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JOINT COMMITTEE ON CORPORATIONS AND SECURITIES

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JOINT COMMITTEE ON CORPORATIONS AND SECURITIES

Wednesday, 27 June 2001

Members: Senator Chapman (*Chair*), Senators Conroy, Cooney, Gibson and Murray and Ms Julie Bishop, Mr Ross Cameron, Mr Rudd, Mr Sercombe and Dr Southcott

Senators and members in attendance: Senators Chapman, Conroy, Gibson and Murray and Ms Julie Bishop Mr Ross Cameron and Dr Southcott

Terms of reference for the inquiry:

Financial Services Reform Bill 2001.

WITNESSES

Committee met at 9.41 a.m.

BECKETT, Mr Ian, Analyst, Product Disclosure Unit, Financial Markets Division, Department of the Treasury

SMITH, Ms Ruth Viner, Specialist Adviser, Product Disclosure Unit, Financial Markets Division, Department of the Treasury

VROOMBOUT, Ms Susan, Manager, Product Disclosure Unit, Financial Markets Division, Department of the Treasury

CHAIRMAN—Today the committee conducts its fifth public hearing into the provisions of the Financial Services Reform Bill 2001. The Parliamentary Joint Statutory Committee on Corporations and Securities decided to inquire into and report on the provisions of the Financial Services Reform Bill 2001 which was introduced into the Commonwealth parliament on Thursday, 5 April. The committee sought submissions by 20 April 2001; however, the committee desires that as many people as possible have an opportunity to comment on this bill and so the committee resolved to receive submissions up until Monday, 7 May 2001, but late submissions are still being accepted. The committee agreed in April to release all submissions received on this inquiry.

Submissions will be available from the Parliament House web site or alternatively the secretariat can send a hard copy of the submissions to those who wish to obtain them. Before we commence taking evidence, may I reinforce for the record that all witnesses appearing before the committee are protected by parliamentary privilege with respect to evidence provided. Parliamentary privilege refers to the special rights and immunities attached to the parliament or its members and others necessary for the discharge of parliamentary functions without obstruction and fear of prosecution. Any act by any person which operates to the disadvantage of a witness on account of evidence given by him or her before the Senate or any of its committees is treated as a breach of privilege. I also wish to state that unless the committee should decide otherwise this is a public hearing and as such all members of the public are welcome to attend. I welcome Ms Vroombout, Ms Smith and Mr Beckett. Do you wish to make an opening statement?

Ms Vroombout—Yes.

CHAIRMAN—Unfortunately I also have chair duty in the Senate clashing with the chairing of this committee at the moment. I will ask you to proceed with your opening statement. I will hand the chair to Senator Gibson in the interim. I should return by about 10.30.

Ms Vroombout—The statement that I would like to make is one that focuses on the objectives and the underlying philosophy of the bill. I do not want to go into any great detail. As you know, the genesis of the bill was, in part, the FSI, the financial system inquiry. The FSI noted the all-pervading influence of the financial system on the economy as a whole. It noted that very large efficiency gains and cost savings could be released from the existing system through improvements to the regulatory framework. In particular it estimated that the cost to users of the Australian financial system in 1995 was around $41 billion and suggested, therefore, that even a small 10 per cent improvement in efficiency would translate into cost savings in excess of $4 billion.

Many in industry see the reforms in the FSR Bill as their Wallis pay-off for changes that will enable them to make the efficiency gains and cost savings that the FSI suggested were available in the system. To achieve those efficiency gains and cost savings the focus of the FSI and of the FSR Bill has been on providing a regulatory neutral regime, moving from an industry focus of regulation—with banks being subject to one set of rules, insurance companies another, and so on—to a functional focus of regulation, regulating like activities in like ways regardless of what institution, profession or body is engaged in the activity.

The objective of this functional approach is to encourage increased competition in the industry, lower barriers to entry, reduce costs and provide greater confidence on the part of consumers. In the context of that approach and those objectives, in developing the FSR Bill the government has required any departures from the functional approach to regulation to be justified on strong grounds. Any departures from that functional approach put at risk the efficiency gains for the industry as a whole. They also put at risk consumer confidence in a single set of rules applying across the industry and, in turn, that puts at risk the benefits of the reforms to the economy as a whole.

ACTING CHAIRMAN (Senator Gibson)—We have received correspondence from the minister. We have two letters before us which basically go through the key points of the minister's suggested changes. The letter of 25 June has a dozen dot points. I think it would be useful if you could give us further background.

Ms Vroombout—As to some of those?

ACTING CHAIRMAN—Yes.

Ms Vroombout—This letter says that there are some parliamentary amendments that are expected to be made when the bill is debated in the House. I think the committee was provided with a copy of those parliamentary amendments. As a result of representations that both the minister and Treasury have received, there are a number of other issues that are under consideration for further parliamentary amendments in the Senate. They are the two kinds of things raised in this letter. As to what is in the parliamentary amendments, the major ones are outlined in the letter. One of those states:

- Providing an explicit role for the Reserve Bank of Australia in relation to systemic risk issues associated with clearing and settlement facilities;

Ruth, could you give a brief run-down on those provisions?

Ms Smith—The exposure draft recognised the importance of systemic risk in relation to clearing and settlement facilities. It included as a general obligation the requirement to do, to the extent that it is reasonably practicable, all things necessary to reduce systemic risk. It also anticipated a parallel licensing regime of clearing and settlement facilities of significance to the payment system. That regime would have been under the Payment Systems (Regulation) Act. However, the proposal for parallel licensing raised questions about the ultimate comparability of the two regimes. Industry developments in Australia in the interval between the exposure draft's release and the introduction of the bill raised questions about the separability of the relevant clearing houses.

It was also necessary to recognise the Reserve Bank's role in relation to systemic risk in the payment systems generally. That is the background for giving the Reserve Bank the role of regulating clearing and settlement facilities with respect to that systemic risk aspect. Obviously, there are issues about duplicated regulation, which I think have been raised before you. That has to be resolved by proper coordination and consultation between the two regulatory agencies. There is proposed to be a memorandum of understanding between them.

Ms JULIE BISHOP—Does the Payment Systems Board report to the minister independently of the Reserve Bank board?

Ms Smith—It does have a separate legal status within the Reserve Bank Act.

Ms JULIE BISHOP—So it would report separately, directly to the minister?

Ms Smith—Yes, in relation to these functions.

Mr ROSS CAMERON—In terms of this payment issue and systemic risk management, does this basically mean that we shut out the smaller banks from the clearance system?

Ms Smith—No. The clearing and settlement facilities that we are talking about here are in the nature of Austraclear; ASTC, which is the Australian Stock Exchange Securities Clearing House; and the SFE Clearing House. We are not talking about relationships between banks.

Ms Vroombout—Moving on from that, another one of the major changes being made in the parliamentary amendments is that the original bill had a regulation making power to exclude people from the financial service provider licensing provisions, but it was just a straight exemption power to be made by regulations. As a result of some of the representations that the government received, particularly from the media organisations, it was recognised that in some circumstances there might be cause to exempt, but subject to conditions—so take people outside the regime, but make them subject to a range of conditions. What has been inserted in the bill is a provision that enables any exemption from those licensing provisions to be subject to conditions.

Ms JULIE BISHOP—Exemption is still going to be by regulation?

Ms Vroombout—Yes.

ACTING CHAIRMAN—Except that the statute will have a general provision to allow groups to be excluded—

Ms Vroombout—And conditions.

ACTING CHAIRMAN—and conditions to be done by regulation.

Ms JULIE BISHOP—But that does not answer the media organisations fundamental concern, does it? They wanted the exemption within the statute as it currently is under the Corporations Law.

Ms Vroombout—On the face of the law. I guess the government has decided that that is not the best approach for taking media organisations outside the scope of the regime.

Ms JULIE BISHOP—Can you just explain why not. Why is it not the case that we are going to include an exemption within the statute?

Ms Vroombout—It goes back to the fundamental basis of the bill which is to provide a uniform regulatory regime applying across the whole of the financial services industry, applying like standards across the whole of the industry. The fundamental framework of the legislation is that it establishes general principles for regulation across the industry with any variance in detailed application to particular sectors being dealt with in the regulation. The broad framework applying across the board is what is in the law. The regulations are the instrument for varying its application, where necessary, to particular activities or bodies.

Ms JULIE BISHOP—There is an exemption in the Trade Practices Act for information providers; there is an exemption in the Corporations Law. I still do not understand the rationale in taking the exemption out of the statute.

Ms Vroombout—It is the whole philosophy in drafting the bill which is to have the general principles and the general framework applying across the board being what is in the law with the variance in the regulation. It is the philosophy that has been taken in drafting the bill.

Ms JULIE BISHOP—Does it come down to a notion of what is personal advice? If those in media are providing what could be deemed to be personal advice then they ought to be licensed.

Ms Vroombout—Yes.

Ms JULIE BISHOP—Is there a definition of that?

Ms Vroombout—There is a definition of personal advice in the bill, yes.

Ms JULIE BISHOP—Have you got that? Could you direct me to it?

Ms Vroombout—It is at the front: 766B defines financial product advice and then draws the distinction between personal advice and general advice. The issue for media organisations is not so much whether what they do is give personal advice but whether what they do is give general advice. Personal advice is actually talking to a person and saying that a product is suitable and appropriate for them; general advice is just saying, 'This is a good product.' For media organisations, the issue is whether some of what they do amounts to general advice which is saying, 'This is a good product' without targeting it at a particular person and saying it is a good product for a particular person.

ACTING CHAIRMAN—What about recommendations which you quite commonly see in the business sections of newspapers these days concerning, say, half a dozen stocks? There is a 'buy' tick against two or three of them, a 'hold' against a couple and a 'sell' against a couple. How would you classify that information?

Ms Vroombout—It is not personal advice, but there is a question of whether it is general advice.

Ms JULIE BISHOP—It could well influence—

Ms Vroombout—Which is part of what the definition of 'general advice' is about.

Ms JULIE BISHOP—So if someone had to be licensed in that circumstance, who would it be?

Ms Vroombout—I guess there are a number of choices for the media organisations—whether they get the licence and have their journalist authorised, or whether the journalists themselves get licensed.

Ms JULIE BISHOP—In circumstances where the story did not have a by-line, it would have to be the organisation. What would it mean, practically speaking, for a media organisation to be licensed? Say it appears in the *Daily Telegraph*.

Ms Vroombout—They would have to meet the licence criteria. They would have to ensure that the authorised reps—as in the people who are actually giving the advice—are trained and supervised in giving that advice.

Ms JULIE BISHOP—What would it involve? I have this vision of the *Daily Telegraph* with a whole bunch of journalists of varying ages and experience, some of whom are seconded onto the finance pages for a week and then they are not. How would this work in practice?

Ms Vroombout—As you will see from the minister's letter, he is suggesting a regulation to address the issue.

Ms JULIE BISHOP—So we have not worked that part out yet.

Ms Vroombout—In the letter there is some discussion of what that regulation would contain, and I will have to go back to it. If what the media organisation is doing amounts to general advice—and I guess that is the threshold question; are they doing enough to make it general advice—what is being suggested here is that, subject to certain conditions, they would not have to be licensed.

Ms JULIE BISHOP—I am talking about circumstances where it is so grey in terms of whether or not they are providing financial product advice in that regard. What would happen for the publisher, the broadcaster, the journalist, or whomever, to be licensed? They do not want to stray into difficult territory so they take the very conservative option and decide to be licensed. What would the individual have to do?

Ms Vroombout—This proposed regulation is intended to clarify the position. If they are in fact giving general advice, then subject to certain conditions—one of them being that the sole purpose of the media activities is not to give advice, as in they are the *Sunday Telegraph* and they happen to have a financial column; if it is that kind of situation—what is being suggested

here is a regulation that would take them outside the licensing regime subject to their disclosing any conflicts of interest they may have.

Ms JULIE BISHOP—As they do now.

Ms Vroombout—Yes.

Ms JULIE BISHOP—I guess we had better wait to see the final draft of the regulation.

Ms Vroombout—The third dot point on the list deals with licensing of natural person trustees, particularly in the context of superannuation funds. Representations were made to the minister that the bill was not clear as to whether each individual trustee had to be licensed or whether the group of trustees could be licensed. The view was also expressed that for some employer superannuation funds and the like it would be difficult for the trustees as individuals to satisfy the licence criteria.

So I guess what is being done in the parliamentary amendments is to create a notional entity—the group of individual trustees—and to have provisions that enable the licensing of that notional entity, the group of trustees, rather than require the licensing of each individual trustee. The fourth one replaces the licence obligation to act 'competently and honestly' in the bill as introduced, with an obligation to act 'efficiently, honestly and fairly'—and that is returning to the position in the current Corporations Law.

ACTING CHAIRMAN—Good.

Ms JULIE BISHOP—So there will have been judicial determinations on the phrase 'efficiently, honestly and fairly'?

Ms Vroombout—Yes.

ACTING CHAIRMAN—Yes. That was discussed when we were in Sydney.

Ms Vroombout—Representations were made to the minister that there was a body of case law—

ACTING CHAIRMAN—Yes, and the same to our committee.

Ms Vroombout—The next one deals with the respective roles of APRA and ASIC in relation to the licensing of APRA regulated bodies. Both in the bill as introduced and in these amendments there are provisions that require ASIC to consult with APRA when it is making licence conditions, or varying, suspending or revoking the licence of an APRA regulated body. Concerns were raised about the provisions that were in the bill as introduced, with suggestions that the requirements for compulsory consultation with APRA were a little broad. Those provisions are now being refined, to limit the consultation to situations where what ASIC is doing could have a significant impact upon the activities of the body which APRA regulates. There was a concern about APRA licences—for example, a bank's licence to conduct its banking business. ASIC licenses it to distribute those products. If ASIC revoked its distribution

licence then it could not do the activities that APRA had licensed it to do. In a situation where we are talking about the revocation of the licence, the revocation power is actually given to the minister rather than to ASIC. Where we are talking about other APRA regulated bodies such as super funds, there is a requirement for ASIC to consult with APRA before it does anything that can impact upon the activities for which APRA regulates the body.

The next point deals with the insider trading provisions. In the bill as introduced, the mental elements in all the offences have been made consistent with the Commonwealth Criminal Code. In relation to the insider trading provisions, that has meant replacing a mental element of 'ought reasonably to know' with a mental element of 'recklessness'—because that is what the Criminal Code would have implied. As a result of further representations following the introduction of the bill, concern has been raised that it might have meant raising the threshold of proof for that offence, so in the parliamentary amendments there has been a return to the mental element of 'ought reasonably to know'.

The final area is a fairly technical one and not one that is directly relevant to the rest of the Financial Services Reform Bill. Changes were made in the bill, as introduced, as to the definition of 'associate'. Some of those changes arose out of changes that were made in the CLERP Act that did not work as they were intended, so further changes were made to the definition of associate. It is a fairly complex definition and there has been a bit of toing-and-froing about what it should actually look like. Further refinements are being made in the parliamentary amendments to that definition of associate. It is a definition that largely works in relation to the takeover provisions in the Corporations Law.

ACTING CHAIRMAN—As there are no questions about the definition of associate point just discussed, what about the next set of points which have been flagged? Can you tell us much about those? I think it would be useful if you can.

Ms Vroombout—I can give you a broad idea. Thinking is not final on all of them and the minister has not made decisions on them, so all I can offer you is a bit more background to them.

ACTING CHAIRMAN—The committee is happy to go ahead and run through each of those quickly.

Ms Vroombout—The first one, and the one that I know you as a committee are familiar with, is the telephone monitoring provisions, and the concerns that have been raised about those provisions and the breadth of those provisions. The minister has indicated that he intends to narrow those provisions to telephone calls made to retail shareholders, so institutional investors and others and calls as between the bidder and target and to any white knights would not be captured by those provisions.

ACTING CHAIRMAN—Which are the main concerns?

Senator CONROY—Would this capture the minister making phone calls to boards of directors to interfere in their internal operations about takeovers?

Ms Vroombout—That is not something I can comment on.

Senator CONROY—No? Maybe he realised he was actually going to catch himself.

ACTING CHAIRMAN—Thank you, Senator Conroy. As there is no further comment on this, keep going.

Ms Vroombout—The next one is the definition of 'basic deposit product'. I know that you as a committee have received representations from CUSCAL, in particular, as has the minister, suggesting that the element of that definition that requires funds to be immediately withdrawable raises particular concerns for smaller credit unions who have discretion as to whether their customers can withdraw their term deposits at any time. That is something that is still being considered, but it is something that is acknowledged as needing further consideration to address the concerns raised by credit unions.

