure, and I think we ought to have some degree of pride in the creation of that structure.

Moving on to the proposed amendments, we are logically baffled. Where do they come from? What is the basis for these recommendations? Is there evidence that SIS is not working sufficiently well? I could stop there.

Secondly, consultation: why didn't we have a chat about this matter first before it reached the Senate? If we then move ahead and suppose—and I think it is a huge supposition—that there is evidence the SIS should be amended, then the two essential premises of the amendments are penalties against recalcitrant trustees and the power to exclude inappropriate trustees.

I must really lay it on pretty thickly that that is exactly what SIS is here for; those powers already are embedded in SIS. It was interesting to listen to Lynn Ralph, whom I respect greatly. Lyn confirms the very fact. She actually said several things but I quote this:

The corporations laws actually allow for prosecution.

So it is embodied already there. There is another interesting observation which is under 'ASIC's surveillance campaign'. I will paraphrase the conversation here. They picked up the mistakes made by trustees and they were able to evaluate the inadvertent mistakes to rectify the breaches and they were 'reasonable' in applying the regulations. I would say again that is under SIS; we have that already. So where on earth does this come from? We have it already and there is no evidence for a change.

In a sense I should stop there but I would like to go on a little bit. If this were brought in—despite the fact that there is no evidence for it, there is no empirical basis for it, and that the provisions that this bill allows for are already encapsulated in SIS, which is the world leader—then it would definitely put off the not for profit, altruistic mutual basis of trusteeship and

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hen it would definitely put off the not for profit, altruistic mutual basis of trusteeship and professionalise it. Essentially, this level playing field moves us into the area of professionalism which is money value. No longer will you have trustees who are doing this for the mutual benefit of their members. As you know, trustees are currently appointed in a democratic style under an employee appointed representatives process which is the pillar of democracy in that sense. If that is outsourced, what happens to SIS? It is the start of the end, so we have grave concerns about the contemplation of these amendments.

**CHAIR**—I raise a point that was put by Lynn Ralph's organisation. If you have a million dollars invested under a collective investment vehicle which is subject to investment management rules that have strict liability and those types of provisions, why shouldn't those apply to the \$1 million which is controlled under SIS law and not subject to those strict liabilities? If the same \$1 million is invested under one sort of regime as compared with another regime and another act of parliament, why shouldn't they be the same? After all, it is not my fault that I might be in this superannuation fund; it is compulsory. So shouldn't the parliament demand equal standards of stewardship by this group compared with that group?

**Mr Brookes**—I think it is a red herring. This concept of a level playing field is correct. Where you have a level playing field, that concept should be applied. Here we are talking about chalk and cheese. Professional fund managers, as Senator Allison was alluding to—or professional trustees in that sense—are in probably the highest paid sector in Australia.

If we go back to the driving simile, we have Ferraris and professional racing drivers on the one hand and we have good solid drivers driving Holdens on the other. The professional racing drivers win prizes. They make money, they are in the business to make money, and money is a temptation. Money is possibly a corrupting influence and therefore you have to be extremely careful that those professional racing drivers actually are qualified to a much higher level than the well qualified average driver. I think that is one point. The concept of altruism within SIS, within trusteeship, is endemic to that. In other words, if you are there to serve your fund without financial interest, you are normally in a position to have the money managed by professional racing drivers, professional fund managers. The end result is that professionals receive the application of the moneys and often the administration and the custodianship. In a sense that outsourcing is done at a sublevel and the trustees' role is to collect, coordinate and synthesise the information and pass it on to the appropriate authorities. So I think there are two significant differences in the concept that you are throwing up.

**Senator HOGG**—Could I interrupt there?

**CHAIR**—I will just take this further. We have this analogy, but the analogy is not really about, as we see it, who is going to win the race. Obviously, the Ferrari will win every time against your Holden. But, where you have a 100 kilometres per hour speed limit, why shouldn't the driver of the Ferrari abide by that speed limit as should the driver of the Holden? That is the issue that we are getting at.

**Senator HOGG**—Yes, but there is another issue that you have to address in answering this: ultimately the responsibility rests with the trustees—

**Mr Brookes**—Absolutely.

**Senator HOGG**—and therein lies the difference.

**Mr Brookes**—I think that is the crucial element, and it is one that not just the Corporate Super Association and all our members and all our funds support but is embraced by any fund that operates under SIS. That is why SIS was brought in at such expense. The consequent education, prudential supervision and regulation was through SIS. In other words, I go back to the first point, which is that the variant members that are sought are embodied in SIS already but they are not draconian.

**CHAIR**—Let us come back to the 100 speed limit. You have got this speed limit and you have got your Ferrari and your racing driver going through the city. The Ferrari has to comply with the speed limit of 100 just as much as the Holden does. We cannot have different rules just because one drives a Ferrari and one drives a Holden. You might say that the Ferrari has better braking systems—and this is often put forward. But, in the eyes of the law, if it is 100 kilometres, it is 100 kilometres, and it is not related to whether you drive a car that has power brakes or does not have power brakes.

**Mr Brookes**—May I go back to the level playing field theory—the erroneous theory here, the hypothesis?

**CHAIR**—But can you see my point from where we come from?

**Mr Brookes**—I can see that bit and I can understand that.

**CHAIR**—We are looking at it from the point of view of it being a regulator or a policeman—and the fairness of the system.

**Mr Brookes**—Yes, that is good. There is another dimension, too: that Ferrari is built for a race. I think this is probably going to extenuate it a bit, but that Ferrari actually focuses well on a racetrack. We have also got the racetrack where the prizes are. It is a different ball game; it is not just road use. We then move on to professional racing—a grand prix with cars whizzing around at 250, 300 kilometres per hour—and those cars are driven by highly qualified professional drivers who are much better qualified under much more exacting standards than the ordinary driver. So, in town, you are quite right, but go back to the racetrack and you know what I am talking about. That is what I mean by non-level playing fields; it is chalk and cheese. You cannot compare the racing track with town driving. That is the issue.

**Senator HOGG**—That has scuttled your driving exercise this afternoon.

**Mr Brookes**—You are probably an advanced driver yourself.

**CHAIR**—No, not at all.

**Senator HOGG**—You know the Tasmanian roads very well.

**CHAIR**—I must say that I was quite interested in the evidence we had this morning, but then we had another body of evidence presented this afternoon which raises a very real question. If

one of these industry funds or one of these other big funds that have a billion dollars topples over and we say, 'Yes, you can have a lower standard,' and people under a management investment regime do not have that, how do you think we are going to feel—having allowed that and having heard this evidence?