Another one raised with both the committee, and with the minister is definition of what is retail and what is wholesale in relation to superannuation products. What is in the bill at present is something that says everybody is retail in relation to superannuation products. A number of industry participants have come back and said, 'Well, in the broad that is fine,' but there are things called pooled superannuation trusts that act for other superannuation funds. Those pooled super trusts should not be required to meet the disclosure provisions in the bill, and other elements of the bill, in their dealings with other superannuation funds. Suggestions have been to put in a professional investor test in relation to superannuation, so that if a super fund is dealing with a professional investor they do not have to comply with the retail protections. Further thought needs to be given to just what you do; that is one option. Whether you limit it to dealings by a pooled super trust with other super funds or whether you just apply a professional investor test is a question that is still being considered.

ACTING CHAIRMAN—Just on that, we took evidence on Monday from the corporate super funds. These are the larger funds. I think they said their minimum was about $80 million in a fund with trustees from both employees and employers. It appeared from their evidence before us that they had not been aware of what had been going on—that was their claim anyway. They wanted to be basically excluded from some of the provisions of the bill. Were you aware of their concerns?

Ms Vroombout—We have heard the concerns of corporate super funds. The minister has indicated all along that the coverage of superannuation funds under the bill is significantly dependent on choice of fund legislation. When choice commences, all funds that are funds of choice under that legislation should also be subject to the FSR Bill. I am largely talking about the licensing provisions, in relation to disclosure. It is a timing difference between funds that you can choose and funds that you automatically go into. But in relation to licensing, the approach that will be taken is that, if they are funds that a person can choose to enter, then they will be subject to the licensing provisions. Under the choice legislation, there will still be a number of employees under state awards and those kinds of arrangements who do not have a choice. Given that the persons have no choice, they will not be subject to the licensing provisions in the bill.

Senator CONROY—I appreciate that you are in a position where you have to draft legislation based on the hope that the choice legislation will be passed by the chamber.

Ms Vroombout—The legislation itself is drafted in a neutral way. It is a reg power that will either bring in or take out super funds from the coverage of the bill.

Senator CONROY—So is that reg dependent on whether or not the choice bill passes?

Ms Vroombout—It will be.

Senator CONROY—It is unlikely. I am not asking you to comment; I am saying that, from what I understand of the debate, it is unlikely that it will pass. Does that affect the legislation or this amendment in any way? I am just trying to understand, from the explanation you gave.

Ms Vroombout—No, it does not affect the legislation and it does not affect this amendment. It will affect the drafting of the regulations.

Senator CONROY—Given that the choice legislation has not been before the Senate yet—though it has been mooted on a million occasions—how long can you wait before you have to draft the reg? The bill may not be presented.

Ms Vroombout—In a sense we might draft two sets of regs with different commencement dates: one which would anticipate choice, and one which would operate in the absence of choice.

Senator CONROY—At what point do you then decide, 'Right, we've got to go with this one as supposed to that one'?

Ms Vroombout—It may well be that they are both in there. Their commencement depends on what happens with choice, and their commencement would be linked with the commencement of choice.

Senator CONROY—I understand. Thank you.

ACTING CHAIRMAN—Just to get back to the corporate funds: one of the key points that they made to us was that their average cost of management was about half that of the public funds. They actually quoted a figure of 0.7 per cent to us. They were concerned that this legislation might force them to have a higher cost regime than they currently enjoy. First of all, are you aware of that, and has this been taken into account?

Ms Vroombout—The cost factor has not been specifically represented to us or the minister. But as I said—

ACTING CHAIRMAN—That is a particular point that the committee would like you to take on board, and come back and advise us about.

Ms Vroombout—Okay.

ACTING CHAIRMAN—Are there any other questions on that particular point?

Senator MURRAY—I understand very clearly what Ms Vroombout is saying, because choice does make a clear difference to licensing. But the witnesses before us the other night were very focused on the actual job they do and the function they perform, which did not, on their evidence to us, result in engaging in actual advice or the ability to influence the choices of the members of those super funds.

Ms Vroombout—The bill does not just require licensing for the giving of advice; it also requires licensing for dealing in products, which means issuing products. So their activity of issuing interests in the super fund would come within that element of the bill, notwithstanding that they do not advise their employees.

Senator MURRAY—They were also concerned that, if they entered the regime at any level, for any reason, they might have to be subject to the full application of the regime. For instance, one of the things they said is that there is absolutely no necessity for them whatsoever to have any capital for their role, because they are in a representative or a trustee capacity. They are not running a business, as it were.

Ms Vroombout—The provisions of the bill say that you have to have 'adequate financial resources' to do what you are doing. If all you are doing is dealing in the product, then it may be that you do not need significant financial resources. That will be a question for ASIC in administering the regime—what level of financial resources are required for what activities.

Senator MURRAY—They indicated that they feared that leaving that discretion to ASIC exposed them to some danger. I sometimes gently suggest to people such as yourselves constructing bills, that the precedent I have seen in the Workplace Relations Act 1996, which is often repeated elsewhere, of simply putting little boxes which indicate the intention of legislation without being enforceable at law—in other words, it is a guidance note within the legislation—often assists enormously in these areas because the regulator takes that as guidance, and it is not justiciable at court, which is the key thing.

Ms Vroombout—I have just remembered another provision that is in the bill that deals with APRA regulated bodies and that financial resource requirement. There is actually a provision in the bill that says if the body seeking a licence is one that is regulated by APRA, then they do not have to meet that 'adequate resources' requirement. It is taken that their APRA regulation is sufficient to satisfy that financial resource requirement.

Senator MURRAY—Nevertheless, I offer you a suggestion as a means of assisting in that area.

Ms Vroombout—Thank you.

Senator MURRAY—What are we on now—clarifying the scope of dealing on own behalf?

Ms Vroombout—The licensing provisions basically capture a person who deals in products, as in issues, or who arranges for the issue of a product on behalf of another person. There is an exclusion from the licensing provisions for a person who deals on their own behalf. Representations have been made to the minister that it is not clear how that exclusion operates in relation to, for example, a managed investment scheme that manages the portfolio on behalf

of the holders of interests in the fund. Work is being done to clarify what is actually meant by 'dealing on your own behalf'.

There is also an exemption in the licensing provisions for a product issuer—all they do is issue products through another licensee. Concern has been expressed that that is a little too narrowly cast and that a product issuer might do things like provide information to that licensee so that the licensee can issue the product, which might take them outside the exception. Work is being done on that exception to make sure that it works appropriately.

With respect to the final area that is being considered for further amendments, there are provisions in the bill which specify how a document is to be given to a person, how an FSG, a statement of advice, or a product disclosure statement, is to be given to a person. By and large they require it to be given to the person personally, or to their agent. It can be sent to an electronic address, and the document can be an electronic document. There are regulation making powers enabling further specification of those kinds of things, but the regulation making power may not facilitate, for example, documents being on a web site and then hyperlink arrangements ensuring that a person actually sees them before they can apply for a product. Representations have been made to the minister that those kinds of things should be accommodated. So work is being done on looking at that regulation making power to enable that kind of thing to be facilitated subject to appropriate consumer protections.

I wonder whether it might be helpful to go through the commission disclosure requirements in the bill. There seems to be some confusion as to when they do apply and when they do not apply, particularly in relation to risk products.

CHAIRMAN—I think that would be helpful. I think there has been some confusion—as well as about when they do and when they do not, about the issue of disclosure on risk insurance, non-investment products.

Ms Vroombout—The confusion seems to lie in that there are three different points at which commission disclosure is required by the bill. At each point it is required for a different purpose. The first point at which commission disclosure is required is in the financial services guide. That is the document that is given to a person when they first go and see a financial adviser, in which the financial adviser is telling them what services they provide and also telling them how they need to pay for the service: will they have to pay an up-front fee or is the adviser remunerated by commission? At that stage the dollar amount of the commission does not need to be disclosed, just the fact of remuneration by commission is what gets disclosed in the financial services guide.

Ms JULIE BISHOP—You could not always disclose it at that point, could you? It would not necessarily be calculated.

Ms Vroombout—You would not know because sometimes it is related to whatever product you are advising on.

CHAIRMAN—At that stage they would not necessarily have defined a particular product.

Ms Vroombout—That is right. The person has come in, you do not know what they want, so you just tell them how they pay you for the service that you are providing to them. That is the first point and that applies to all products. You have to disclose the way you are remunerated. The second area in the bill where commission disclosure is required is where personal advice is given: where a person makes a recommendation to a particular person that a product is a good one for them. At that stage disclosure of any benefit, advantage, whatever, that might influence the advice given, has to be made. So that means for all products, where advice is given, if something is capable of influencing the advice given then it needs to be disclosed. If personal advice is given in relation to a risk insurance product and if the commission is capable of influencing the advice given, then it has to be disclosed.

CHAIRMAN—The quantum, or just the fact that you are getting a commission?

Ms Vroombout—The bill is not specific, and the regulations will detail what actually has to be disclosed. It will be recognised in the regs that, in certain circumstances, the quantum may not be identifiable. On commissions it usually is, but things like volume bonuses, special holiday packages and those kind of things may not be always—

Ms JULIE BISHOP—A free set of steak knives does not have to be disclosed!

CHAIRMAN—That is opening up a bigger gap, then.

Ms Vroombout—These are incentives to the adviser to sell the product.

CHAIRMAN—One of the issues here is that salaried personnel do not have to disclose commissions because they are not paid commission—they are salaried—

Ms Vroombout—But if they receive a volume bonus—

CHAIRMAN—But you are saying that they will not have to disclose it.

Ms Vroombout—If they receive a volume bonus—something that is capable of influencing their advice—then they do have to disclose it.

CHAIRMAN—But not the quantum?

Ms Vroombout—If it is quantifiable, yes.

CHAIRMAN—If it is quantifiable! There is certainly a gap that has opened up between them and the commission agent.

Ms Vroombout—The basic approach is that anybody who receives a payment that is capable of influencing their advice has to disclose that payment, whether they are an agent or a bank employee. The bill does not distinguish—

CHAIRMAN—The bill does not, but you said that the regulations will—the regulations will require disclosure of monetary amounts but not necessarily of other bonuses.

Ms Vroombout—The regulations will recognise that not all payments are quantifiable. In some cases, it may be that the commission is not quantifiable. We are not going to be requiring the disclosure of something that is not quantifiable. If those volume bonuses are quantifiable, they will have to be disclosed; if commissions are quantifiable, they will have to be disclosed.

Ms JULIE BISHOP—By its very nature it could not be a volume bonus—it is ongoing.

CHAIRMAN—Yes. It depends on the volume. At any point in time the person would not know the volume.

Ms Vroombout—No, but they would have to say, 'I receive a volume bonus. If I sell X products in a month then I receive—

Ms JULIE BISHOP—They would have to go to that detail as to the actual formula by which their volume bonus is calculated.

Ms Vroombout—We have not got into the detail of drafting the regs. All I am trying to flag is that the regs will recognise that some things cannot be quantified.

The final point of disclosure is in the product disclosure statement—the document that is given to a person when they are purchasing the product. The purpose of commission disclosure at that stage is so that the person knows how much they are paying for the product and anything that can impact upon the return on the product. So in the product disclosure statement for risk insurance products, as a general rule the commission does not impact on the return on the product, so commission disclosure would not be required for risk insurance products as a separate element. You would still have to disclose the premium for the product but not separately disclose the commission in relation to a risk insurance product where it did not impact upon the return. I think that is where part of the confusion has arisen: people have seen that provision in the product disclosure statement requirements and the discussion in the explanatory memorandum about that provision and taken it as applying to the statement of advice situation.

Senator MURRAY—If the legislation is either unclear or leaves it to the regulator and the regulations to make it clearer, once again the box approach may assist. It was very clear to us in the evidence given to us that the competing provisions in the bill that you have just referred to were alarming risk insurers. If the matter is to be resolved, as easy an interface between legislation and regulation as possible should be devised. The box approach I outlined earlier is one of the ways in which legislators can explicitly guide the regulator without taking away the discretion to establish the regulations in the most practical form.

Ms Vroombout—I am not sure that the confusion arises as a result of different possible interpretations by the regulator. I think it arises because there are a number of provisions in the bill dealing with commission disclosure in different situations.

Senator MURRAY—That is where it arises.

Ms Vroombout—I think that, read as a whole, the bill is clear on its face as to when disclosure is required in those three different situations.

Senator MURRAY—But bear in mind that the behaviour of the person is going to be dictated by their belief as to what the bill, or the act as it will become, will say. In that circumstance, competing—or as they see it, competing—provisions in different parts of the bill may induce a wrong interpretation. I think if that exists as a fact, then we need to find a way to deal with it.

Ms Vroombout—To address it, yes.

CHAIRMAN—Mr Murphy, in his submission, put to us that the effect of commission disclosure on risk products will be to effectively cause product manufacturers to develop a level commission structure. He also said:

Level commissions is a means of the big end of the market maintaining inforce portfolios and reducing the services to the advisers which will cause a negative impact on the policy holders, clients ...

He also said:

Currently the cost of risk insurance over the counter is the same cost from an adviser and, generally doesn't come with the same level of advice and care.

He also raises the issue of level commissions basically making it impossible for agencies to recruit and train new staff. What is your reaction to those comments?

Ms Vroombout—I cannot comment upon what insurance companies are likely to do.

CHAIRMAN—It is an important issue that we have to consider.

Ms Vroombout—I am not sure what it is in the commission disclosure provisions that makes Mr Murphy believe that insurance companies will have a single level of commission.

CHAIRMAN—I guess it is the fact that they will become well-known between companies.

Ms Vroombout—But they will still be required to be disclosed, so I am not quite sure why—

CHAIRMAN—If they are publicly known and each company knows what the other company is paying, then they can use that to force down the commission that they are paying to agents to the same level. It is an important issue.

Ms Vroombout—Yes.

CHAIRMAN—You have not considered that?

Ms Vroombout—It is not an issue that has been raised specifically with us.

CHAIRMAN—It was in this submission. Are you saying that you have not examined the submissions to which you are responding?

Ms Vroombout—I have read all of the submissions, but I have not prepared detailed responses to all of them.

CHAIRMAN—That is why we want you here; to respond to the main issues that have been raised in relation to the legislation.

Ms Vroombout—There are a range of issues in those submissions. It was difficult for us to—

CHAIRMAN—This is one of the most important. We spent half a day on this issue. This is one of the most important issues raised with this committee.

Ms Vroombout—I cannot comment on how insurance companies will respond to the bill.

CHAIRMAN—Okay. Another issue raised in that submission was the effect the legislation has on changing the relationship between agents and principles and the impact this would have on the goodwill of the agent's business; in effect destroying his capital asset.

Mr Beckett—I think the way the legislation is drafted will provide options for insurance agents who are currently working under the IABA framework. They can choose to become a licensee in their own right, and the bill provides a qualified licensing regime. Alternatively, they can become an authorised representative of a licensee. In some respects, that is similar to the current arrangement under IABA whereby they have an authorisation from an insurer and the insurer takes responsibility for their actions and training.

The main difference is that, while they will still be able to operate on behalf of different insurers, they will have to seek written cross-endorsement—at the moment they just have to notify insurers. I think the bill was drafted in a way that was intended to provide greater flexibility so different industry participants could structure their arrangements as best suited their needs. It does not, I think, require a particular type of arrangement to exist. It is really a matter for industry to sort out how they structure their arrangements within the bill: of itself I think the bill does not force them to change. At the moment they have to represent an insurer, and in future they will have to represent an insurer who is a licensee. They can represent multiple insurers and they can subendorse if they are a corporate representative—which is what they can do now under IABA. A similar joint and several liability regime to that currently applying under IABA will apply.

CHAIRMAN—I think the issue is that under the existing arrangement the clients are in fact clients of the agent, whereas under the new arrangements—I am interpreting what was put to us—the clients actually become clients of the provider.

Ms Vroombout—The bill does not force that outcome. The bill has nothing to say about whose clients they are.

CHAIRMAN—I will quote you two instances from Mr Murphy's submission He says there is a concern about two aspects: the failure of a dealer and the breakdown in the relationship between a dealer and a proper authority holder. He says:

The first instance we have is a situation where a dealer would be the source of payment from the receiving funds from the individuals who are clients of the proper authority holder. Should he licensee fail and a administrator or trustee be appointed, the client would still be funding accumulation plans or in the case of income streams the asset commission would still be generated, but neither of these sources of income would be paid to the adviser. The adviser, I don't believe, would be considered to be a preferred creditor, and, all monies received would be held by the trustee in administration until an outcome was achieved. In that time, the adviser would not have received any remuneration, nor would he be able to move his clients because his clients are the clients of the dealer. Any income being generated from the business of those clients would also be held by the trustees.

… … …

The adviser would then have to go and establish a new client base, a new portfolio before receiving any remuneration from their business or applying the skills for which they have been trained. If he hadn't gone broke already.

Ms Vroombout—As Ian said, the bill does not force any particular structural outcome as between insurance companies and their agents. The one that they have at the moment where they are not an authorised representative or the agent of the insurance company is one of the options available under the bill. The other option available under the bill for those agents is to seek a licence in their own right. The one that they seem to be talking about is where a licensee is interposed—the dealer they are talking about—between them and the insurance company and they act as the authorised representative for that licensee. That is one of the structures that the bill provides for, but the bill does not force any of those particular outcomes. It is a question of commercial negotiations between the insurance companies and their agents.

CHAIRMAN—But it does remove multi-licence holdings legislation, doesn't it?

Ms Vroombout—No, it doesn't. What it does require is the approval of each of the companies to that multi arrangement as distinct from, at the moment, its notification.

CHAIRMAN—That is a pretty big change. It means one company can prevent you from having access to another company.

Ms Vroombout—At the moment they are liable for all of those activities. The companies, I guess, put the view that if we are liable for their activities when they work for somebody else we should also know and be able to say who else they can work for, which is what the joint and several liability provisions say. If you can attribute liability to a particular insurance company, then that is who is liable. If you cannot figure out which of those insurance companies is responsible for the activity, then they all are.

CHAIRMAN—Right; I understand that. And that does not apply at the moment?

Ms Vroombout—At the moment under IR, but there is a notification requirement. The liability requirements are the same.

CHAIRMAN—The liability requirements are regarded as acceptable at the moment, so why change that?

Ms Vroombout—We are not changing the liability requirements.

CHAIRMAN—No, but you are giving the companies or the product provider greater power over the agent than they currently have, and you are attributing that to the liability issue.

Ms Vroombout—That is one of the issues. The other point I would make is that that consent requirement is in the current Corporations Law. The current provisions in the Corporations Law have that cross-endorsement requirement, as distinct from the notification requirement. So I guess the question for the government in putting together this single licensing regime was: which way do you go? The decision was taken to go with the cross-endorsement or consent requirement rather than the notification requirement .I think that is probably an issue that they should be pursuing with ASIC to see what those capital adequacy requirements are.

CHAIRMAN—The argument they are putting—that it is increasing, if you like, the big end of town as against the small operator—is probably valid. Whatever the reasons, that is the practical outcome.

Ms Vroombout—But there are options available to them, one of which is to seek a licence in their own right.

CHAIRMAN—In practical terms that is not an option because of the capital adequacy requirements and so on.

Ms Vroombout—I am pretty sure that ASIC, in its policy papers, has not said precisely what capital adequacy requirements it will impose under the bill. I think that is probably an issue that they should be pursuing with ASIC, to see what those capital adequacy requirements are.

CHAIRMAN—The second issue he raised is where a licensee or dealer decides to suspend or cancel the proper authority of an adviser for any reason other than a criminal or fraudulent act. He says:

> The adviser would then have to seek another dealer to provide him with a proper authority. It may well be in this transitional period that the adviser would need to undertake additional studies, or meet the requirements of another dealer group, which may not be in the immediate interest of the adviser.

During that period, the adviser is left in a situation where they cannot act, and the clients introduced to the original dealer would stay with the dealer because of the adviser not being in a position to provide services to those clients as a result of not having authority to advise. In other words, they are saying, if the dealer decides they do not like the colour of your eyes or whatever and they want to revoke your authority, they can do it and you are really left without any redress.

Ms Vroombout—I am not sure why that is significantly different from the current agency agreement arrangements. If an insurance company wants to—

CHAIRMAN—The point is that at the moment they can have more than one agreement.

Ms Vroombout—We are saying that they can under this bill, too.

CHAIRMAN—Only with permission. You have already said that it is much more restricted than under the existing arrangements.

Ms Vroombout—Yes.

CHAIRMAN—It seems to me that the case is that the whole thing is being skewed toward the dealers—most of which are now owned by the major companies, predicting that, in the future, all of them will be owned by the major companies, so there will be a limited number of dealers.

Ms Vroombout—I go back to the same point: the bill does not force any particular outcome, but gives these people a range of options as to how they operate under the bill.

CHAIRMAN—In theory. But what they are saying is that, in practice, they are not real options.

Ms Vroombout—Some of them could explore with ASIC what it would require for them to seek a licence in their own right.

CHAIRMAN—To have to explore it with ASIC rather than it being in black-letter law is leaving it pretty uncertain, isn't it? If ASIC says, 'No, we are going in this direction,' they are left without a feather to fly with.

Ms Vroombout—The bill gives them a number of feathers to fly with and a number of options.

CHAIRMAN—You are saying that it is dependent on ASIC, though.

Ms Vroombout—I am saying that for them to seek a licence themselves will be subject to ASIC's granting that licence and ASIC's view of the application of the licence criteria to them, as it is for anybody else who seeks a licence.

Senator CONROY—I would like to examine the obligations of a financial market operator under the FSR Bill compared to the obligations currently under the Corporations Law. Comparing section 792A of the FSR Bill with section 769A of the Corporations Law, I do not see an obligation for a licensee to have arrangements for the expulsion, suspension or disciplining of a member for conduct inconsistent with just and equitable principles in the transaction of business, or for the contravention of the exchange's business rules or the conditions of a licence held by a member. The FSR Bill obliges licensees to have adequate arrangements for monitoring the conduct of participants in the market and enforcing compliance with the market operating rules. Also, there is the obligation to have adequate arrangements for the settlement of transactions and to have adequate arrangements for investigating complaints by investors relating to the transaction of the business of investors on a stock market of the exchange. Can you take me through those obligations and explain why they are missing or how they are to be dealt with under this regime?

Ms Smith—A number of those sorts of obligations, which are mentioned on the face of the Corporations Law at the moment, as to what should be under business and listing rules, for instance, will be specified in regulations under section 793A. There is also provision under section 793A requiring written procedures on certain matters. That will also include some issues of regulatory interest which are not appropriate for the business or listing rules.

Senator CONROY—Could you take me through the ones you think are and are not appropriate?

Ms Smith—The regulations have yet to be drafted, although instructions have been given. You are interested in the provisions that are currently in—

Senator CONROY—I am talking about section 769A of the Corporations Law.

Ms Smith—The 'fair and orderly market' I think is addressed in the face of the new provisions. As to 'monitoring and enforcing compliance', that is under 'supervision'. 'Adequate arrangements for expulsion'—

Senator CONROY—By 'supervision' do you mean that does not need to be there because the ASX do that?

Ms Smith—They are required under the bill to have 'adequate arrangements for supervision', under 792A(c).

Senator CONROY—What do you think is meant here by 'supervision'? The stock market have appeared before this and a number of other committees and said, 'We're not a market regulator,' so what do you think is intended by the word 'supervision'?

Ms Smith—I think they are regarded in the legislation—currently and as proposed—as the front-line regulator, and that is their having a certain role in relation to the conduct of participants on that market, and in relation to listed entities.

Senator CONROY—As I said, another committee is examining the supervisory role—you may be familiar with it, or you may be forced to read *Hansard* and commiserations if you are!—and the stock exchange have made it clear they do not consider themselves to be a market regulator of any sort. They believe they have no powers to enforce anything and that that is not their role. They have made that very straightforward and clear statement. At the end of the day it is probably a policy question, so I am not asking you to comment outside your area—but I am interested in your interpretation of the word 'supervision', and what onus you think that puts onto the ASX.

Ms Smith—I think there is an onus, and there are certainly ways in which they can enforce their business and listing rules. Those are provided by the law currently and as proposed, and there is a memorandum of understanding with ASIC about their passing relevant information to ASIC through their oversight of market activities if, for example, the information indicates insider trading.

Senator CONROY—One of the points that the ASX have raised in discussions with the committee is that they only have one sanction: to suspend listing. They can pass information on to ASIC—except that that is not a sanction. So in terms of supervision their only sanction, if they believe their listing rules have been breached, is to suspend them. They indicated that they are very reluctant to do that because the costs to the shareholder base—on whose behalf, technically, they are representing and supervising—of doing that are far more dramatic than just a mere breach. They feel that because it is the ultimate sanction, it is no sanction at all, because

they will never really do it. I am not trying to put words in their mouths, but I think that was essentially their argument. Their problem was, 'Because we have no intermediate steps, we only have the final solution, it is impractical so we don't use it.' Do you think that approach is a problem for them, in terms of the interpretation—in the way you have described it, as supervision—and the onus that you mentioned?

Ms Smith—They have not put to us, in the context of the Financial Services Reform Bill, that they need greater powers in relation to listed entities.

Senator CONROY—That is not my point. They actually say, 'We don't want greater powers; in fact, we don't want any powers, and we don't believe we've got any.' At the end of the day it may be a policy issue for the minister to try and resolve, but they actually almost rejected—and I am not trying to be pejorative—or they do not accept the sort of definition that you would be putting forward.

Ms Smith—I think you were going through the 769A subsection.

Senator CONROY—Yes. I stopped you after the second one, sorry.

Ms Smith—The third one is expulsions, suspensions, disciplining, et cetera. This will be addressed in the regulations, as to what is required to be included in the rules and written procedures. That certainly covers access and the subsets of access.

Senator CONROY—Do you have any idea when those regs will be available?

Ms Smith—Drafting instructions have been provided to the Office of Legislative Drafting. We have not got a draft back yet.

Senator CONROY—Do you think the regs will be available before the bills are debated in parliament? Is it your hope?

Ms Smith—Debated in the House?

Senator CONROY—Sorry. The House will hopefully deal with it today or tomorrow, but what about the Senate? Do you think they will be available for their—

Ms Smith—It is possible that there will be an exposure draft.

Senator CONROY—If you could keep going, thanks.

Ms Smith—'Adequate arrangements for the settlement of transactions that result from trading in securities'—that is the clearing and settlement arrangements. And (e), 'adequate arrangements for investigating complaints by investors', relating to transactions on the business and for investors on the stock market or stock exchange. Again, investigations to a certain extent appropriate to the role of the market operator would be required in the written procedures

Senator CONROY—What do you envisage? What is your interpretation of a level for investigating complaints?

Ms Smith—Relevant to the market operator's obligation in supervising the market, it has to—

Senator CONROY—The point in the Corporations Law is about having adequate arrangement for investigating complaints by investors relating to the transaction of the business.

Ms Smith—It is a question of the division of the responsibility between the market operator in investigating such matters and the responsibilities under the financial service providers' licence for ADR type schemes.

Senator CONROY—Are there any more points?

Ms Smith—You have got to the end of that.

Senator CONROY—Okay. Comparing section 792A(a) of the FSRB with the existing provision in 769A(1)(a) of the Corporations Law, the obligation appears to have changed from one of 'ensuring that the market is an orderly and fair market' to that of 'ensuring that the market operates in a way that promotes the objectives of fairness, orderliness and transparency'. Is that a watering down of the obligation?

Ms Smith—No, we do not see it as that. They are objectives. I do not know whether you can ever say that something is completely fair and orderly. There are also the tensions between the individual words, which was brought to our attention.

Senator CONROY—The word 'ensuring' and the word 'promoting' are not the same, and I do not think that the *Oxford English Dictionary* or the *Macquarie Dictionary* would define them as being the same. Would they?

Ms Smith—Quite possibly not.

Senator CONROY—If I looked up a simile book, those words would not be listed next to each other as being interchangeable, would they?

Ms Smith—No.

Senator CONROY—So we are agreed then that they are not the same. 'Ensuring', to borrow one of your words, seems to place an onus or an obligation on them to deliver this outcome. The new words, such as 'promoting', appear to be fairly broad. You could promote motherhood—it never happens. You could promote global peace—it never happens. Therefore you have got no real pressure on you to deliver the outcome, whereas the words 'ensuring that the market' seem to have a more stringent interpretation.

Ms Smith—I see the difference as being cosmetic, and the intent is not different except we have introduced the concept of transparency as well.

Senator CONROY—So you would be relaxed then if the word 'ensuring' was moved and replaced, given that it is cosmetic.

Ms Smith—The point the markets would probably make is that there can be tensions between fairness, orderliness and transparency.

Senator CONROY—If the market said to you that there is tension, what would those tensions be? I am struggling to see how they can conflict, but I would love to be informed.

Ms Vroombout—Upstairs markets are available only to certain people and the trading information is not available to the market as a whole. Perhaps they would not be as transparent, but they may meet orderly criteria, so there is some balance between the two.

Senator CONROY—Would you take me briefly through what an upstairs market would be? Is that for rich people? Are we talking upstairs, downstairs here: the schmucks are downstairs operating the exchange; in the upstairs market there are a few cosy deals, glasses of whisky, cigars and nice comfy chesterfields?

Ms Smith—I think they are referring to large parcels.

Senator CONROY—Exactly. My question stands. Your answer complements it, unfortunately. The belief by the market—I presume that is the ASX—is that ensuring that the market is orderly and fair is restrictive of the upstairs-downstairs operation. Is that the problem?

Ms Smith—They have concerns about the implications of transparency.

Senator CONROY—Of the existing words in the Corporations Law.

Ms Vroombout—Not the existing words; the inclusion of the new word 'transparency'.

Senator CONROY—I would have thought that they are required to comply with the Corporations Law anyway. I guess that is a debate we will have in the chamber with the minister. ASIC has a power under section 794C to assess a market licensee's compliance, yet no power to require information from the market operator. How is it envisaged that ASIC will conduct its assessment under section 794C?

Ms Smith—There is section 792D, the obligation to assist ASIC, and section 792E, to give access to market facilities.

Senator CONROY—So you think that they cover off on ASIC having all the available information to conduct its investigation? You think that they are broad enough, that they give ASIC the power to get the information?

Ms Smith—For particular ones. Of course, there is the ASIC Act as well.

Senator CONROY—And a memorandum of understanding and a variety of other things. So would you be confident? Have ASIC expressed any concerns?

Ms Smith—No, I do not think so.

Senator CONROY—There is a curious note on paragraph 8.3 of the explanatory memorandum referring to the end of the special position of the Australian Stock Exchange Securities Clearing House, which says:

> The proposed provision will permit but not require more than one clearing and settlement facility to handle the clearing and settlement of transactions executed on the one financial market. As a consequence of this, problems may arise about consistent treatment of the same issue by different facilities. This will need to be addressed but does not present a reason to retain provisions with an anti-competitive effect.

If the situation arises that there is more than one clearing and settlement facility on the one financial market, what is proposed to ensure that there is consistent treatment of the same issue by different facilities?

Ms Smith—Under 7.2, the arrangements with clearing and settlement facilities are relevant to the licence of the market operator. In the case of the Australian Stock Exchange, at the moment the expectation is that all trades would be settled through ASTC, the Australian Stock Exchange Securities Clearing House. It is unlikely that there would be a real competitor until another clearing and settlement facility was prescribed for the purpose of division 4 part 7.11 of these provisions—that is, it could also provide electronic transfer of legal title. In that process there has to be an assessment of the services it will offer, whether it would be in competition with another clearing and settlement facility, and the arrangements for consistent treatment of things like some of the matters which are currently dealt with in the provisions relating to the securities clearing house, such as the treatment of who is a member for the purposes of an annual general meeting and so on.

Senator CONROY—What I was asking was: what is proposed? Is there a regulation that will cover this? I appreciate, as you say, that there is not likely to be a competitor the next day, but the whole purpose of this is to open it up to competition. So I am just trying to get a feel of what you are proposing and whether you have looked at what will be necessary.

Ms Smith—To become a prescribed clearing and settlement facility for the purpose of division 4 of part 7.11, you have to first be a licensed clearing and settlement facility under 7.3.

Senator CONROY—So you think that licensing process is where that would be captured?

Ms Smith—The licensing process and also the rules; a lot of these matters are dealt with under the operating rules of a clearing and settlement facility and the backing—

Senator CONROY—It is a bit like access to terminals for airlines: the capacity to be forced to use an existing terminal and not being allowed to configure it in your own way, and not being allowed to build a structure. The ASX has a clearinghouse at the moment, which is hand in glove. So the question is: will a new company have to essentially adopt the same model? That is if electronically they are not compatible and if the ASX builds its structure in a particular way.