**Mr Brookes**—May I ask you a question?

**CHAIR**—Yes, by all means.

**Mr Brookes**—Where is the evidence which says that this is required?

**CHAIR**—One of the problems at the present time, we are told, is that under SIS they have been quite unsuccessful, and that is why they have had to rely on Corporations Law to get the successful convictions. Now, there would be a lot of cases in terms of trusts and trustee arrangements where Corporations Law may not apply because they are not corporate trustees, et cetera. So here we have a situation where we are applying principles under investment management and incorporating them into SIS rules in order to bring them up and make sure the same hundred million dollars has the same degree of potential stewardship as the hundred million dollars invested under a different regime.

**Mr Brookes**—I can see where you are coming from. But, you see, under analysis it all falls apart—that line of argument—which is that, fundamentally, the management of the money is still with the professional fund managers or with custodians. It is actually managed outside the funds—not always but almost always. So the due diligence requirements on actual application of moneys has to be at the professional racing driver level so they can afford to pay themselves three hundred or four hundred thousand a year.

**CHAIR**—It does not have to be.

**Mr Brookes**—Well in fact that is the way it works. That is the outcome. From a trustee point of view, if you are getting zero for actually spending time and a great deal of effort and commitment to representing your members at trustee level, that is when you have town driving versus the grand prix racing driver. I keep on going back on that, but SIS already incorporates a variation. Firstly, there are the penalties for recalcitrant or non-prudential acts by trustees, secondly, there is the power to exclude inappropriate trustees already and, thirdly, you can move to Corporations Law if you feel you want to try for a prosecution.

**CHAIR**—We say that Corporations Law does not give you a universal application because you have some trustees who are outside the Corporations Law.

**Mr Brookes**—But we still do not know where this is coming from. What are the facts? For instance, somebody might say to us, 'Look, we've got a worry here because the 300 funds have been very naughty, you know, they've been late by three hours on their fund reporting, which is a terrible offence, and we are going to throw them a criminal offence for being three hours late with their report.' I am being facetious.

**Senator HOGG**—I do not think you are.

**Mr Brookes**—Thank you. That would be the end result of this bill if the amendments were put through. Since the Corporate Super Association is the voice of corporate superannuation in Australia, the evidence to us will say, ‘We have a problem with some of your funds; this is happening.’ That might happen under SIS at the moment. We have a dialogue with ASIC. Just as Lynn Ralph was saying, they did a surveillance campaign. Lynn’s words are very good because they show how good the current system is. It is reasonable and it is tolerant. If we move to these draconian laws, there will be the debility of zero tolerance. ‘You have done this; you are wrong.’

**CHAIR**—I have some difficulty coming from your perspective. At the end of the day, your corporations are used to complying with the various laws. You might not be in collective investment vehicles.

**Mr Brookes**—We are not.

**CHAIR**—Why would some of the top corporates in Australia be worried about this? If your colleagues in collective investments say, ‘Yes, they are there. We can live with them—the experience of the regulator, the rules that the regulator operates by, the guidelines he has given us which are there—and providing they are going to be in place by the time this legislation is in place, then there is a degree of certainty knowing how we are going to act.’ So the inadvertent breach and those sorts of things may well, as Lynn said, be an indicator that there is a systemic problem of far worse issues down the track.

**Mr Brookes**—Let us see it then, Senator Watson. There is nothing there that says that is the case, so show us. That is what we are saying. This is a bolt out of the blue.

**Senator HOGG**—So you were not consulted?

**Mr Brookes**—No.

**Senator HOGG**—Not another one not consulted.

**CHAIR**—They are a relatively new and important player in the game. We appreciate your evidence, but we have got to work out where we are going.

**Senator ALLISON**—Concerning disqualification of a trustee, do you have any views about this provision in the bill? Do you personally know of any trustees who might be disqualified on the grounds of fraud or previous criminal convictions, if that were to be the criteria that ASIC adopted for disqualification?

**Mr Brookes**—No direct personal experience, to be honest. I will research that, but I believe that section 120A under SIS already gives the power to exclude inappropriate trustees anyway. The power is already there enshrined under SIS. SIS is very well thought out legislation and is a very extensive framework. Concerning experience with difficult or recalcitrant trustees, we have no knowledge and nothing has come through our network to say that applies to our funds. I am not saying that our funds are wonderful—I do not know—but I do know that there is a provision to exclude inappropriate trustees already. That is why we think that this draconian power that is proposed is actually redundant and unnecessary. What this leads to is a

reconsideration from well-intentioned trustees of actually acting selflessly and not for money on behalf of their members who have elected them, and that is dangerous because it is really opening up the floodgates again.

As we saw in the other proposed bill on the segregation of pension assets and under CLERP 6, the other proposed bill, it is opening the doors to say that you have to be a full profit financial provider when we are saying—as industry funds would, as AIST would, as the Institute of Actuaries would, as the Institute of Chartered Accountants would and as ASFA would—that we are not in this business to make money but to look after the best interests of our members.

**CHAIR**—So the degree of stewardship is really the issue that we come back to all the time?

**Mr Brookes**—It is, and that is why we support SIS. SIS has a track record which has been tried and tested. Again we say that if SIS is not working then fair enough. If there is evidence to say that SIS is not working for the following reasons—bang, bang, bang—then we need to do something about it. But that is missing, isn't it.

**CHAIR**—You asked the question as to whether the government consulted with you before drawing up this legislation. You have between 30 and 40 corporate members, some of the biggest corporates in Australia. Did you go back and ask all your members how they viewed these changes?

**Mr Brookes**—Yes.

**CHAIR**—All these corporates unanimously came forward and said that it was too draconian?

**Mr Brookes**—Yes, with one caveat to that from the survey that when we were talking with members we had about an 80 per cent response. So with that rider, yes, absolutely. That is what we always do. Again, it was at fairly short notice, and it is excellent that this matter has been referred to you. That is good news. What I am saying now is on behalf of the members of the association.