I know this is a problem because Computershare, who run a share registry, have concerns about how they can interact with the exchange at the moment in terms of a share registry. If they do not configure it in the way that the ASX chooses to configure its, then they have

compatibility issues. Have you considered those sorts of problems, which are real problems that Computershare currently have? I just foresee that this will be a problem if we look at it from the regulatory point of view that says, 'Here's how it works. You've got to fit into the terminal. You may have a differently sized plane but you are going to use the same terminal and you've just got to buy the same plane we've got.' Do you follow the analogy?

Ms Smith—I can see there are difficulties because the ASX is what it is now, but certainly the—

Senator CONROY—There may be a requirement to make the ASX's interface more generic rather than purpose built for the ASX's existing clearinghouse. That is what I am probably driving at. It is like separating the hand in glove so that the interface is more generic. They are going to say, 'This is what we built. This is how it is: if they want to access our market, they've got to have the same sized hand as us.' Whereas, the others may say, 'We've got an operating system. We just want to interface, but we're restricted by the fact that the interface is purpose built for the ASX's clearing house.'

Ms Smith—I can see the difficulty you are pointing to but there is a question whether it is appropriate for this legislation to address what seems to be a competition issue.

Senator CONROY—I accept that. I was trying to get a feel for how you propose to ensure that this problem does not happen—it may be by regulation, or it may be that you say, 'This is off to visit Allan Fels again,' so that they do not have that problem. That is what happened in the airline terminal issue: they ended up going to Fels and Fels directed that access be granted. Now, that did not address the size of the plane issue. If they wanted to bring in a new four-level airliner, they could not dock it at our existing airport. To a degree that is a policy issue for a little bit down the track but I was wondering if you had considered that.

In relation to the shareholder limitations and market operators, paragraph 9.8 of the EM refers to guidelines being issued to indicate what matters will be considered when determining whether a market is of national significance. Have those guidelines been released?

Ms Smith—No, but they are indicated in the explanatory memorandum at paragraph 9.9.

Senator CONROY—I appreciate that they are in 9.9. Will they be required to be released?

Ms Smith—Yes.

Senator CONROY—Have they been released?

Ms Smith—Not so far as I am aware.

Senator CONROY—Any idea on the timing?

Ms Smith—No, but I can find out.

Senator CONROY—I think Senator Gibson asked about this, but I just wanted to go over it. I have one further question in relation to the clearing and settlement facilities. The latest amendments provided to the committee indicate the RBA has a role in supervision of these facilities. Can you explain the role of the RBA and the rationale for that? I apologise; I know you have covered some of that. How many regulators will an entity like the ASX now have to deal with and how clear is the delineation between the regulators? It has been put to me that the ASX will now have to deal with three regulators: ASIC in some issues; APRA in some issues; and now the RBA in some issues.

Ms Smith—I do not know how many issues they would have to speak to APRA about except in relation to the supervision of some participants who are also regulated by APRA. I do not think there is any direct regulation of the Australian Stock Exchange by APRA, so that leaves two for the Stock Exchange to deal with. As to the rationale, there has always been concern regarding systemic risk in relation to clearing and settlement facilities. That was acknowledged in the exposure draft of the legislation. That exposure draft built in obligations to reduce systemic risk on the operators of clearing and settlement facilities. It also envisaged a possibility of a parallel licensing regime under the Payment Systems (Regulation) Act 1998 for clearing and settlement facilities of particular significance to the payment system. That route was not taken up in the final bill because of the difficulties about comparability of the two regulatory regimes, and developments in Australia in the clearing and settlement field. So the outcome is a recognition of the role of the Reserve Bank in relation to systemic risk generally, and their taking on the oversight of the obligation for—

Senator CONROY—I thought APRA covered systemic risk. I appreciate it is for a certain set of institutions, but I thought APRA was the systemic risk regulator nowadays and the Reserve Bank had lost those roles. I am interested to see why the Reserve Bank seem to have recaptured this for one particular set of institutions. Maybe they just have a better lobby than APRA at the moment, and that would not be hard. I was wondering why they seem to have it carved out and given back to them when most of those systemic risk issues have been passed to APRA.

Ms Smith—They see it as close to the payment system and the role of the Payment Systems Board in that connection.

Senator CONROY—In creating this new role, does the ASX have its own clearing house?

Ms Smith—That is right.

Senator CONROY—If you did not do this, it may be that ASX was left in charge of supervision of the other competitors?

Ms Smith—ASIC would be.

Senator CONROY—No, the ASX. Would the ASX be in charge of licensing and regulating? Was there a perception of a potential conflict of interest unless the Reserve Bank picked up this new enhanced role? I think there are only two clearing houses at the moment which are regulated. Do the RBA currently look after the ASX Clearing House?

Ms Smith—No. They have no role on the face of the legislation, but if an issue of systemic risk arose ASIC would contact the RBA.

Senator CONROY—Again, I know you have briefly touched on the next couple of questions, but I wanted to clarify a corporate funds issue. I think Senator Chapman or Senator Gibson mentioned it earlier. Is it the obligation of a licensee that it has available adequate resources to provide the financial services covered by the licence and to carry out the supervisory arrangement? This is not an obligation if the licensee is a body regulated by APRA. Are corporate super funds a body regulated by APRA, so they are exempt from that obligation?

Ms Vroombout—Yes.

Senator CONROY—The licensee must also obtain the competence to provide their financial services. How is competence to be determined when you have a system of representative trustees, as in a corporate super fund? Is it to be determined collectively? Is that what is intended by the new section 761FA? Does that mean there are five things that would demonstrate competency, and all five of them must be represented among the trustees?

Ms Vroombout—Yes.

Senator CONROY—How is that actually going to work and what would the competencies be?

Ms Vroombout—Ultimately, it will be a question for ASIC to determine in licensing the body. Either of those outcomes, I think, would be available to the trustees.

Senator CONROY—What would be the competencies that the board would be required to have collectively?

Ms Vroombout—It depends on what—

Senator CONROY—They are trustees of a super fund. They are fairly well defined so I would have thought that—

Ms Vroombout—But the fund may advise employees, or the fund may merely issue products. So it depends on what the activity is as to what the competence—

Senator CONROY—Most funds do both.

Ms Vroombout—Then the competence would be addressed to both of those things.

Senator CONROY—If this were a corporate fund for Merrill Lynch, I could understand that having employees come onto the board might enable you to meet some of the competency requirements. But if there is a truck driver who happens to be in the Transport Workers Union—which you have probably heard by now I am very fond of and I am a member of—and he were to be appointed onto the board, I cannot see them adding to the competency list; and I am trying to ascertain what that would be. That may even be the same because a lot of employers in the

trucking industry are former truck drivers; it is very common. I am just concerned that, even though you are allowing a collective competency, unless a truck driver happened to also have a financial services licence, because they may be in between driving trucks and speculating on the stock market, you could still end up with no collective competencies as potentially defined on your board. Do you think that solves the problem of requiring a board to be collectively competent?

Ms Vroombout—I think the competence of an authorised rep to advise is very different from the competence of the licensee who authorises that person. The competence of the licensee who has people acting for them is to have systems in place and to have organisational competence to ensure that those who are acting for them perform their duties appropriately. It does not mean that they themselves need to—

Senator CONROY—So as long as the systems are in place to guarantee the competencies, that would then be a tick off on the board competencies?

Ms Vroombout—Ultimately it will be a question for ASIC as to what it requires.

Senator CONROY—Could you tell me what the government's intent is? I think this is a bill that is meant to give life to a government intent. What is the government's intent? I appreciate that you say that ASIC will make an interpretation, but what intent are they going to interpret? Someone one must know. I appreciate that the minister is not here, but the government must have expressed an intent; they must have said, 'This is what we want you to achieve—go away and draft something that achieves this, and ASIC can interpret it.' So what is the government's intent?

Ms Vroombout—We did not look at each individual situation, but looked across-the-board at what requirements a licensee should have. How those requirements are met in each particular situation is a question for ASIC in administering the law.

Senator CONROY—What competencies are required to meet the goal that the government's bill states it wants to meet?

Ms Vroombout—The bill itself says you have to be competent to perform the service for which you are licensed.

Senator CONROY—If you are just a group of truck drivers—this applies to the majority of Australians in the majority of funds, and I am talking about individual numbers rather than the large corporates; in particular I am talking about the industry funds which have many millions of members—you are unlikely to find any of the competencies that you appear to be seeking through the licensing process, certainly among the employees and, I would be willing to argue, in the case of most of the employers as well. While I accept that this is an attempt to possibly accommodate this concern, unless we have something definitive from the government it will be hard to make a judgment about whether or not this addresses the concern. I appreciate that it is an improvement on the existing position, which is really why I am asking about the intent. Is the government's intent to have the required competencies collectively on the board? To me it still seems that, while it is a genuine attempt to address this issue, it will not actually address the problem of—

Ms Vroombout—The competence requirement stands. A question remains as to how ASIC interprets it in each particular situation and industry but, yes, the competence requirement still stands for the collective group of trustees.

Senator CONROY—So if we are lucky enough to be working in a financial services industry, we might just be able to find some people who would be trustees and who meet the competencies because of their professional backgrounds.

Ms Vroombout—As I said, the competence at the licence level, as distinct from that of the person actually giving the advice, is almost an organisational competency issue: the ability to know whether those people who are performing the activities are doing it appropriately.

Senator CONROY—As you probably—frighteningly—may know, my job used to be going round on behalf of a super fund, talking to members—truck drivers. I think I understand that I will have to be licensed, potentially, because I am going around inviting them to keep putting money into their own fund. So I, in my previous life, am probably captured. I am trying to find out whether my old boss and the old board are going to be captured. Despite what I think is a genuine attempt to address the issue, I have a suspicion that the collective position on the TWU super fund board is that not one single member would meet any of the competencies required. Maybe by accident the corporates do, by dint of which corporate fund it may be. It may be so in the Merrill Lynch corporate fund, but if you are the Coles Myer corporate fund, I suspect almost nobody on the board would meet the competencies, other than the financial officer who may be appointed to the board. But I can take that up with the minister. Again, I suspect that that is more a policy position.

It is stated that a licensee must also obtain adequate systems for training and supervision of representatives—which would have been me. Corporate Super has put in a submission to the committee, as has Freehills, that this obligation does not readily translate to the administration of super funds by elected trustee representatives, who rely heavily—again this is going over some of the ground we have just been talking about—on outsourcing specific functions to qualify as providers in order to meet their responsibilities. How do you contemplate the obligation for systems for training and supervision of representatives applying to those corporate super funds?

Ms Vroombout—Part of it is that they have appropriate systems for monitoring what they have outsourced. The bill does not prevent outsourcing. What it would require is proof by the licensee that they have appropriate checks and balances in relation to the people to whom they have outsourced those obligations.

Senator CONROY—The submission to the committee from the commercial law firms suggests that they will need to be licensed as well if, in the context of a construction contract, they warn a client for the need for insurance. How do you respond to that?

Ms Vroombout—In my opening I talked about the regulatory neutral regime that we are setting in place, and the objective of that regulatory neutral regime. If a person gives financial advice, then they are subject to the bill, regardless of their profession or other activity. So the question is: are they giving the kind of advice regulated by the bill? If they are, then why are

they any different from a financial adviser who gives the same advice, and why should they be subject to any lesser obligations than a financial adviser who gives the same advice?

Senator CONROY—That is a good answer. Would you consider, in the context of a construction contract—you are getting your legal advice all organised for it—that if they suggested to the client that they do need to be insured, that would be giving financial advice?

Ms Vroombout—I think it would depend very much on the facts and the circumstances surrounding it. It would be difficult for me to make an assessment of that.

Senator CONROY—If you do not know, when you have done a lot of the legwork on this bill, how is anyone else going to know?

Ms Vroombout—I do not know the full circumstances surrounding the giving of that information to the client. It is very difficult for me to give a definitive legal opinion without knowing the full facts.

Senator CONROY—I am trying to work out which extra part of the facts you would need. Let us say I go in and ask for an interpretation of this contract. They go through and tick it all off, and it is all fine. And then they say, 'Oh, by the way, you probably need to take out insurance.' I am not sure what part of the facts you need. Do you want it to be in two separate meetings, so they come in, tick off the legal contract, then leave and come back five minutes and say, 'Now—

Ms Vroombout—Perhaps all they say is, 'You might want to think about taking out insurance.' The definition of advice is 'a recommendation or statement of opinion that is intended to influence the person in making a decision in relation to the particular product'.

Senator CONROY—So, in your view—and no-one would know better than you—if they said, 'You might need to think about getting insurance,' that would probably escape—

Ms Vroombout—Possibly.

Senator CONROY—You are a lawyer, aren't you? I can tell.

Ms Vroombout—Yes.

Senator CONROY—But if they said, 'You will need insurance,' that would probably fall the other side of the line?

Ms Vroombout—Yes, or, 'We think that you should take out insurance.'

Senator CONROY—So new lawyer talk should be 'you might need to do this' rather than 'you will need to do this', or 'you should think about doing this'. You are drafting it; I am asking you for help! A million lawyers are going to be reading this transcript, saying 'What did she quite mean?' I will move on: I am not sure that we can go much further along that path. The accountants were saying the same thing. They do not give financial advice either. I am sure you

have been witnessing all of the people in this country who do not give financial advice appearing before the committee.

Ms Vroombout—In part the declared professional body provisions were intended to address some of the concerns raised by those professions—that they are already subject to high professional standards and regulation by their professional bodies.

Senator CONROY—That does not mean, though, that they are qualified to give financial advice.

Ms Vroombout—That is right.

Senator CONROY—I understand Senator Chapman did ask some of these questions. The multi life agents have given evidence before the committee. As I understand their position, the FSR Bill will force them to seek appointment as an authorised representative, which may not be on the same terms and conditions as their current agency arrangement. Have you looked at this issue? They suggested that this was a constitutional issue: that you were taking away an existing legal commercial property right.

Ms Vroombout—The constitutional issue is something that I have not seen before and something that we have not had an opportunity to explore. What I would say—and I did say in response to questioning from Senator Chapman—is that the bill itself does not force any particular outcome. It is neutral as to the structural arrangements. They can continue to act as an authorised representative for a number of insurance companies, they can go and get a licence themselves, or they can act for a dealer.

Senator CONROY—They say they cannot continue to act; the bill will actually stop this. They say they will no longer be licensed under their existing law and they will need to reapply, if you like, for a new licence, even though they will be reapplying for the exact, existing position.

Ms Vroombout—Agents themselves are not licensed under existing law. They operate under the Agents and Brokers Act but there is no licensing or registration—

Senator CONROY—That is an act though, isn't it? They are forced to be registered in a particular way.

Ms Vroombout—Agents, no; brokers, yes.

Senator CONROY—We are talking about small business, so goodwill and value are of concern to them, and they are essentially arguing that if the bill is introduced in its current form the value of their existing business will go to zero, because they will not be able to continue to operate. I appreciate that you described as neutral the choice they have between two paths—but they are saying that they do not have the choice to stay doing exactly what they are doing. If the bill is introduced their business—which has a notional value because they have long-term contracts, a whole range of clients, and there is a value to what they are doing right now—will have no value. It will have zero value. They will have to enter a new set of negotiations in which, if they are lucky, they will get all their existing terms and conditions. So they can

actually get their value back up to what it was, but if we pass this bill in its current form we will actually leave them in a position where the value of their business has gone. They are saying that under the constitutional provisions—and *The Castle* gets a guernsey at this point—taking away a property right means they are due for some compensation—to the value, potentially, of their existing contracts, because you will have effectively terminated their existing contract.

Ms Vroombout—As I said, this is the first time we have seen the constitutional argument and we will need to take it away and consider it.

Senator CONROY—I notice that there is to be an amendment restoring the requirement for a licensee to act 'efficiently, honestly and fairly'. It is, however, still expressed to be 'only to the extent that is reasonably practicable to do'. Where has that exemption come from?

Ms Vroombout—That was in the exposure draft of the bill, released in February last year. There were no comments at all on its inclusion in that exposure draft bill.

Senator CONROY—I was not invited to make a submission.

Ms Vroombout—Nobody submitted on it in the bill. Where it came from is that, yes, those are the words that are in the current Corporations Law, but those words are being applied to a much wider range of people, to whom both 'fairness' and 'efficiency' may have different meanings to the meanings they have in a dealing between a stockbroker and its client.

Senator CONROY—I would have thought there were some fairly straightforward legal interpretations of 'efficiently', 'honestly' and 'fairly'. They have been around for a while in the Corporations Act. It is the 'to the extent that it is reasonably practicable to do so' part that I find quite extraordinary. Does it mean that you do not have to be efficient, honest and fair if it is not practical?

Ms Vroombout—To not have it, makes it strict liability to do something that to a very small extent is not fair, but is extremely efficient. It is similar to the markets licensing one. Something that is very efficient might not be very fair.

Senator CONROY—If I could try to characterise it so that it makes sense to me—at the moment there are three tests that you have to pass; the clause 'to the extent that it is reasonably practicable to do so' allows you to trade between the three tests and, in effect, only meet one of them. It may be efficient—

Ms Vroombout—To have an appropriate balance of all three is what it requires.

Senator CONROY—Whereas, at the moment, that is not the case. You have to meet all three tests.

Ms Vroombout—I not quite sure of the case law on it, but I suspect that even on the current formulation there is some balance between the two, because they are not mutually exclusive concepts.

Senator CONROY—I am sure that is right. I am sure the case law does seek to strike a balance. What I am concerned about here is that the balance is probably going to be at the top end of meeting 'efficiency, honesty and fairly', but that with the clause that you have now inserted, it allows the argument to go forward that, 'If we meet one of the three, we are meeting the legislation.'

Ms Vroombout—I do not think it allows that.

Senator CONROY—That is one of the bravest calls I have ever heard from a lawyer and I look forward to you defending that in a court case. But at least I now have an understanding of what is intended, and we will take it up with Senator Kemp in the chamber.

The consumer groups in their submissions expressed concern about the potential for abuse created by a licensee not being responsible for conduct of a representative if that representative discloses to a client whether they are acting outside their authority. What is the rationale behind that carve-out of that liability and what will be required to make sure that the client knows that the representative is acting outside their authority and understands the implications of that?

Ms Vroombout—The first point I would make on that provision is that it does not apply to criminal and civil actions that are available under the bill. The criminal and civil liability provisions under the bill operate on their face without that provision applying to them. So that provision only applies to, in a sense, common law actions for damages. The rationale for them is, in a sense, to encourage licensees to cross-endorse people. The way the joint and several liability provisions work is that where an authorised representative is acting for more than one person, if you can identify which licensee that authorised representative was acting for in their behaviour, that licensee is responsible. If it is not possible to identify which licensee the person is acting for in doing what they are doing then they are all liable. This provision facilitates that if the fact that the representative is appropriately disclosed as acting outside their authority then the licensee is not liable for that activity.

Senator CONROY—Shouldn't we be seeking to encourage them not to act outside their licence?

Ms Vroombout—Yes, we should be.

Senator CONROY—The simplest way to do that is for the person who has given the licence to the licensee to make it quite clear and say, 'If you misbehave then I am going to actually be liable; therefore, you are not going to misbehave because if you misbehave then we are going to deal with you as well,' rather than saying that they can get out by simply having a carve-out that allows them to wriggle out.

Ms Vroombout—That allows them to wriggle out but makes them liable? Are you saying that the authorised rep who has wriggled out is then liable?

Senator CONROY—Is still liable—but we should be encouraging them not to step outside their licence.

Ms Vroombout—We should be, but in the case of multiple licensees I guess it is the difficulty of determining who you attribute the authorised rep's behaviour to and the ability of the licensee to control the various behaviours, given that they are working for a number of people.

Senator CONROY—Given a multiple licensee may be doling out on behalf of three or four different firms, they are prepared to accept liability if they know for a fact that they are only doling out their own product. I am just trying to think how it works in practice. Let's say I am a multi-agent. I walk in, I have AMP, I have AXA, I have the Commonwealth. I sit down and they are on the table, so to speak. I am offering the whole suite. I am presuming, because I am not tied, that I am offering the whole suite. Therefore, I am offering partially one third, so one third of what I am saying is about offering for this. The companies therefore seem to be arguing, 'Because they are not 100 per cent offering then we are not prepared to accept liability, whereas if they offered 100 per cent then we would.' I am just not sure that it makes logical sense that they get to escape liability simply because they cannot be 100 per cent identified. I guess I work from the basis that it is better to have three people's deep pockets to have a go at, in this instance, than nobody's deep pockets. If liability was acceptable for them if they stepped outside the bounds, for a tied agent, I do not understand why they think they can get out of it on the basis of a multi-agent.

Ms Vroombout—Ultimately, that is a question of policy.

Senator CONROY—I appreciate that. I appreciate that we are trying to collapse the industry back down to the control of just insurance companies, that they would be happy with this provision. Section 916B deals with subauthorisations. Subsection (3) allows an authorised representative to authorise an individual to provide a specified financial service if the licensee consents. Why are the words 'an individual' chosen and not, for example, 'an employee'?

Ms Vroombout—I am not sure why 'individual' rather than 'employee'. What was intended was the distinction between an individual and a body corporate so that you can subauthorise an individual but you cannot subauthorise a body corporate. That is largely a chain-of-responsibility issue. If you allowed subauthorisation of body corporate then you are getting a lot more remote from the licensee when you are talking about the people who are actually performing the activity, so it was limited to individuals or natural persons, rather than bodies corporate.

Senator CONROY—Individuals subauthorised under section 916B(3) have to be notified to ASIC under section 916 F. that is the section that deals with an obligation of licensees to notify ASIC about authorised representatives.

Ms Vroombout—Section 916F(1) specifically refers to a person authorised under section 916B as somebody whose authorisation does have to be notified to ASIC.

Senator CONROY—So that is a yes.

Ms Vroombout—Yes.

Senator CONROY—You may have covered some of this but there was an extra component I wanted to just get your comments on. Turning to disclosure and conduct requirements, a definition of retail investors is essential here. Section 761G(6) deems all persons who acquire a superannuation product to have acquired that product as a retail client. A number of organisations have suggested that the section will only mean that the trustees of superannuation funds who invest in a pooled superannuation trust would be deemed to be a retail client. Have you accepted that there are problems with the drafting of section 761G(6)?

Ms Vroombout—The minister has and he has done so in that letter to Senator Chapman.

Senator CONROY—Why wasn't section 7621G(6) extended to people who receive a superannuation payout in excess of $500,000 and then invest it in a non-superannuation product? Aren't they in many cases properly 'retail clients'?

Ms Vroombout—It is actually envisaged that in that case regulations made under specifying the product limit will have a different limit for somebody who has received a superannuation payout as distinct from somebody who—

Senator CONROY—And what would that limit be?

Ms Vroombout—It is not something that we have considered yet; we are still drafting those regulations.

Senator CONROY—The figure of $500,000 is one I have kicked around for a couple of years on trying to get a protection and I think CNAL is an example where people left their fund—I am not sure if you are familiar with it. It is one that is getting a fair bit of play and people are concerned about the fact that they did not get suckered while they were in their existing fund. They took their moneys out and invested in what they thought were safe investments. It is that that I am hoping the bill is trying to capture.

Ms Vroombout—The amount of $500,000 is the current limit in the Corporations Law, and I guess it is likely that that is the limit which will be applied for most products. It has been suggested by some of the superannuation associations that the reasonable benefit limit in the tax legislation is a more appropriate choice. That is certainly something that will be considered in drafting the regs.

Senator CONROY—The requirement to disclose the quantum of commission received by a providing entity in a statement of advice is only required if the payment of such commission might reasonably be expected to be, or have been capable of, influencing the advice. In what circumstances do you see the payment of commission not influencing the advice? Is it a bit of an oxymoron?

Ms Vroombout—As we understand it from the insurance industry, some agents receive a commission that covers not just the service they provide to the client but also an amount that covers certain back office functions that they perform on behalf of the insurance company. To the extent that the commission reflects payment for the provision of a back office function, it could be said not to reasonably influence the advice they are giving—it is payment for a service they are performing.

Senator CONROY—I think we have similar debates on similar issues where one of the concerns that I have expressed, and the government I think has taken on board in the past, is people loading up their back office aspect of this saying, 'We only got 1c—the other $5,000 was really a back office effort.' This is caving into that by saying, 'We are not even going to attempt to delineate.'

Ms Vroombout—The bill does not delineate. Its delineation is 'may be reasonably expected to influence the advice' and it will be a question of proof as to whether it—

Senator CONROY—Would you think 50 per cent back office, 50 per cent commission would not—

Ms Vroombout—It depends on what services the particular agent performs for the insurance agency.

Senator CONROY—But they are performing the exact same services as the other person who has to provide a commission and who is providing the service but does not have back office. All the services being provided by the person who does not have back office are being provided by the person who also provides a back office service. All that is happening is that they are also doing a back office function; they are not doing less. So the person who does not do back office has identical motives, motivations and aspirations to the person who happens to have a back office as well. It is not as if we are saying, 'We are offering you a back office service but, by the way, we are not really providing you with some of the other services.' The selling of the product is the selling of the product.

Ms Vroombout—But the industry says that, in some circumstances, the commission payment reflects both. It reflects both the back office function and the service being provided.

Senator CONROY—But that is not an excuse for not disclosing the commission; that is a reason for people in those circumstances to find a way to express their commission outside their back office function. I am not asking you to draw the line as to whether it is 50 per cent or whatever, but I would have thought the majority of these individuals had a capacity to do a calculation of how much is a back office operation and, therefore, whatever is left is the commission.

Ms Vroombout—This bill will require them to disclose that portion—

Senator CONROY—In all circumstances?

Ms Vroombout—that does not reflect the back office function. It requires them to disclose that bit of it that is capable of influencing their advice.

Senator CONROY—As I am sure you have probably heard on the grapevine from one of our hearings, Senator Ferguson—who is no longer on this committee—was recently quoted at an AMP tied agents seminar—if I can use the word 'tied' as opposed to 'multi'—with an ASIC official, but ASIC officers have now said, 'No, we are not quite sure that that is the case.' However, clearly, Senator Ferguson believes it to be the case that, if I am a tied agent, for the purpose of disclosing commission, because I am only selling one suite of products, I do not

have to disclose commission. We have been talking about whether or not disclosure of commission, broken out of back office, will happen in all circumstances under this legislation. You just said that it would; so I am looking to understand whether you are aware of the evidence that was given to the committee last week and the questioning I then took Mr Johnson through.

Ms Vroombout—I am, and I think there are circumstances where a tied agent, selling only one product, would have to disclose the commission.

Senator CONROY—Do you know many tied agents who only sell one product? I have never met one.

Ms Vroombout—No.

Senator CONROY—They normally sell a suite of products.

Ms Vroombout—But one of a particular kind of product.

Senator CONROY—That is like saying you can go into a home loan originator and just get a simple, straightforward account. They try and sell you bells and whistles, they try and sell you redraw, they try and sell you fifty-fifty—no-one just sells—

Ms Vroombout—If their commission varies, depending on what those bells and whistles are, then my view would be that they would have to disclose that commission.

Senator CONROY—Only if it varies.

Ms Vroombout—If it is capable of influencing the advice they give, so if they are advising you to take on a bell—

Senator CONROY—If I walk in and say, 'I want a home loan,' and he says, 'Okay, what sort?' at what point is he going to say, 'I am only selling you this one, I do not have to tell you my commission, but there is this bit of a bell and whistle over here if you want a redraw facility,' and get a higher commission? That would be a capture.

Ms Vroombout—That one, I think, would clearly be a capture.

Senator CONROY—So this is down to this vanilla argument of a car. You walk in and say, 'I want to insure my car,' and he says, 'Right, here is the policy,' which, if I can use Mr Johnson's words, is a vanilla product. But it depends on how much you want to insure it for; it depends on what the going market value is. There is no such thing as a vanilla product in insurance; that is really my point. It is a fiction to try and pretend that there is a vanilla product, because every single product must be treated on its individual circumstances. By definition, there cannot be a vanilla product. Do you still have this belief that there is a vanilla product?

Ms Vroombout—No, I personally do not have a belief that there is a vanilla product. I am not sure that vanilla versus bells and whistles is the right distinction for whether commission

should be disclosed. The question is: is the fact of payment of commission capable of influencing the advice given?

Senator CONROY—I would have thought a non-sale is a big reason to sell a product. I do not want to sound silly but the whole purpose of me phoning you up or knocking on your door to sell you life insurance products is to get commission. I am not out there doing it because I am a philanthropic soul; I am doing it to gain a commission. The fact that the commission may not vary if I sell you this car insurance or that car insurance does not stop the fact that I am influenced in my attempt to sell you a product because I want to make some money from you. It is like saying that I am working for free. But, again, I appreciate that they are probably policy debates to have with the minister and I appreciate your answer. Just to go to the distinction that appears to be being drawn—and you said you are not sure that it is the appropriate distinction—by the legislation, you are familiar with this argument—

Ms Vroombout—I am not sure that I would say the legislation draws that distinction. The distinction the legislation draws is whether the commission payment is capable of influencing the advice given. The words in the bill are:

might reasonably be expected to be or have been capable of influencing the providing entity in giving the advice.

That is what the bill says. It makes no distinction.

Senator CONROY—I no longer have any idea of what that sentence means, given our discussion, but I will take that up with Senator Kemp. You would be aware of the argument that tied agents in particular are having with their governments about the manner in which they are taxed under the alienation of personal services, where they are arguing that they are not employees because they have all these clients. The governments' argument is you are getting it paid by one person—in effect, you are tied and you only receive your remuneration from the one company. They are actually arguing to be exempted on the basis that they are not employees. Do you think it is unusual that they are now arguing that because they are tied they are employees and of course would never be driven by commission? Did you see any conflict in their position at all?

Ms Vroombout—I guess not. It is not something that I am in a position to comment on.

Senator CONROY—You are from the Treasury.

Ms Vroombout—Yes—

Senator CONROY—I appreciate that it is a different section of Treasury—

Ms Vroombout—But they are views of the organisations and I do not feel in a position to comment on their views and I am also, as you say, not a tax expert.

Senator CONROY—It seems to me a little unusual that the legislation—and this is what concerns me—could potentially define them in two different ways. I describe this as having their cake and eating it.

Mr Beckett—We have said that the FSR Bill deals with one aspect, which would be consumer protection, and the tax legislation deals with the tax treatment—

Senator CONROY—I would have thought, at the end of the day, the tax treatment would be the one that a court would use overridingly to determine their position. They cannot have it both ways. They cannot say, 'We are not employees for the purposes of tax, but for the purposes of not disclosing commission we are employees.' It is a ludicrous proposition for them to advance.

Ms Vroombout—But I am not even sure that the fact that they are employees necessarily means they do not have to disclose commission.

Senator CONROY—That appears to be the way that ASIC are trying to interpret it. And if you have read the *Hansard,* with Mr Johnson—

Ms Vroombout—Unfortunately I have not. The bill does not distinguish between who is an employee and who is an authorised representative for commission disclosure purposes. What it says is that, if the commission is capable of influencing the advice, it has to be disclosed. If you are an employee who receives a commission that is capable of influencing your advice, you have to disclose it.

Senator CONROY—The question comes back to at what point could a commission possibly not influence anybody—employee or otherwise—to seek to make a sale? It is a ludicrous proposition. The whole reason you are making the sale is to gain the commission. That is the whole motivation—it is called the capitalist system, which we all subscribe to. But they are philosophical issues that I will take up with the minister.

Ms Vroombout—Yes.

Senator CONROY—In the product disclosure statement there is no requirement to include a single figure that is indicative of the impact of all fees and charges on a product. Was any thought given to requiring an indicative example of the impact of all fees and charges in the PDS?

Ms Vroombout—Yes, thought was given to it. There are widely differing views in industry and in the consumer movement about whether a single figure is actually a useful figure.

Senator CONROY—I am a consumer and I have to tell you it would be bloody useful.

Ms Vroombout—But there are also widely differing views as to how you calculate that single figure.

Senator CONROY—Cost to customer, cost to consumer.

Ms Vroombout—But when you have fees and charges imposed throughout the life of the product, knowing how long you are going to hold the product, knowing what the rate of inflation throughout the life of the product is—

Senator CONROY—Provided they are consistent across all companies it does not matter whether they are whackily out or whackily in, you get a chance to make a comparison between companies, and that is what you are really trying to achieve. You are trying to make it so the consumer makes an informed decision between whether Mr Beckett is selling a policy that he is going to make 10 grand on or Ms Smith is taking a policy that she is only going to make five grand on. It does not matter about inflation. As long as they are consistent, as long as there is a requirement with a seven-year cost. I have this argument with banks on what we call 'truth in lending' and they say it is not humanly possible to calculate an annual average percentage rate, which is just a load of rubbish. They can do it if they want to, providing the starting point is cost to consumer. So if you outsource or do not outsource your product, it does not matter, it is the cost to the consumer and as long as the assumptions are there it is possible to come up with a figure. It may be wildly underestimating the final cost to the consumer.