**CHAIR**—What you are virtually saying to us is that there should be two standards: one for us and one for the professionals who run the investments under a different act of parliament called the Managed Investments Act?

**Mr Brookes**—May I dwell on that for a second?

**CHAIR**—Effectively, that is what you are saying to us, aren't you?

**Mr Brookes**—In other words, the fund managers would accept no commission and no remuneration for managing money. It is an important point.

**CHAIR**—Yes, but when you put your money out to the fund managers they accept a commission or charge something for investing that money.

**Mr Brookes**—They do.

**CHAIR**—As I said, there is no difference there.

**Mr Brookes**—What do you mean when you say that there is no difference there?

**CHAIR**—There is both a charge—and I presume it is the same charge—if you invest through Credit Suisse, Ford Australia or C+BUS?

**Mr Brookes**—I am sorry to raise that point, but it is an important point that the trustees and the corporate sponsor do not receive any financial benefit whatsoever from the running of that superannuation fund—zero benefit. There is a critical difference.

**CHAIR**—But at the same time, just because they run it for no return, it does not mean to say that they should have a lesser regulatory regime just because they are amateurs or just because they are volunteers.

**Mr Brookes**—I agree with you absolutely that they should have a very strong and proven regulatory regime, and that is SIS. That has been tried and tested. Again, if it is not working, where is the evidence to say it is not working; where are the facts?

**CHAIR**—The evidence will be further given to the committee. We were also told that they did not get the successful prosecutions under SIS, that they had had to get them under other laws such as the Corporations Law where it was appropriate. That is clearly not satisfactory.

**Mr Brookes**—I am not here to think about why ASIC haven't got successful prosecutions. I do not know. If that is the area then let us have a look at it, evaluate it and ask what prosecutions are sought: is it that I have made a spelling mistake or what is it? It still goes back to that point, may I say.

**Senator HOGG**—Coming back to this issue that a number of things are going to be taken into the criminal code as a result of the proposed legislation: do you see a need to have a commonsense approach, which says that, unless there are repeat offenders or there is something systemic in a company, the criminal code does not apply, otherwise the normal provisions of the SI(S) Act apply? Are we really looking at a systemic fundamental breakdown in a fund where the criminal code applies as opposed to the other circumstances where someone put their annual report in but it was late and, therefore, discretion can be applied and these people will not be hunted down, so to speak, and treated like criminals? Is that a broad sort of approach?

**Mr Brookes**—I think so, but again I would say that SIS actually embodies those provisions very well. That was supported by Lynn Ralph, maybe inadvertently. But the surveillance campaign that she referred to by ASIC actually did identify the mistakes and the inadvertent mistakes—it is a very important word 'inadvertent'—not strict liability mistakes. Those mistakes, the breaches, with proper consultation, were able to be rectified. That is a decent, democratic, reasonable way to solve these sorts of problems.

**Senator HOGG**—Should we have hard and fast legislation, which allows no flexibility, no discretion whatsoever, but then the regulator steps in and applies discretion over the top?

**Mr Brookes**—Isn't that risky? It really is.

**Senator HOGG**—I always worry about that.

**Mr Brookes**—It is sort of saying, ‘You are guilty.’ We are a democracy here, are we not? This is effectively saying that you are guilty until proven innocent. It is more that way than the other, which is ‘You are innocent until we prove you guilty.’ It is rather like saying that judges are empowered. If you accepted this, it is rather like saying when you go to court, the judge says, ‘Right, you are now guilty of stealing; that is it.’

**CHAIR**—We will give you 10 minutes to prove your innocence.

**Mr Brookes**—You cannot prove your innocence, really.

**Senator HOGG**—The onus of proof has shifted in this regime.

**Mr Brookes**—That is right. It is a fly on the face of democracy in a nutshell, if you think through it. It is only a small thing, and it is a small piece of paper that we wrote on, 1½ pages. Really you could finish it on one line: are you going to allow an affront to democracy to exist or not?

**Senator HOGG**—Thank you very much. Coming back to the issue of consultation—that has been an issue that I have pursued all day—you indicated that you were not consulted. When did you first find out about the existence of the bill?

**Mr Brookes**—About three weeks ago.

**Senator HOGG**—So you knew prior to the secretariat contacting you? You actually knew of the bill when it passed through the House of Reps?

**Mr Brookes**—No, I didn’t know when that had passed through the House of Reps. I was contacted by one of our members flagging this issue. They had got that issue, I believe, from AIST, the Association of Super Trustees. We then did a quick survey, and I was kindly contacted by the excellent Ms Morton for the interview here—and thank you for interview today—so it has been a short time scale.

**Senator HOGG**—It is not that you have not paid your Internet connector fee, or your telephone bill, or moved office that you were not contacted?

**Mr Brookes**—It could be, but that might be a criminal position—no, sorry.

**Senator HOGG**—Right, it was not any of those things; you just were not consulted. Would you expect to be consulted?

**Mr Brookes**—We would like to be.

**Senator HOGG**—Some do not consider this a significant matter enough that they should necessarily be consulted.

**Mr Brookes**—We would say all these matters are significant—anything that appertains to, in our sense, corporate super, but we think wider than this. Anything that applies to trustees, corporate funds, shrinking of the corporate markets, bars to democracy or bars to free competition. All those elements are very, very important to us.

**Senator HOGG**—The only other question I ask is: are you a Carlton supporter?

**Mr Brookes**—I will not answer that, apart from the fact that the Hawks are far superior.

**Senator HOGG**—I think you have answered my question very well.

**CHAIR**—Thank you.

[2.57 p.m.]

**RASSI, Mr Richard, Member, National Superannuation Committee, Institute of Chartered Accountants in Australia**

**REILLY, Mr Keith, Technical Consultant, Institute of Chartered Accountants in Australia**

**CHAIR**—The committee wishes to thank the Institute of Chartered Accountants for coming before the committee and also for preparing the submission. We welcome Mr Richard Rassi, who is appearing before us today. I think it is the first time, Mr Reilly, that you are appearing before the committee.

**Mr Reilly**—That is correct.

**CHAIR**—Don't feel intimidated by the circumstances or the sorts of questions that are asked. You can see from the last witness that people approach this issue from a number of perspectives but, at the end of the day, as parliamentarians, as overseers of the regulators, we have to make sure that those funds are protected—whether you are paid professionals who drive Ferraris or whether you are people who drive a second-hand Holden. We invite you to talk to your submission from your experience.