Ms Vroombout—Which may make it misleading and deceptive.

Senator CONROY—If there is an agreed standard, then I am sure that Allan Fels will understand that the calculation is based on the same set of assumptions for everybody and it was not an individual company. What I would say is that it is up to the industry to come up with an agreed figure that will be then ticked off and everyone says, 'Okay, that is the method.' How do all these incredibly smart and rich people fill a tax return in each year, do you think? They sit there and they go, 'I have no idea how much money I made on that product. I will just send the tax office a note that says, "I have no idea; I don't know what you should tax me this year".' They actually put in, each year, an annual amount to the tax office, I presume, which means they have derived it from somewhere. So they could make a wild guess as to how much they may make per product. I am sure they have done those calculations on the odd occasion.

Ms Vroombout—They can make a guess across the product as a whole but, for me as an individual customer, that guess may actually have no bearing on what I as an individual customer have to pay because I might hold the product for longer than they have assumed.

Senator CONROY—As I say, it is the same with home loans. The argument applies in both circumstances. I may sell the house after two years. So it is an indicative cost. But if you do not give them a single figure to make their comparison, then they are just not in a position to make a comparison. What we are seeking to do here is to make a comparison and three per cent and three per cent look the same. But the actual dollar amounts that Mr Beckett and Ms Smith have made off me are a hell of a lot different, even though they both put a three per cent figure on it. But I will keep chatting with Senator Kemp. I notice that you have included a prohibition on cold calling arising from an unsolicited meeting with another person. Why have you limited the prohibition to just meetings?

Ms Vroombout—That seemed to be the area of most concern, the knocking on the door. It is much harder to—

Senator CONROY—To get someone off your doorstep. I appreciate that.

Ms Vroombout—You can hang up the phone, you can ignore an email. It is much harder to close a door on somebody.

Senator CONROY—Have you ever tried getting some of these people off the phone?

Ms Vroombout—Yes.

Senator CONROY—I appreciate that not having the face is an improvement.

Ms Vroombout—I guess the other, balancing consideration was not wishing to limit unduly the marketing of products. They were the balances.

Senator CONROY—Some groups, as I am sure you would be aware, have called for a restriction on cold calling by telephone. For example, it might be only during certain hours. Do you have any thoughts on those calls? Or do you think that would be unduly restrictive?

Ms Vroombout—They are not issues that have been raised with us. Ultimately they would be questions of policy, for the minister to decide.

Senator CONROY—Would you enjoy a phone call at midnight?

Ms Vroombout—I would hang up.

Senator CONROY—Do you think they should be permitted to call you at midnight, or would banning it be a restrictive application of the law to their marketing regime?

Ms Vroombout—I think cold calling is an issue across the whole community, not just in relation to financial products or services. So, if it is an issue of concern, it probably needs to be addressed more broadly.

Senator CONROY—I want to spend some time on the treatment of basic deposit products. I appreciate that you said the minister has not quite finished his definition—which is very convenient for him, while he continues to criticise me for holding the bill up. If a teller or an employee of an authorised representative is only dealing in basic transaction accounts, is there any obligation in the FSR Bill for that person to be trained in relation to the features of those products and for the licensee to maintain that competency?

Ms Vroombout—Yes, there is. The formal authorisation is not required, but the training and supervision obligations are still in place.

Senator CONROY—Is the teller or employee of an authorised representative required to tell a retail client about the fees and other features of a basic deposit product?

Ms Vroombout—In issuing the product they would be required to hand over a product disclosure statement—

Senator CONROY—Isn't it oral?

Ms Vroombout—Let me just check. They have to provide certain information at the time—

Senator CONROY—Orally?

Ms Vroombout—Orally. And that should include fees and charges, but I just have to check. The basic requirement is that they do have to hand over a PDS at the time of the issue of the product. If it is not reasonably practical—and sometimes that might be because it is being opened over the phone or whatever—

Senator CONROY—Does the PDS contain the fees?

Ms Vroombout—Yes, it does. If it is not reasonably practical to hand it over at the time, then they have got to give an oral statement, which is required to include certain information, including information about the costs of the product. That would include fees and charges.

Senator CONROY—If a teller recommends that a person open a particular transaction account over another, is the teller required to consider the financial and other personal circumstances of that person?

Ms Vroombout—Yes. The suitability requirements would apply. Even though they do not have to hand over the statement of advice, the suitability requirements still apply.

Senator CONROY—Do you see that working practicably in a bank, with a teller and a queue, to go through all those sorts of things? Do you think that is actually going to work, from a practical perspective? If a teller suggests that a person invest the $5,000 in their transaction account into a term deposit, will that be financial advice?

Ms Vroombout—Yes.

Senator CONROY—Even if the term deposit is for only two years?

Ms Vroombout—It is still advice.

Senator CONROY—Would they be required to be licensed?

Mr Beckett—They would have to be an employee of a licensee or an authorised representative of an employee.

Ms Vroombout—They would have to be the employee or authorised rep of a licensee.

Senator CONROY—And they would be required to have a different level of training than if they were just a 'basic bank product' under the definition. I am trying to find out where the line is regarding when they do have to provide information—because I do not actually think there is a difference between that and the giving of financial advice. We have just drawn some sort of bottom line. What actually happens is still the same, but we are just saying that there is a particular line at which you do not have to provide certain information. I am trying to understand where that line is.

Ms Vroombout—It is in the definition of 'basic deposit product', which is a term deposit of two years or less.

Senator CONROY—Will the teller be required to disclose any bonus points, commission or other benefit they get from such cross-selling?

Ms Vroombout—Yes, if it is reasonably capable of influencing the advice that they give.

Senator CONROY—Do you think that keeping your job is something that would reasonably influence your selling?

Ms Vroombout—But what the bill requires disclosure of is remuneration, including commission.

Senator CONROY—But I am willing to bet that in a court of law the threat of being sacked will fall within the broad definition of 'remuneration and commission'. What happens, in case you are not aware, is that banks require tellers to meet certain targets each month. Otherwise at the end of the process, if you fail over a certain period, you will get reassigned, sacked, and you will be out the door. I am willing to bet that in a court of law that will end up being defined as 'commission', even if for the purposes of the bill at the moment you do not agree with that. So I am a teller, I have to make a sale, it is Friday afternoon at 5 o'clock and it is the end of the month. If I do not make this sale I lose my job, because I am on my third warning for having been hopeless at this particular selling aspect. Do you think that there is a requirement to disclose? This is what banks do, this is actually what happens and people are in this position. The question is: is keeping your job 'remuneration'—and I have to say that I think I keeping your job is remuneration. If I do not make the sale, I do not get remunerated on Monday, because I do not come back.

Ms Vroombout—I guess my view, on my reading of the bill, is that that would not have to be disclosed.

Senator CONROY—Because you do not think keeping my job is remuneration or commission. Okay, I am surprised.

Normally if an adviser recommends that a person switch between products, under section 947D, further disclosure must be made in the statement of advice. If no statement of advice is required, as is the case with basic deposit products, are those extra disclosures required; and, if they are required, how are they to be disclosed to the retail client?

Ms Vroombout—I do not think those disclosures would be required.

Senator CONROY—Is an employee of an authorised representative or an employee of a licensee required to give a PDS; in other words, are they a 'regulated person', as that term is used in section 1011B?

Ms Vroombout—That is an employee of?

Senator CONROY—An employee of an authorised rep or an employee of a licensee.

Ms Vroombout—An authorised representative is clearly covered by paragraph (d) of that definition. An employee of the licensee itself would be regarded as acting for the licensee and so would be required—

Senator CONROY—So neither of these people is a regulated person, or are you saying that both are regulated persons?

Ms Vroombout—In the case of an employee of a licensee, it is the licensee that is the regulated person; but, through them, the employee is required to hand over the PDS.

Senator CONROY—So you are the licensee and I am the employee; I can sell something, but you have to give them the PDS, not me.

Ms Vroombout—The obligation is on me to make sure that you hand it over. I am the one that is liable if you do not hand it over.

Senator CONROY—I will quickly move on to clerk and cashier exemptions. Can you explain what is contemplated by work ordinarily done by clerks and cashiers? I cannot find anyone who can so far so you are my last hope.

Ms Vroombout—Taking money, issuing receipts—it was envisaged that those kinds of things would be covered by—

Senator CONROY—Is there a menu somewhere that sets it all out?

Ms Vroombout—No, not a menu that we have.

Senator CONROY—You are drafting it; help me here. What activities in a financial services organisation will not need to be licensed?

Ms Vroombout—Things like just taking money and issuing receipts would not require licensing.

Senator CONROY—Is a teller recommending accounts or various deposit accounts the work ordinarily done by clerks and cashiers?

Ms Vroombout—I would not have said giving advice was work normally done by—

Senator CONROY—I am asking if they just recommend accounts.

Ms Vroombout—But recommending accounts is giving advice.

Senator CONROY—Okay. Thank you.

Proceedings suspended from 12.16 p.m. to 4.14 p.m.

[4.14 p.m.]

ADAMS, Mr Mark, Financial Services Reform Policy Coordinator, Australian Securities and Investments Commission

JOHNSTON, Mr Ian, Executive Director, Financial Services Regulation, Australian Securities and Investments Commission

KELL, Mr Peter, Executive Director, Consumer Protection, Australian Securities and Investments Commission

RODGERS, Mr Malcolm, Director, Regulatory Policy Branch, Australian Securities and Investments Commission

TREGILLIS, Mr Shane, Executive Director, Policy and Markets Regulation, Australian Securities and Investments Commission

VAMOS, Ms Pauline, Financial Services Reform Policy Coordinator, Australian Securities and Investments Commission

CHAIRMAN—Today the committee conducts its fifth public hearing into the provisions of the Financial Services Reform Bill 2001. The Parliamentary Joint Statutory Committee on Corporations and Securities decided to inquire into and report on the provisions of the Financial Services Reform Bill 2001 which was introduced into the Commonwealth parliament on Thursday, 5 April 2001. The committee sought submissions by 20 April; however, the committee desires that as many people as possible have an opportunity to comment on this bill and so the committee subsequently resolved to receive submissions up until Monday, 7 May 2001. However, late submissions are still being accepted. The committee agreed in April to release all submissions received on this inquiry.

Submissions will be available from the Parliament House web site or alternatively the secretariat can send a hard copy of the submissions to those who wish to obtain them. Before we commence taking evidence, I reinforce for the record that all witnesses appearing before the committee are protected by parliamentary privilege with respect to the evidence they give. Parliamentary privilege refers to the special rights and immunities attached to the parliament or its members and any others necessary for the discharge of parliamentary functions, without obstruction and fear of prosecution. Any act by any person which operates to the disadvantage of a witness on account of evidence given by him or her before the Senate or any of its committees is treated as a breach of privilege. I also wish to state that unless the committee should decide otherwise this is a public hearing and as such all members of the public are welcome to attend.

I welcome the representatives from the Australian Securities and Investments Commission. Can I advise that at about 4.25 p.m. I will have to leave the hearing, probably for about 20 minutes or so, for a meeting with the minister. I apologise in advance for that, but I will be back

as soon as that has finished. I will ask Senator Gibson to chair when I am absent. Do you wish to make an opening statement?

Mr Johnston—I should point out that Shane Tregillis, Peter Kell and I are accompanied today by some of the experts whose blood, sweat and tears have gone into our policy proposal papers. We will be able to answer your questions after our brief opening statement.

As the committee would be aware, ASIC issued its first four policy proposal papers in April this year and the second tranche in June. Thus far, we have issued some nine proposals and a process guide. We will issue further documents for comment over the next few months. It is important to note that our policy proposals are just that: they are documents issued to generate comment and give some guidance on the issues ASIC will face in administering the Financial Services Reform Bill. The priority with which we addressed those issues and issued the PPPs was based on consultation with industry and consumer groups. The issues about which they indicated they would need early guidance were prepared first—for example, financial product advice and dealing, and organisational capacities for licensees.

In the first tranche we also issued a process guideline on how to apply for a financial services licence. Our process has been to issue the PPPs based on the bill when tabled, to invite written submissions on the proposals and to engage in discussion with industry groups, industry participants and consumer groups. Since issuing the PPPs, we have had some 30 or so meetings with these groups on issues raised in the policy proposal papers, with further discussions to come on the second tranche.

In addition, we have conducted a number of ASIC Speaks on FSRB. ASIC Speaks are seminars whereby we go out to the marketplace and tell them what is in the PPPs and what they should take note of, and tell them about our proposals and our approach. Some 2,500 people have attended these events and we plan to have another round of these when the FRSB is implemented. Some 1,800 people have also registered for our email advices whereby we keep people up to speed with where we are in the process. Our policy proposal papers are designed to raise the issues in terms of how we will apply the provisions of the law. It is not our role to frame the legislation or the policy which drives it: that is for others to consider. Nor is it ASIC's role to clarify what policy is in this area. I believe that the Department of the Treasury has appeared before the committee today for that purpose.

ASIC looks forward to continuing to liaise with industry groups, participants and consumer groups. We have received some 50 or so written submissions thus far on our PPPs. Those submissions and the ongoing discussions to which I have already referred will assist us in framing the administration of this new law. We are happy to take the committee's questions.

Senator CONROY—I have a couple of general questions. There is a nice thick impressive number of pages. Are these the last of your PPPs?

Mr Johnston—No, there are others to come. I think you have there the first two tranches.

Senator CONROY—How many more tranches can we expect?

Mr Johnston—There will be two or three more issues but, on the specific number of policy proposals yet to come, Mr Adams might be better placed to answer.

Mr Adams—We have about three or four more papers to come.

Senator CONROY—Are they a comparable size to these first two?

Mr Adams—They will probably range between 40 and 50 or 60 pages each.

Mr Johnston—To clarify something for the record, we did note that other evidence given before this committee talked about some thousands of pages having been issued by ASIC. That is not so in our case. It is not 1,000 pages, it is not 600 pages—it is somewhat less than that.

Senator CONROY—I accept your admonishment.

Mr Tregillis—The schedule of the content of the remaining ones is largely set out in a document called 'Building the FSRB administrative framework' that actually tries to give you a timetable—it is like a sort of summary. That is very important and it was a result of industry consultation to let people know what was coming in the contents so that people would understand how we were rolling this out. That sets out the ones that are not currently available.

Senator CONROY—I am looking for the timetable.

Mr Tregillis—It is on page 31.

Mr Johnston—The other thing which we would highlight—and I referred to it in the opening statement—was that we consulted with industry about what they needed to hear about early and what could be given a lower priority. Clearly we do not have the resources to put everything out at once, nor could industry absorb everything at once, so we did want to prioritise those matters which we were advised were the most important to be dealt with early and those which we were to be considered first.

Senator CONROY—In terms of this timetable, I am looking in horror at the fact that stage 4 appears to be about the same size as the first three stages in terms of the number of headings and appears to possibly be issued after the actual implementation date of 1 October that is proposed at the moment. Do you see a problem with issuing even just the last of the drafts after the implementation date?

Mr Tregillis—Just to explain the box before my colleague answers, that includes final versions of the other drafts. The reason why that box looks particularly large is that it includes the next stage, so you will see with the PPP the example refers to licensing organisational capacities, and that really means that that will be the policy statement arising out of the consultation documents that you now see before you; likewise the process guidelines. What we are indicating there, and the reason why the box looks larger, is the next stage and the actual policy documents and not necessarily the policy proposal documents.

Senator CONROY—I see the words 'final version of adapted IPS 146. Does that indicate that that is the final version of one of the earlier ones? Looking at box 1, is—

Mr Tregillis—That is correct. Just to explain the structure—

Senator CONROY—In terms of the final versions, that is the first of the final versions, is it?

Mr Rodgers—With anything that has a 'PS' after it in the front column, the proposal is that they are issued as final policy statements.

Senator CONROY—What is the status of a policy statement?

Mr Tregillis—A policy statement is how ASIC will administer the provisions of the law.

Senator CONROY—It is not actually the law though, it is an opinion. I have had this discussion with Allan Fels so I am sure you are conscious of that.