**Mr Rassi**—I am here to represent the Institute of Chartered Accountants. I am a member of the national superannuation committee. I am here to talk to our brief submission.

**Mr Reilly**—I am a technical consultant for the Institute of Chartered Accountants in Australia and I have overall responsibility for superannuation retirement incomes policies. I might just say, Senator Watson, if I can put in a little plug, that Susan Orchard apologises that she could not be here today. She is sunning herself in Noosa at the moment and certainly not driving a Ferrari, as far as I know.

**CHAIR**—Thank you very much.

**Senator HOGG**—Can I just ask what a technical consultant is? I meant to ask that of one of the earlier witnesses. Does that mean you are a lawyer, an actuary, a statistician?

**Mr Reilly**—It is a fairly vague title. Basically, I am a chartered accountant by background. The institute was just going through a corporatisation model and I was director of technical standards, so I am on the staff and I report to the chief executive officer and to the board. We have just changed titles. It is very complicated. I can give you either card, by the way, if that helps.

**Senator HOGG**—No. Thanks very much. I just wanted that clarified for the record.

**CHAIR**—You have heard, perhaps, some of the debate and the different perspectives that people are coming from. Obviously, from your perspective, Mr Rassi, you audit both the public offer-type funds that come under collective investment rules under the investment managers act

and you also audit others that come under SIS and maybe some aspects of Corporations Law. The big thing here is we have to protect that money.

**Mr Rassi**—My reaction to this was that it was heavy-handed. I fail to see the reason why we need to legislate for this type of risk. We are talking about an auditor failing to issue his audit report within the prescribed timeframe, but I think that overlooks something very fundamental: that is, that the auditor is really the last piece of the puzzle in the sense that the responsibility for preparing the accounts rests with the trustee. They bear the ultimate responsibility. Typically, the trustee outsources the function of preparing the financial statements to an external administrator, and that external administrator then prepares the accounts, presents them to the auditor on behalf of the trustee for audit and the auditor comes in and does an audit and issues an audit report. He is very much in the hands of the other players in this process.

To impose criminal penalties on an auditor for failing to issue an audit report within the prescribed timeframe, to me, ignores the practicalities of how the industry works. Secondly, it almost implies that there are practitioners out there that would deliberately withhold the issuing of an audit report within the prescribed timeframe, otherwise you would not be making that a criminal offence. I have great difficulties with that legislation. It is almost like legislating for a parent who withholds pocket money from their children. There is no risk there. I cannot see why we need legislation in that particular area.

The second major point that I have to make about this proposed legislation is that, again, we were not consulted in relation to these proposals. I would say that most practitioners would regard this as quite a serious imposition on their obligations as practitioners. There would be an expectation that the profession would be consulted where there are amendments that have application or implication for practitioners.

**Senator HOGG**—How did you find out about it?

**Mr Rassi**—Someone brought it to my attention. I cannot remember who the person was.

**Senator HOGG**—Post the passage of the bill through the House of Representatives?

**Mr Rassi**—I think so. The committee gave a response on 3 July, but there was certainly no formal process for consultation.

**Senator HOGG**—What about the consultation with your own membership, which Senator Watson raised with another witness? How widely were you able to consult with your own members?

**Mr Rassi**—We did not have very much time to consult with anyone. The national superannuation committee, as representatives of practitioners in this area, really made the decision and formulated this response to the proposed legislation. In truth, there has been very little consultation amongst members. I would have to say that most practitioners would probably share a similar view.

**Mr Reilly**—We deal with corporations legislation quite a lot. There have been occasional instances where criminal action has been taken against an auditor—one a number of years ago.

A real concern is that, where criminal action is taken against a professional, it should only be where that professional has not been inadvertent in his or her responsibilities but, instead, where in the particular profession the auditor has deliberately engaged in fraud. In the particular instance that we looked at, and it is based in Western Australia, the institute had a real dilemma in determining just what support we would provide for that member, that auditor, because the view that we took—and that was a somewhat different view to a special investigation—was that the auditor may or may not have discharged his professional responsibilities. But it was very difficult to see where an auditor who was only receiving an audit fee and it was not of such a significant amount to really cloud his or her judgment could be subject to criminal charges. In the end, the auditor was subject to a criminal action and was convicted.

This sent a real message back out within the auditing profession, and generally within our membership, that perhaps we do need to be very clear in terms of how the legislation should apply and whether our representation at the time to that particular member, and that member's own legal advice, was in fact sufficient in the case when that particular auditor was a member of a professional auditing firm. That firm has since taken a quite different stance to any allegations that are being made against the particular firm or its members. A criminal charge is a very serious charge. It effectively implies that you have been guilty of fraud, of deliberate misrepresentation. If that is the case, I do not think that the Institute of Chartered Accountants would object overly strongly given that, in the superannuation area, it is people's money and people's livelihood. But in terms of having those criminal provisions applying where there has been a failure to lodge an audit report on time, particularly when you look at trustees—you have heard evidence earlier on today that trustees are often acting in an honorary capacity—our advice to our members would certainly be to think very carefully before they do audit work under the SIS legislation the way it is now.

**Senator HOGG**—With regards to the issue in Western Australia, was that just a single transgression of the law or were there a number of transgressions of the law in the same area?

**Mr Reilly**—It was a company failure. Criminal action was taken against the directors and the auditor. The particular major shareholder, in fact, died before the case was concluded. One could say that in that particular instance there was certain evidence to suggest that that particular individual had acted quite improperly. Criminal proceedings may well have been the appropriate action to take. There was no evidence to suggest that that auditor was involved in any deliberate deception. The auditor may or may not have done the audit work as well as he or she should have at the time in accordance with auditing standards but there was no—as I think our submission refers to it—'deliberate or reckless' action.

**CHAIR**—But that is the very issue we are getting at, aren't we?

**Mr Reilly**—Yes.

**CHAIR**—I would have thought that that case sent a very powerful message to all auditors that you have to lift your standards in terms of the way you do audit. Although it was not reckless, et cetera, it is a question of maintaining standards to protect people's money.

**Mr Rassi**—I think this is a different issue.

**CHAIR**—I know, but we are getting back to this basic sort of requirement of making sure, despite the fact that there have not been widespread frauds, that it cannot occur and it will not occur.

**Senator HOGG**—Can you tell us what the commonsense approach would be in this? It might not necessarily be the strictest legal sense—a commonsense approach.

**Mr Rassi**—There is two things. I think criminal liability should be imposed only where there is a deliberate intent to defraud or make personal gain from a situation, and you would have no dispute from the institute then, I would have thought.

**Mr Reilly**—That is correct.

**Senator ALLISON**—How do you know unless you take it to court and press the charge whether the intent was there or not?

**Mr Reilly**—I think that is probably a matter of evidence more than anything else in looking at the particular instance. In fact, under the Corporations Law the particular instance in Western Australia referred to you, one would argue there was some political pressure. I am not aware that there have really been other criminal cases taken against auditors—are you, Richard?

**Mr Rassi**—No.

**Mr Reilly**—That has been the only one that I can recall. I am raising it with the committee because I think it was a case where, yes, the auditing profession certainly sat up and said, ‘What does this mean?’ What I think the auditing profession has also said though is that really that is an inappropriate charge to be levelled against an auditor, and we still are contemplating what to do in that particular case. I guess the easy way out is to isolate it and say that it was a product of the 1980s and we would hope that does not occur again. But if we suddenly found our members subject to criminal charges then I think we would be looking very closely at the legislation, hence the reason that we are here today.

**CHAIR**—The point is that you are subject to criminal legislation when you audit a public offer fund, aren’t you? Why are you taking a different stance in terms of your auditing a public offer fund as opposed to auditing funds which might have equal employer-employee representation?

**Mr Rassi**—Could you clarify that for me?

**Mr Reilly**—We might discover something today.

**CHAIR**—Right. It has been put to us that in public offer status operating under the management investment rules for collective investment vehicles that take money—say \$100 million—you audit those now. You are subject to those tight rules and strict liability and it is not a problem. If you are late how often have you been rapped over the knuckles?

**Mr Rassi**—I have not been rapped over the knuckles.

**CHAIR**—You haven't? That is what I say.

**Mr Rassi**—But I am only one of many practitioners.

**CHAIR**—What I am saying is that you are operating under that regime and you have not had a problem. Although you may well have inadvertently breached the 60 kilometres per hour speed limit from time to time, that has been ignored, because there are rules set down in the way discretion is going to be exercised by the regulator. You are coming to us now and saying we have some different people still investing money through perhaps the same investment managers but there are different policing requirements and lower standards. Under this situation you are worried about being a day late in issuing your audit report, whereas up there you are not worried about being a day late in issuing your audit report. Isn't there a double standard? Where do you come from?

**Mr Rassi**—The reality of it is that I have issued many late audit reports, but were they intentionally issued late or were they a case of the trustee and the administrator providing me with the information late? In all cases it was the latter.

**CHAIR**—But what I am saying is that under the regime up there, which you have been operating under for years in auditing public companies, it has not been a problem—and you say you have been late.

**Senator HOGG**—I think that is at the big end of town though.

**CHAIR**—But it is still the problem that they have been late.

**Senator HOGG**—It is easier dealing at the bigger end of town than at the smaller end of town.

**Mr Rassi**—Mr Chairman, I have to be honest and say to you that I am not sure whether there are criminal penalties under the Managed Investments Act for issuing a late audit report.

**CHAIR**—We were told there were similar rules. If there are differences, we would appreciate it if you would come to us on those.

**Mr Reilly**—We would like to do that.

**Mr Rassi**—We would like to research that, but I am not aware of that.

**CHAIR**—ISFA indicated that they would be worried about not having a standard which they would be able to comply with. The person who presented the evidence said she has been a regulator and that is not the way the regulators work.

**Mr Reilly**—Certainly under the Corporations Law the criminal penalties do not apply to the sorts of breaches that we are looking at here—that is quite clear. We would have to go back and look at the Managed Investments Act to see.

**CHAIR**—That is very important.

**Mr Rassi**—Yes.

**CHAIR**—If that were the case, we would be prepared to look at amendments.

**Mr Rassi**—Given the way that the proposals are put here, they really are out on a limb compared with other pieces of legislation, but we would need to look at that.

**CHAIR**—How quickly can you get back to us, because it is important?

**Mr Rassi**—We can look at it very quickly.

**CHAIR**—We really do want to make sure about this.

**Mr Rassi**—It would not take us more than a couple of days to get the answers on that.

**CHAIR**—We would certainly appreciate that. Senator Hogg?

**Senator HOGG**—I understand that you were not consulted. Did you have an expectation that you should be consulted or that there was a need for you to be consulted?

**Mr Reilly**—We have an expectation of that, because our members are involved in various facets of the superannuation industry and the retirement incomes industry and we are structured so that we are able to provide submissions and provide assistance to government, parliament and regulators—Treasury staff, APRA, ASIC et cetera. In terms of the Corporations Law, where I have spent most of my time and have been grilled by the Joint Parliamentary Committee on Corporations and Securities, we would be quite irate if corporations amendments were made without being consulted beforehand.

**Senator HOGG**—That is before the legislation hits the House of Representatives?

**Mr Reilly**—Yes.

**Senator HOGG**—I just wanted that clear.

**Mr Reilly**—We try to ensure that the same applies in the retirement incomes area and superannuation as well.

**Senator HOGG**—On this occasion at least one witness has said that the changes sought were not overly significant to them and that, whilst it would have been nice to have been consulted, in effect they were not consulted. But obviously it was a significant matter to you and therefore you would have thought that you would have been consulted.

**Mr Rassi**—Certainly as a partner in a major accounting firm, I have responsibility for what I sign off on and I have direct responsibility in my role as an auditor of SIS regulated funds, and it does concern me.

**Senator HOGG**—All right. How did you find out about the changes?

**Mr Rassi**—As I said before, someone brought it to my attention. It might have been one of my staff or it might have been someone from the institute—I cannot recall—but that is how it was brought to my attention; it was not through the formal channels.

**Senator HOGG**—The other issue that you raise had not been raised today until now—and I thank my colleague Senator Watson for raising it. It is your ability to consult with your membership. The time from when this inquiry was announced to when the inquiry actually sat—and I may stand corrected—was no more than about two weeks. That is not a great deal of time for consultation with your members. Do you feel that is important for you or is your organisation so well structured that you are able to use your committee to reasonably reflect the attitudes of your members without a wide consultation process?