Mr Tregillis—It is not the law. There is a range of circumstances where we have to explain how we will apply the law. So where we have, for example, a discretion in the law to vary or modify the law—which we currently do and will continue to do—then we explain the general principles upon which we will exercise that discretion. Where we have a process to fulfil, such as a licence application, then we will put out a number of documents, which again are explained in the current document, as a policy saying, 'Here are what we think the obligations are in general terms.' And then you will see a process guideline, which is really a step by step guide to how to do it. So they are the circumstances. We will also say, in some cases, 'This is the attitude we will take to enforcement of a provision or the administration of a provision.'

It is a good point. It is not possible in these policy statements or, in fact, any policy statement, particularly for a new piece of legislation, to address every particular fact or circumstance. We use these documents and try to write them in terms of general principles that can be applied, modified, varied. Our policy statements are reviewed and updated, and I think we make that point.

Unusually, in these ones, as a result of feedback previously, we have put in—with some hesitation, I might say—some worked examples, particularly in the first policy statement. That really was designed in order to solicit comment and get feedback, because our experience has been that people look at the general statements but then, when they come to actually test them, if you like, as illustrations against particular examples, they tend to focus more squarely on the actual underlying principles.

The main aim of a policy statement is not to explain or deal with particular circumstances of fact but largely to set out the underlying principles. Clearly, in ASIC's administration of the law, even for well-established policy we get what we call novel applications that do not fit squarely within it. We then have a process internally where we decide it. Policy statements are also important because most of the decisions here are reviewable by AAT administrative appeal, so the AAT does pay attention to an agency's policy position when it does a review. It is important to have a soundly based policy when you are exercising discretions—the grant of a licence,

refusal of a licence, such exercise of a discretion. So that is really their function. It is not to write the law.

CHAIRMAN—They don't actually become regulations? They are separate from the regulations?

Mr Tregillis—No, they are separate. But if we do a class instrument, if we write a policy and then execute an instrument using our powers to formally modify law—which is not a policy statement—in some cases that is a legislative instrument subject to those requirements. So we have formal modification exemption powers, but we have as a rule, I think—and, to be quite honest, we are very proud of it—a very transparent process in which we try to explain fairly fully how we approach these issues.

CHAIRMAN—But you would not equate them to, say, a tax office ruling? It is a different concept from those?

Mr Johnston—There is no legislative force. We would point out too, as Mr Tregillis said in terms of transparency, that you would see as you work through the policy proposal papers that, beside each piece of guidance that we give, we ask what we think are appropriate questions for comment: is this the right answer? Is this appropriate? What other considerations should we have? So they are very much a consultative document.

Senator CONROY—I am conscious that there is another ASIC policy note or guideline that I am very familiar with, and a couple of times I asked Mr Cameron, when he was the head of ASIC, whether or not you were going to enforce the particular policy guideline. I was told that he did not believe that the guideline was enforceable. I am returning to the famous Corporations Law requirement for disclosure of executive remuneration and valuation of option packages, on which you have issued a note. I asked a number of times whether or not you were going to take to court any one of the many companies that do not comply with either the law or your note, and I was told that it was not enforceable and that it required change. So I am just trying to get to an understanding of what the legal position is if someone just says to you, 'I don't give a stuff what you have written. It's not the law, it's just your interpretation, and I'm going to keep doing exactly what I'm doing.' What do you do then?

Mr Tregillis—A policy, as I said, gives an indication of how we will administer the law. In order to take action, for example, we will use this policy to guide whether or not we grant somebody a licence under the new regime. Clearly, in exercising that, we have to look at all the facts and circumstances but internally be guided by the policy. Somebody can say to us, 'We disagree with your decision,' and then challenge it and then there is an AAT. Somebody may challenge our view of the law by saying, 'We say this is a high priority. We are not going to comply,' and then we take action in the appropriate forum—the relevant tribunal or the relevant court. But the status of the policy itself is not law. Particularly in this area, it is more about how we will exercise discretions. Most of these policies are about how we will assess you when you come in. In terms of a licence, there are requirements to be met. So it is about what we think you have to do to demonstrate that, how we will exercise discretions. This tends to be a much—

Senator CONROY—It is probably more so in the situation where somebody qualifies for a licence—and they are objective tests. These are your requirements; I appreciate that that is the

situation. You grant them the licence if they meet all your tests. After that they can say to you that they do not agree with your interpretation of what giving financial advice is and they have no intention of complying with you. My statement to you is: I do not think you can actually take the licence off them on the basis of their argument with you about the interpretation of the law. You can hold it over them and say, 'Well, do it,' but I do not think you would win an argument like that if they had passed any objective test criteria. So the question is, how do you enforce your view of what financial advice is?

Mr Tregillis—We would have to take that matter to court. There are examples, such as certain computer packages et cetera, where we have indicated that they are providing advice under the existing law. We have been challenged on that. Ultimately, in terms of this law and its reading, we say, 'Here is our view about how we're going to administer it.' Ultimately the courts interpret the laws. People do not always agree. That is ultimately how we do it. But in terms of its administration, we are trying to provide sufficient guidance and certainty to the industry, who are really saying to us, 'We need to know what your attitude is. How do we know whether we have met this requirement? Please provide guidance.' This is designed for the bulk of the industry who say, 'We're keen to comply; we need to understand what your thinking is.' That is the nature of the dialogue we enter into in this case.

Senator CONROY—It is essentially a voluntary code to follow along?

Mr Tregillis—No, it is not.

Mr Johnston—It is not so much a code; it is guidance.

Senator CONROY—It is a voluntary guide then.

Mr Johnston—But if someone disagrees with a position under it and we believe that their actions are in contravention of the law then we take action against them under the law, and, as Mr Tregillis said, the court will decide. What we have said here is, 'We think if you behave in this way, you will be within the law; if you behave in another way, you may not be.' We would then challenge it if appropriate.

Senator COONEY—ASIC has got the two functions. The facilitating function is where your approach is to help, as far as you can, the corporate sector produce its goods and services and enrich the shareholders in the Australian community, and that particular relationship is one that you see as cooperation. I would suggest, then, that you say to them, 'Look, if you're going to take that approach it may help you if we told you how our mind's thinking, so that we can facilitate what you want to do as well as we can.' If on the other hand they say, 'We're here to stare you down; this is war between ASIC and us,' then you go to your regulatory function. Maybe this has been put to you: does the facilitating function—to which I think these policy statements apply—ever get mixed up with the regulatory function, so that these policy statements become subject to examination in court?

Mr Johnston—To some extent they do both, because the reason the policy statement is there is to say, 'There's a body of law in place'—be it the Corporations Law or any part of it—'that has some legal requirements. This part of the law requires you to behave in a particular way.' Our policy statements, then, give guidance as to how we interpret that part of the law. So, yes, it

is facilitative in that it allows people to organise their affairs in a way that complies with the law, but it does address our regulatory function, as you describe it, by saying, 'If you don't behave in that way it may be that you are operating outside of the law,' in which case we would then take proceedings if we believed the law was being breached. So I think it does both.

Senator COONEY—Can I put this to you just to test it out? For example, what would you do if a person were acting, in fact, as a matter of reality, outside of the law but in conformity with your policy statements?

Mr Johnston—I would not like to contemplate that that would happen.

Senator COONEY—In other words, say that you put forward a policy which was in contravention with the law—which could happen, because you do not know what the law is until it is challenged. The only people in the land who really know what the law is are the High Court.

Mr Johnston—So you might be addressing a situation whereby it is found in court, through some type of proceedings, that our policy was wrong?

Senator COONEY—Yes.

Mr Johnston—If that were the case, we would change our policy, because our policy is there to interpret the law.

Senator COONEY—Would that result in any proceedings against the company concerned?

Mr Tregillis—The company would have taken it to court. If the court upheld the company's position, clearly that is a determination of the law.

Senator COONEY—No. This is incidental, which sometimes happens in court cases: another issue arises that you did not really think would arise. That is resolved, but it is in conformity with—

Mr Tregillis—But, again, if the court speaks on the interpretation of the law, that is the law. We would go back and then make sure that whatever we said or did was consistent with the court's views. It occasionally happens that—

Senator COONEY—In other words, what would you do to the person who acts in conformity with the policy but not in conformity with the law because of the way you would go around it? Today there was a series of questions in the chamber about the department of social security. Acting Chair, do you remember that series of brilliant questions in question time today in the Senate? Those questions were about how the department of social security goes about its job. The same sort of issue here I think arises with these policy decisions. These are your ideas of what goes on, aren't they? They do not have the force of regulation.

Mr Tregillis—No. They are really a statement, particularly in this area, of where we have a discretion—that is, the commissioner has an action to do, which is either grant a licence or

exercise a discretion before some function. It is really a statement of how we are going to perform that in conformance with the law. There may be some circumstances where there has been the type of issue that you have suggested. Part of the reason for the public, if you like, is that we do not just sit there; we test these, as we are doing with these policy propositions, against the views of industry and practitioners. So part of it, like the safeguards, is the very public transparent process that we go through. But clearly our decisions, even the admitting of the regulatory or administrative ones, are subject to administrative review, which can be on the merits. But the AAT has a general view that, where there is a well articulated policy, it will do it. Not very often but occasionally our decisions are, on the merits, overturned at administrative review; that can happen.

Senator COONEY—I know that you never make mistakes, but with social security there may be overpayments; they are really the fault of the department, but they never let us claim them back—I do not know whether you are aware of that—and there is a lot of law about that sort of stuff.

Mr Tregillis—No. Ours is really more the exercise of discretion. We are not making payments; it is really somebody coming and applying for a licence, and it is a question of whether or not we should give them the licence and on what conditions. Alternatively, if they apply for relief or there is some other activity and they want a view about whether this is legal or not, you will see that we are very careful in these documents to make it clear that they do not have the status of commission legal advice. Again, we clearly say that these are statements of commission policy, not statements of legal advice. We are very careful on the factual circumstances because, again, one of the risks in factual circumstances is that a slight variation of the facts could change the answer, and so we clearly articulate that. Different agencies obviously have different sorts of issues in that area.

Senator CONROY—I want to go to some advice, which I am not sure whether you have seen, prepared by Phillips Fox; it was on behalf of the Institute of Chartered Accountants. I am not sure whether that has come your way.

Mr Tregillis—Yes, it has.

Mr Johnston—Yes, it has.

Senator CONROY—It raises a concern, which is why I have been discussing this general issue, about what is and is not law. That concern appears to be on page 3, if anyone has it handy. It states:

The broad definition is found in Section 763A. It defines a financial product as a facility through which or through the acquisition of which a person:

makes a financial investment;

manages a financial risk; and

makes non-cash payments.

That is just identifying the definitions in the bill. Then it goes on to have a discussion about the application of the FSR accounting services. It goes through some lengthy discussion of that, but I think the gist of the concern that Phillips Fox are advising on is the words 'manages a financial risk'. Your definition of what constitutes financial product advice and giving financial advice appears to allow in your regulation the giving of a general asset class advice. In particular, on page 4 they say:

Some guidance for accountants can be found in Policy Proposal Paper No. 1 issued by ASIC in April 2001 entitled "Licensing: The Scope of the Licensing Regime: Financial Product Advice and Dealing". In that proposal paper, ASIC expresses the view that a statement or opinion or recommendation in relation to a "broad asset allocation decision" does not constitute financial product advice.

My question to you is this scenario: I am a disgruntled customer of an accountant, I have had a recommendation put to me of a broad asset class, and I am going to court saying that they should not have given me this advice because they have advised me how to manage a financial risk by adopting a certain asset class. All the poor accountant has to defend himself is your policy paper, which has become a policy statement. Talk me through how a judge is not going to define 'managing a financial risk' as a recommendation of an asset class.

Mr Johnston—I do not know that we can talk through how a judge would or would not define it. I think one point to make is that we have had a look at this piece of advice and I do not think the view that Phillips Fox come to is all that different from the view that ASIC would have.

Senator CONROY—I appreciate that it is not a repudiation of what you have done. I think their concern is certainty, and that all an accountant in this situation is going to have for certainty is your policy statement, which you have agreed is not law; it is your opinion.

Mr Johnston—Nor is it the intention of the policy statements when they become policy statements to provide certainty, though. We are not sure that we can ever do that. They are there for guidance and for what our interpretation might be, but they are not there as legal advice or providing certainty.

Senator CONROY—I am the disgruntled customer who thinks I have been given bad advice by the accountant. I do not think they had a licence because they have suggested to me that I should take out superannuation, maybe a few shares and maybe another asset class. In my view, now that I have lost the money—and these things are always wonderful in hindsight—all of that was about managing a financial risk. Can I get some inkling into the interpretation that you have given 'managing a financial risk' and why recommendations on asset classes are not that?

Mr Adams—I am sure in that first PPP about advice, we attempt to try to give some guidance about how you can unpack the meaning in the law about what is financial product advice. In so doing, in the interpretation we put forward a view that it is our view that broad asset allocation as we have described there is unlikely to be financial product advice, and we asked questions about it. So it is still open to someone to suggest that, notwithstanding our view, we think it is advice and they could pursue it in their own remedies.

Mr Tregillis—As Mark Adams has said, there are some questions about whether we need to refine. A couple of the comments are, 'That's too general. We don't quite understand it.' The

division between that and specific, which we have put and we have answered a specific question about, is a vague area.

We think the better view is that, if it is broad asset allocation advice, you are really just talking about general sectors of the economy and that does not fit within the current definition. That view seems to be supported by most of the legal opinions and other comments we have got, so it is a generally supported proposition. It is not actually a new proposition; it is one that has existed under the current law in terms of defining where someone provides a recommendation or advice on the current law. The types of people that it was originally designed to deal with were the asset consultants who may be providing to funds and others broad advice about sectors of the economy. So that is where it has come from. We have looked at that—

Senator CONROY—This is about recommending taking out superannuation, taking out an annuity—

Mr Tregillis—The PPP have the question about when you get down into quite specific recommendations about types of products—

Mr Adams—It does not go quite that far to say that specific product. It would say 'sectors' so we think that advice—

Senator CONROY—Invest in the mining industry—

Mr Adams—That would be an offer or an asset allocation.

Mr Tregillis—We would say that most specifically.

Senator CONROY—You are joking! I would think that it is the exact reverse. I could have got away with it in the case of the national mining industry. But the definition—

Mr Johnston—But with respect to your comment in terms of identifying the specific asset class, if they said to someone, 'You should have perhaps 30 per cent in mining, 20 per cent in retail stocks and we think you should put the balance into banking stocks,' we would think that is getting more specific.

Senator CONROY—I am trying to help accountants sleep at night at the moment so that they know where they stand in a legal sense so that they are not going to be caught by disgruntled me because suddenly I did put some money into the mining industry and then I found that I lost all my money.

Mr Johnston—We have put, as Mr Adams says, what is under the PPP as our understanding of how we think that should be interpreted at the moment. We ask specific questions in there and say, 'Give us your feedback as to whether that is right or whether you have any other ideas.' Most of the feedback that we are getting is that that seems to be about right but we are listening to anything that is put to us. It is not a final position.

Senator CONROY—I am trying to understand the difference between consultation and a pop quiz about whether someone likes something or not.

Mr Johnston—We would be asking for—

Senator CONROY—Citizen initiated referenda are a good idea but unfortunately we are not going to adopt them.

Mr Tregillis—Again, in the responses we asked not only for a view but also for an underlying reason for changing consequences. We are not just saying: what do you prefer because this is in your interests. We do have a look at the rationale. We are really saying that at one extreme we are broadly advising on asset allocation at the broad level, and we would say that there is a degree of comfort you should take but, again, it is up to you whether you are providing advice. As you get down into the more specific sectors we say that that starts to run the risk that you may need to be licensed or otherwise operate within that regime. That is the proposition that we have put. It is the proposition that is in the current law and, I must say, it has not actually caused us a huge amount of difficulty to date in its administration.

Senator CONROY—You have probably been dealing with more sophisticated investors, I put to you, Mr Tregillis. You are going to be dealing with mums and people with superannuation packages who have never had that much money in their lives before. I think you have a different investor class that would have been looking to that one previously. That is the problem: you have picked up consumer protection as part of your new role.

Mr Tregillis—I hear you what you are saying. The concept of broad asset allocation advice which is in the current policies does not seem to have caused us a lot of queries about where the boundary is drawn but, as we have commented, it has come back as a series of questions about whether we need to be a bit more specific about where that boundary is.

Senator CONROY—That is why I am just trying to see where your thinking is.

Mr Tregillis—The thinking is that we would not want to have that undermine the obligations on licensing and competency where you start to provide that personal advice. We do not actually want to open up that as an avenue to avoid the licensing regime too broadly.

Senator CONROY—Mr Johnston, could you take me through what sort of asset class recommendation you think would not breach?