**Mr Reilly**—I think there is little bit of both. Clearly there is a need to go back to the membership fairly frequently. We have a weekly email newsletter service 'Retirementincomes alert today', and that is one way of consulting and advising the membership of the sorts of issues that are being raised. We also have some fairly experienced practitioners and members in superannuation. Ordinarily our own superannuation committee and staff are able to arrive at a decision that the membership would support. So we do a little bit of both. Like everyone else, we would like a degree of time for consultation, but there is short notice as well and we can do both.

**CHAIR**—Mr Rassi, we are giving you that submission from William Mercer because we think it may assist you in formulating your responses to the committee which you are going to come back to us on. It is an aid that may help you. Are there any further comments?

**Mr Rassi**—The only other comment I want to make is that, unfortunately, in a lot of these proposals a lot of the changes to superannuation legislation almost ignore some of the other players that are critical to the workings of this industry—the fund administrators, for example, who in the corporate superannuation arena are a very significant element of whether things are done properly and whether the things are done on time. To a great extent, a lot of this is in their hands.

**CHAIR**—But at the end of the day, the trustees are responsible, and if they have a record of being late you can always go to another manager, can't you?

**Mr Rassi**—You can, but we all know that changing managers for a superannuation fund is not something that can be done overnight.

**Senator HOGG**—It is not easy.

**Mr Rassi**—It can take months, well after the criminal offence—

**Senator HOGG**—You can be in a contract that lasts three years. You can have a three-year contract.

**Mr Rassi**—Correct.

**Senator HOGG**—And it might happen in the first year of your contract. Then what do you do?

**Mr Rassi**—And to change administrators is an absolutely massive task, as many of us around the table would know. That would occur well after the criminal offence has taken place. There is that weakness with a lot of these proposals and amendments, and we are sort of overlooking that factor. It is one of my areas of concern as a practitioner.

**Senator HOGG**—What happens in that case? If you are into the first year of your contract and a situation arises where there is a breach of the law under that which is envisaged, you can terminate the contract. Would that be your view?

**Mr Rassi**—You can terminate the contract, but in practice the termination of a contract is a last resort. It is extremely expensive. It costs you an absolute fortune.

**Senator HOGG**—I understand all of this.

**Mr Rassi**—And there are not that many choices out there for corporate superannuation funds.

**Mr Reilly**—And you leave yourself open to action by the very contributors to that fund, who would argue that you are not acting in their best interests.

**Senator HOGG**—That does raise one other issue that I have pursued with some other witnesses. There is an assertion that there will be a cost burden on the various funds if this regime is put in place. I do not expect you to have any indicative costings today, but are you able to provide this committee with any indicative costing of the burden that might be placed upon funds as a result of the criminal code amendments coming into play? Will it make it more onerous for the various funds in their operation? It might well be that there is a one-off compliance cost but then there may well be a repeat compliance cost as well. Could you take that on notice. If there is no simple answer to it—

**Mr Rassi**—We will take it on notice.

**CHAIR**—Thank you very much.

[3.21 p.m.]

**GRAY, Mr Bryan William, Chairman, Australian Custodial Services Association**

**O'CALLAGHAN, Ms Joanne Olivier, Legal Adviser, Australian Custodial Services Association**

**CHAIR**—I welcome to the committee for the first time, I think, Mr Bryan Gray and certainly for the first time Ms Joanne O'Callaghan. Feel rather relaxed: it is a fairly informal atmosphere in which we operate. You have the protection of parliament. If you so wish, you can ask for evidence to be taken in camera. We doubt that that will be necessary on this particular issue. We have called you because you come from a very important role, custodial services. As you know, with superannuation, we try and break it up to have the division of responsibility as a protective measure for the stewardship of the investments. We appreciate the role that custodial services play in this country because that is one of the lynchpins in terms of releasing assets, paying moneys et cetera. So your support to the strength of the superannuation system is absolutely vital, and that is why we have asked you to come to the table today and to present evidence. Of course, as you would appreciate, members of the committee will question you. Sometimes we play the role of devil's advocate because we have to try and anticipate issues. Some people object and say, 'This is being a bit hypothetical,' but we do not want some unintended consequences to flow from the legislation. So, with that background, welcome.

**Mr Gray**—I am chairman of the Australian Custodial Services Association.

**Ms O'Callaghan**—I am a legal adviser to the Custodial Services Association.

**CHAIR**—Is that a full-time position?

**Mr Gray**—No, it is not a full-time position. It is very much volunteer. The association is an association of custodians that are operating in the marketplace.

**CHAIR**—How many?

**Mr Gray**—There are 17 members. Collectively, our members hold about \$500 billion in assets for Australian superannuation funds, other institutional investors here in Australia and also the Australian assets of institutional investors who are located offshore. The 17 members are really the custodial operations of the four major banks, organisations like AMP, Perpetual Trustees, Permanent Trustees and the large global custodian banks such as Chase Manhattan Bank, Citibank, Bank of New York, Hong Kong Shanghai Bank and State Street Bank.

**CHAIR**—Apart from being a volunteer, you are employed by one of the major institutions?

**Mr Gray**—Yes, I am director of marketing at State Street Australia. I wonder whether it might be worth giving just a little bit of background on the sort of services that custodians provide and the role that they play, which may help set the scene.

**CHAIR**—Thank you.

**Mr Gray**—The role that custodians play really is one of primarily safekeeping of the assets of superannuation funds and other institutional investors. As I say, if we use the example in Australia of a large superannuation fund, that large superannuation fund may hire a number of investment managers to manage assets on its behalf and spread those. What it may also do is hire a custodian to stand in behind those investment managers and safekeep the assets at arm's length from the investment managers to arrange, under the instruction of investment managers, for buys of shares and bonds that take place in the market each day to be settled, to be held, and then for all of that information to be recorded and to be reported back to the superannuation fund. So it is an important role and we provide services both here in Australia for superannuation funds as well as in a number of markets around the world that they may invest into.

**CHAIR**—Thank you.

**Senator HOGG**—Do you have an international arm?

**Mr Gray**—Yes. The organisation I represent is State Street Bank. State Street Bank is obviously an international company. The Custodial Services Association here in Australia represents the interests of the Australian arms, I guess, of those organisations.

**CHAIR**—Thank you. So—the proposed act.

**Mr Gray**—Our association reviewed the amendments. We are pleased to say we have no issues in relation to the proposed amendments, particularly schedule 3 amendments, changes to the Superannuation Industry (Supervision) Act. We believe they are designed to enhance the powers of the regulator, I guess, in their enforcement and in carrying out their functions. The function of the regulator, we believe, is a very important function. They act in protecting the interests of superannuation assets of ordinary Australians, and any changes to legislation that allow them to be able to perform that function more efficiently we support as an organisation.

**CHAIR**—Those rules, we are told, commonly apply under the Managed Investments Act for public offer funds. So if you have a collective investment, therefore, the people comply with those and ISFA tell us that they have no problems. They look tough but in practice they are okay. Putting your international hat on, are there similar types of legislation that apply overseas?

**Mr Gray**—There is US legislation.

**CHAIR**—What about the US? Is that tough like this?

**Ms O'Callaghan**—We have not really looked at it from the position of the trustees because there is actually very little in the legislation that relates to the custodians, but the managed investments legislation is, in our experience, tougher than it is in the United States. My understanding is it is modelled more strongly on the United Kingdom. But in terms of the way it operates, the way it affects the people who run the funds, it does have precedents elsewhere.

**CHAIR**—We have two classes of witnesses today—and they come from the big end of town—who say we should have common laws applying to a million dollars worth of investment, whether it be under this regime or whether it be under that regime. At the end of the day, they have money invested and they want to make sure it has the tightest prudential regulations. How do you see witnesses who come before the committee and say, ‘The legislation under SIS is quite adequate; there is no need to make a change?’

**Mr Gray**—What I would say is that the changes that are proposed—certainly that I can see—reiterate the importance of the role. They reiterate the importance of the regulation of superannuation and they reiterate the importance of the role of trustees in managing their responsibilities for those superannuation assets. Certainly, my reading of it was that it served to reinforce the importance of that role.

**CHAIR**—We are seen to be a leader here. Some people say it is becoming an export industry for us because so many other countries are interested in our model. So the issue is: will our reputation in the world community go down if we are not seen to be ratcheting up the requirements for people who operate under the SIS regime—basically public offer funds and the like and corporate areas—that are not currently subject to the Management Investments Act? What sort of message would it send if we continued along the same line throughout the legislation saying, ‘Well, we have two standards in Australia?’

**Mr Gray**—I think it is important to be consistent in the application of legislation across products. It makes Australia more competitive internationally in an environment where the legislation has been applied consistently regardless of the nature of the investment products that are being covered.

**CHAIR**—What do you say when they say, ‘We come from an environment where we have to put our hands up, we are volunteers, we are unpaid, and therefore it is unreasonable to apply these sorts of penalties to us’?

**Mr Gray**—I sympathise with that position, but equally it is an extremely important role. I guess what may be required is increased education. There are other areas perhaps where you can illustrate or assist those trustees to perform their role but, at the end of that day, it is a very important role that they carry out. I think that pointing that out and having legislation that allows the regulator to be able to take action where necessary is important.

**Senator ALLISON**—Are custodians full-time paid workers in their field?

**Mr Gray**—Yes. Custodians are professional providers of services in the same way that investment managers are.

**Senator ALLISON**—And do you think professionally trained, full-time, fully paid people should be trustees?

**Mr Gray**—I think potentially there is a role for people who are professional and that are paid in the administration of superannuation.

**Senator ALLISON**—That was not quite the question. It was the trustees.

**Mr Gray**—Do I think the trustees should be paid?

**Senator ALLISON**—Do you see parallels between custodians and trustees? Are they doing much the same work?

**Mr Gray**—I guess they are, in terms of protecting—

**Senator CONROY**—They are, after MIA.

**Mr Gray**—That is right. They are, in terms of protecting the interests of investors, yes.

**Senator ALLISON**—So trustees, in your view, should be paid and be full-time professionals?

**Mr Gray**—I am not in a position to comment on that. I think there is a role for professional trustees within the industry. I am not advocating that every trustee out there should be paid for it.

**Senator ALLISON**—There seems to be a bit of a contradiction from what you are saying.

**Mr Gray**—Why is it a contradiction? What I am saying is that there are situations where it may make sense for a board of trustees to engage someone who is working in the field full-time and is able to provide some advice and some assistance as a—

**Senator ALLISON**—Don't trustees do that anyway with administrators and the advice they get? Will this legislation not mean that they will need to seek much more of that advice and spend much more on consultants and lawyers?

**Mr Gray**—I am not sure. I cannot comment on whether it would mean that they will need to spend more on them. The point I am making is that I think it is an important role that they have and obviously there is a role for advisers in that as well in terms of providing that. There is a requirement, I suppose, as a trustee to ensure that you are seeking the advice or the ongoing education that you require to perform the function.

**Senator ALLISON**—It has been suggested to the committee that this could all be a dastardly plot to destroy the trustee system as we know it, especially the voluntary nature of it. Can you conceive of that possibility?

**Mr Gray**—Certainly, that is not how I read it. As I say, the way I read it was that it was reiterating the importance of the role. That was all.

**Senator ALLISON**—If that trustee arrangement went to full-time paid people, would that not put the two sectors on more of a level playing field—the costs associated with paying trustees would create more of a competitive environment? Would that be an argument that might be advanced?

**Mr Gray**—Would it create more of a competitive environment?

**Senator ALLISON**—If we were taking the dastardly view.

**Senator CONROY**—We want a level playing field—competitive neutrality.

**Mr Gray**—Are you saying that it makes corporate superannuation funds more competitive with other superannuation products that are out there? Does it make them more competitive? It probably puts them on an equal footing. I am not sure that it necessarily makes them more competitive.

**Senator ALLISON**—I guess we are searching for a bit for a motive here. The fact that there does not seem to be a problem to solve means some of us are interested in looking at what other motivations there might be, and that has been suggested as one of them. It is not something that has occurred to you?

**Mr Gray**—I do not subscribe to that. It certainly has not occurred to me. The way I read it was that it was highlighting the importance of the role and providing the regulator with the ability to perhaps take action where it may have been perceived previously that they may not have been able to.

**Senator CONROY**—When the managed investments bill was being debated before it became the act what was your organisation's position on support or opposition for MIB or MIA as it became?

**Mr Gray**—I was not with the association at the time, but I think the association supported that legislation.

**Senator CONROY**—I do not remember your organisation appearing before the committee.

**Mr Gray**—I do not think the organisation did.

**Ms O'Callaghan**—A lot of that may have been attributable to the fact that it did not impose direct obligations on custodians because custodians are not directly licensed and they have very few direct obligations under the law as it currently stands under both SIS and MIA. The way that the regulators choose to regulate the custodians is to impose requirements on the managed investment schemes and the superannuation funds as to what they should require from a custodian. There is very little direct regulation. So, in a sense, it did not have a direct impact on the custodian associations. Where it started to get complicated was when ASIC and APRA both said what should be in a custody contract for the people whom they regulate. A lot of that tended to become inconsistent with market practice on a global basis. Then the association started to get involved in lobbying APRA quite heavily on its custody guidelines and ASIC on its policy statements on custodians.

**Senator CONROY**—Should custodians be licensed?

**Ms O'Callaghan**—They will be under the new legislation, under CLERP 6.

**Senator CONROY**—That has just been withdrawn.

**Mr Gray**—We thought it had been deferred.

**Senator CONROY**—Deferred, withdrawn. Will the criminal penalties that are being talked about here apply under CLERP 6? Will you be subject to the same criminal penalties?

**Ms O’Callaghan**—Most of the things that are imposed here are direct impositions on trustees. The only things that affect custodians in this bill are having an NTA, net tangible assets, of \$5 million and not having a disqualified person on your staff. They are the two main obligations. We have that obligation under MIA anyway.

**Senator CONROY**—Should these sorts of criminal provisions be part of a licensing arrangement that involves custodians?

**Ms O’Callaghan**—I do not think that is proposed at the moment.

**Senator CONROY**—I am asking you whether you think it should be.

**Mr Gray**—I am not sure we would have an objection to it.

**Senator CONROY**—We want to have a level playing field?

**Mr Gray**—Sure.

**Senator HOGG**—Some people before us today have described the criminal code amendments as being too draconian. Given that it seems as if we have had no manifest reason put before the committee as to why there should be those provisions there and we do not know what gap we are actually plugging up at this stage—when we get to APRA they may well be able to shed light on that—do you believe that for something like filing an annual report late that you should be subject to the criminal code? That is the sort of thing that has been put to us today.

**Mr Gray**—I cannot really comment on that. I can understand the position. I guess it may seem harsh, but it depends on what the consequences of not filing those are.

**Senator CONROY**—Not passing on tax file numbers that are not even compulsory to be passed onto the fund?

**Mr Gray**—Yes.

**Senator CONROY**—Would that be a criminal—

**Senator HOGG**—Breaking the criminal code is the issue that has triggered a lot of the witnesses before us today not being happy with that aspect of the legislation. It seems to me that there may well be a commonsense approach that says that if someone is a serial offender then you may wish to apply the criminal code, as opposed to someone who has, because of circumstances as they have just happened to evolve—forgotten to post something, or there has been a mail strike, or the letter went missing in the mail, or whatever it might be—and

inadvertently a breach has been made of the law and that therefore would warrant, probably not the criminal code being applied, but maybe there is a need for some sort of slap over the hand. Is that the sort of approach you would favour?

**Mr Gray**—Yes, I think that makes a lot of sense. It is extent to which the breach or the particular act has the ability to lose retirement assets for people's retirement. It may well be that not providing a tax file number on time is not going to achieve that but there could be some other provisions that do. Failing to make contributions on time and those sorts of things have in the past caused problems. I guess there are probably some situations there that from a personal view probably could be amended or could remain as they are.

**Senator HOGG**—The other question I asked of all the witnesses today, and you are the last, is: were you consulted on this bill and did you expect to be consulted?

**Mr Gray**—No, we did not actually and we were not.

**Senator HOGG**—You were not consulted?

**Mr Gray**—No, we were not consulted and we did not expect to be. In fact, we found out about it only last week.

**Senator HOGG**—You found out about it last week?

**Mr Gray**—Yes.

**Senator HOGG**—And how did you find out about it?

**Mr Gray**—We found out about it actually when we were invited to attend here.

**Senator HOGG**—So that is the mechanism for you finding out about this particular piece of legislation?

**CHAIR**—Are you saying that the secretariat is not doing their job?

**Senator HOGG**—No. I am very proud of the secretariat and the way in which they have—

**Senator CONROY**—Public spirit in this committee secretariat is just awesome.

**Senator HOGG**—It is absolutely marvellous the way they have pursued people around the nation to get them before us today.

**CHAIR**—We do appreciate you coming before us because you do bring a very important perspective to it and, although a lot of the legislation may not apply, I think it is important for us, as committee members, seeing your part in the overall picture.

**Mr Gray**—We appreciate the invitation.

**Senator ALLISON**—The disqualification provision in this bill, I understand, affects custodians as it does trustees. Do you have any thoughts about whether there should be some guidelines as to who might be disqualifiable? Should ASIC be required to note a history of breaches before disqualifying? Are you happy with the wide discretion in this provision?

**Mr Gray**—That was actually one of the things that we did consider. It would be good to have some guidelines laid down by the regulator, and I guess the view that we have taken is that the regulator would not apply that power indiscriminately. But certainly it would be useful to have some guidelines laid down on how that would be applied.

**Senator ALLISON**—The argument was put by ASFA that this is not appealable so it would be a major slur on a person's reputation to be disallowed or disqualified and there is not a lot they could do about it, and is this natural justice?

**Mr Gray**—Yes, that is a good point. I think it would be useful certainly to have some guidelines laid down.

**Senator CONROY**—Treasury has got very broad discretion in there at the moment.

**CHAIR**—Are there any further questions?

**Senator CONROY**—No.

**Senator ALLISON**—No.

**CHAIR**—Thank you very much for appearing before the committee today. It was very useful.

**Mr Gray**—Thank you.

**CHAIR**—That concludes the committee's proceedings for the day. We will be taking evidence from Treasury, ASFA, ASIC and maybe a representative from the minister's office in terms of policy issues. You will be notified of that. Thank you very much.

**Committee adjourned at 3.45 p.m.**