Mr Johnston—I am not sure that we want to go through numerous hypothetical examples—

Senator CONROY—You might not want to, but I would like you to; that is the problem.

Mr Johnston—That is really because the matter is still under consideration.

Senator CONROY—I am asking for your opinion. I am sure nothing you say here today will outweigh your final policy statement, which is your definitive position. I am looking for some guidance because, tragically, I am going to have to vote on this bill long before you have been

able to produce a final policy statement. I am hoping to be able to make an informed vote, so I am seeking your assistance to try to understand your asset class allocation.

Mr Johnston—It seems that if I do tell you what our final position might be—

Senator CONROY—No, I am asking for an early opinion, which no-one will hold you to.

Mr Johnston—As we mentioned before, if in the course of performing a task someone was to say, 'I really think you should consider putting some money into property and perhaps some into shares,' we would classify that as a general piece of advice rather than specific in terms of asset allocation.

Mr Tregillis—The answer really is that the consideration is set out in A11. I am not sure we can go much beyond that in saying a broad asset allocation decision. We then do refer to Policy Statement 120, which, if you like, has the same concept in it.

Mr Johnston—So this is an existing policy statement.

Mr Tregillis—Sorry, it is an existing policy under the current law. It says:

> If asset allocation advice goes beyond being a very general recommendation on securities and identifies any specific securities (eg interests in X trust) or classes of securities (eg income or growth funds, franked or unfranked securities, mining shares or property trusts), the advice is more than general asset allocation advice.

So that again is just to try to add some detail. In A11Q1, we tried to set out the principle. We said:

> Is further guidance necessary on the difference between broad and specific asset allocation advice? If so, what kind of guidance?

There were mixed comments; I have only just skimmed them. Some people say, 'No, currently that is sufficient.' Other people say, 'It would be useful to provide a bit more illustration of the type you are talking about.' We have not yet reviewed it so there are mixed views.

Senator CONROY—So property shares is general and that would—

Mr Johnston—It is broad.

Senator CONROY—To me, the mining sector is broad. That is a sector of the economy.

Mr Johnston—Senator, I understood your earlier point though to be saying some in mining, some in something else, et cetera, and getting more specifically into classes.

Senator CONROY—You are saying property. To me, property is a sector and mining is a sector, but you have gone property and shares. I said mining is something else and property shares is okay, but mining and whatever else—

Mr Tregillis—The best of our current thinking though is really, again, set out in answer to your question. We would say that, if you are giving advice as an allocation between whether

you put your money into mining shares, property shares or growth funds, that starts to get you into the advice area that is regulated. In terms of our current thinking, set out in the document and reflected here—

Senator CONROY—So if I did not say 'mining shares' but I said 'mining sector', am I still broad?

Mr Tregillis—No. We would still argue that is basically getting into sectors that are quite specific.

Senator CONROY—But property is a sector. It is defined in the ABS as a sector. Mr Johnston was comfortably saying property and shares. Property is a sector just like mining is a sector.

Mr Tregillis—Mining shares or mining sector buying real—

Senator CONROY—No, as I said, I dropped the word 'shares'. But you do not buy shares in property as such; you go and get in a property trust.

Mr Tregillis—Sorry, I thought that was what you were talking about. There is a choice between, if you like, sectors of listed property trusts or unlisted property trusts. The type of discussion we were talking about was really whether you get into, probably, real property versus securities. Within that there are clearly distinctions: in securities, are you into property trusts or listed property trusts? Are you into mine securities?

Senator CONROY—Between those, the word 'property' is the sector that defines those things. Just because of a couple of different things—

Mr Tregillis—I think we were probably using 'sector' even more broadly, in terms of allocation between real property, securities and other investments at the most general level.

Senator CONROY—So if someone took it from your statement about property that they actually may go and buy a house, and maybe negatively gear it, would that be what you meant? Or would you have meant a listed property trust?

Mr Johnston—No, it is talking about a broad asset allocation. If you start getting much more specific than that, then you would be required to be licensed. So we were talking about someone who might say—

Senator CONROY—I appreciate that we have come down to a point. Now I am actually trying to go back up to find where we cross this threshold. As I said, the word 'property' to me means a sector. I am not sure if anyone was watching this morning while we were chatting with Treasury, but I will come to where Treasury thought the interpretation of the law was—it involved the word 'might'. So I am just trying to go back up. I appreciate we have come down to a point; I am with you when we are down at this level. Now I am trying to go back up to find where that threshold was. I accept that we clearly reached a point down here when we were talking about 'Buy BHP'. You would have to be mad. But that is a recommendation about the 'mining sector'. I am just trying to find that line going back up.

Mr Tregillis—Clearly, we are saying that at one end of the spectrum—which is really what we have put in the policy—we think that generally, if it is at that general level of real property sector or securities, then we have put the view that, more likely than not, that does not sit within the definition of advice. As you go down iterations, we would agree with you that there are issues and we can have examples. It has been put to us that we need to unpack that to provide more guidance, and, as I say, the opposite view has been put to us by some commentators, that that is sufficient for people to understand what it is. That is the current circumstance. I do not think we have a better answer; we have certainly got a lot of comments that ask similar questions about where that distinction—

Senator CONROY—I appreciate that you are just working your way through it. I am not trying to hold you to—

Mr Tregillis—The other question is whether ASIC should be trying to provide a bright guideline or not, or just leaving it at general level.

Senator CONROY—The whole point of this conversation is to say no, and that it should be in the legislation. That is the whole point of this particular conversation. But that is a matter for parliament to decide. I am actually trying to take it out of your hands, so that you are not going to be caught in this situation. I am sure that if it were in legislation, then Mr Riley will probably sleep better at night, after this conversation, than he currently does.

Senator COONEY—Apropos of what Senator Conroy is saying, you might look at 'Building the FSRB administrative framework'. In a certain sense, at page 19, under 'Licensing', you sum up the problem. You say:

> In this PPP, we propose guidance that will help people consider their obligations under the Law. Of course, while we propose guidance, it remains the responsibility of the person to determine what obligations they must comply with under the Law.

That creates an issue, being as bland as that, about what is most helpful. Is it better to just leave a thing to the black-letter law, or is it better to follow the guidelines—rather than policy statements—of ASIC? In the end, what you are saying is, 'Look, it is your responsibility.' And so it is. You cannot change that. I cannot see how ASIC can forgive anybody for breaching the law, even though ASIC gave them advice that led to that situation. So how do you handle that dilemma—as I see it, in any event—where you put out policy statements, which I think are rather guidelines, and you say, as you must, 'If you follow these and you go wrong, you are still subject to the law'? That is true. What is your quality control in all this work?

Mr Tregillis—It is the process we are going through now where we test them and people have an opportunity to raise practical issues—lack of clarity. To go back to policy, we do not ever pretend that a policy statement can deal with every single set of circumstances or iteration. We just do not think that is possible. Clearly the law establishes the legal framework. The policy really is an expression of how ASIC will exercise discretions. If you need to apply for a licence, the criteria we will use to do it is designed to provide some certainty to people in how ASIC is going to approach the obligations of the law—it has some knowledge. We do it in a very up-front and transparent way. In fact, most of the comments coming back are that people would like further clarification in order to assist that certainty. We do not go to that extent

because we do think it is the general principles of the law and then the general guidance and we try, within that framework, to be as helpful as possible.

Senator COONEY—It is really a giant opinion of what the law is that you are giving.

Senator CONROY—A completely unbiased opinion, too. Could I go to the legislation. Section 766B states:

Meaning of *financial product advice*

(1) For the purposes of this Chapter, financial product advice means a recommendation or a statement of opinion, or a report of either of those things, that:

(a)is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products—

We have been talking about sectors and other things, but the legislation talks about a class. Is the mining industry a class? Is the mining share a class? Is property a class? To me, property is a class.

Mr Adams—The question of what is a class of financial product has certainly been open and live and has come up a number of times through the development of this bill. What the Treasury has provided you, as notice of the parliamentary amendments, indicates that they are planning to put in a power to provide regulations to define 'class of financial product'.

Senator CONROY—You beauty!

Mr Adams—Regulations under that will assist the task.

Senator CONROY—I am glad we are going to have one harmonised definition. Do you prepare them? Are they done by Treasury?

Mr Tregillis—Treasury.

Senator CONROY—So you are preparing advice about a product class before you have seen the regulation. That must be hard.

Mr Tregillis—You will notice that, in all of the policies and because regulations are still being proposed, we clearly indicate before we finalise it that we will ensure—

Senator CONROY—My problem here for you—I am feeling for you guys here—is that you are going through all this consultation process which could be a complete waste of time if Treasury define a class as something other than what your consultation process has come up with.

Mr Tregillis—Again in the introductory document you will see that we have focused on those things which we think are less dependent on additional regulations, but clearly through both regulation and the parliamentary process the legislation may change. We need to ensure that our final policies reflect that legislation as it is passed by parliament. We are familiar with

that process. Concerning the current concept, we think that, at some stage, clearly broad asset allocation does not fit within the definition of financial advice, which is why we have put it in there. We will need to address the questions you have asked about at what extremes and where it cuts in. They could also be addressed through the regulation making power.

Senator CONROY—I will take that as, yes, it is hard.

Mr Tregillis—We have an explicit statement that we review all of these policies in light of the regulations and the final bill as passed by parliament.

Senator CONROY—I am sure that anybody who is involved in your many 40 meetings is very pleased to hear that you will review after you have finished and when you see the regulations. Going to the disgruntled consumer who is unhappy and thinks that the advice that was given was intended to influence them to invest in property—

Mr Tregillis—I thought it was the disgruntled accountant.

Senator CONROY—No. The problem is that you currently have disgruntled accountants. I am taking it the next step and being the disgruntled consumer, and I am trying to save the disgruntled accountants from being disgruntled in the first place. So I am just looking at this and I am listening to you and I am conscious of what you have defined, but I have to say that I do not see them as inconsistent. I think you have taken a very narrow definition in terms of 'financial product advice'. I think this is the point that Phillips Fox is alluding to: it is a very broad definition if you read the legislation—whereas you have gone down a very narrow path. There may be good reason for you to have done that. My concern is that I am in front of a judge and my argument is, 'Well, look, ASIC have a very narrow definition by which they give a tick, and there is nothing wrong with that; the problem is that the legislation is very broad.'

Mr Rodgers—I do not think we disagree with the proposition that the law is broad. I just draw your attention to the example we use in the PPP. That is an example of a broad asset allocation recommendation about something that is a financial product but also something that is not a financial product. To some extent, I think the thinking behind this was, where you are giving general advice about the allocation of your assets across a whole range of potential assets, perhaps including financial products but also including non-financial products—

Senator CONROY—What are you defining as that?

Mr Rodgers—I am saying that real property is the example we use here—that is, real property rather than securities that have property as their underlying asset.

Senator CONROY—You think a judge is going to differentiate in terms of the word 'property' between a listed property trust and a house? I have to say I am surprised that you think a judge would do that.

Mr Rodgers—But again fortunately it is not our task to predict what the judge will say.

Mr Tregillis—In terms of the application of the licensing provisions, the answer must be yes; clearly a judge would say that, in terms of real property, they are not within the definition and do not attract the provisions of the legislation.

Senator CONROY—So real estate agents will escape on this basis. They will advise you to buy a house and negatively gear it, and that is not going to be the giving of financial advice.

Mr Rodgers—That is a question for the legislation itself and whether advice about—

Senator CONROY—But I am asking for your view on that. Given that you now have this definition of 'real property', are you seriously saying to me that, if I am a real estate agent and I advise you to buy a house—whether or not I advise you to negatively gear it—that is not giving financial advice?

Mr Rodgers—It is advice about a 'financial product', which is a defined term within the legislation, and certainly houses are not financial products.

Mr Johnston—The short answer is that it is not caught by the legislation.

Mr Tregillis—You could check with Treasury, but we do not think that currently that would be caught.

Senator CONROY—Real estate agents are out, accountants are out, lawyers are out. Is there anyone left but financial planners? Why are we adding all of these pieces of paper for something that is already—

ACTING CHAIRMAN—Senator Conroy, please! Mr Johnston.

Mr Johnston—It is not contemplated by the law, and all that we can do is administer and interpret the law that is given to us. However, on another occasion going back a year or so, we did put out a discussion paper on real estate agents and whether or not they should be caught in some way.

Senator CONROY—I remember.

Mr Johnston—There are jurisdictional issues because it is not something that we regulate, but we did publish a paper to try to raise in the minds of state attorneys, among other people, the fact that perhaps this was something that needed to be addressed. So it is something to which ASIC has specifically drawn attention, and we are aware that the industry wishes to draw attention to it as well. But it is not caught in the law.

Senator CONROY—If a real estate agent, an accountant or a lawyer says to me, 'I think the best thing for you to do is to buy a house and negatively gear it,' are you seriously saying that that will not constitute managing financial risk?

Mr Adams—Yes. I think there are specific exclusions from the definition of 'financial product' and real property is one of those.

Senator CONROY—Just out of interest, whereabouts is that one in here? If it is there, it is there, and it will not matter.

Senator MURRAY—Whilst the witnesses are looking for that, perhaps I can reinforce your point, Senator Conroy. I seem to recall that the Treasurer's own figures in his press release indicated that the result of cutting capital gains tax would create a massive arbitrage of several hundreds of millions, which would mean a shifting of—

Senator CONROY—An asset class perhaps.

Senator MURRAY—activity to ensure that the tax was at a preferred rate. Negative gearing is part of that whole milieu. If the Treasurer has been able to identify hundreds of millions of dollars of arbitrage, then assuredly, if that motivation were to exist in the tax system, the motivation would exist for people—

Senator CONROY—It would be driving you to manage a financial risk.

Senator MURRAY—to promote it.

Senator CONROY—Yes.

Senator MURRAY—So I think you do have a point.

Mr Adams—I have just been having a quick look at the bill. The definition of 'financial product' in clause 763A relies on the concept of a facility. It refers to a 'financial product' as being a facility through which various things happen, including managing financial risk. That is in subclause (1). In clause 762—

Senator CONROY—But property is an asset class. If you were to say 'owner occupied', maybe you could get away with it.

Mr Adams—Perhaps I could conclude the picture. Clause 762C on page 22 of the bill defines a 'facility'—and remember that that is the key word in 'financial product'—and that does not include real property. It talks about intangible property. So real property is not captured by the definition of 'facility'.

Senator CONROY—So you could be contending that a property trust, which is buying a part of a building—

Mr Adams—I would not be contending that. In that context, you have a vehicle being the trust, which could well be a managed investment scheme. The underlying assets of that managed investment scheme may be real property, but what you as a consumer purchase is an interest in that managed investment scheme, and that interest is intangible.

Senator CONROY—I am not an expert on managed trusts, but I thought you bought ownership of part of a building.

Mr Johnston—No. You buy a unit. The underlying assets are unitised and you buy a unit, which only represents an interest in the fund; it does not represent part of that property.

Senator CONROY—Ownership of the building itself.

Mr Johnston—So that is certainly caught under this, but real property would not be.

Senator MURRAY—You are thinking of strata title.

Senator CONROY—There is a variety of different—

Mr Adams—In that context, you may not be buying a unit in terms of an interest in the scheme. The definition of 'managed investment scheme' is a broad concept, and it includes also the concept of 'common management of assets'. So it may well be that you as the purchaser do have some interest in the real property, a direct interest. But the managed investment scheme in that context is a contractual bundle of rights, being the common management of that property. So in that context it is still—

Senator CONROY—So a strata would be in 'managed', and a property trust would be out.

Mr Adams—No; a property trust is in, and the strata scheme is also in.

Senator CONROY—I thought you had put them on the other side of the line. I will be watching tax law.

ACTING CHAIRMAN—Perhaps I can change topics for a minute. Today I met with the Australian Financial Planning Association and they raised a query with me concerning the definition of Australian financial services licences under the bill. They made the point that Australian financial services licences can be issued to specific providers, such as stockbrokers and life and general insurance agents, but that that provision does not include financial planning as a specific category. I understand that the FPA had some meetings with your organisation last week and put the proposition that there should be a specific category—with the appropriate qualifications of course—to cover financial planners. Would you care to comment?

Mr Johnston—We had a meeting with the FPA last week but, to be frank, it was not particularly on this issue. They did raise it and said that they noted that the bill provided for specific recognition of some categories. Obviously financial planners can be licensed or authorised as representatives under the bill, but some categories are allowed to record themselves as insurance brokers or stockbrokers. We suggested that that is really a matter to take up with the Treasury rather than with us, because it is not something that we authorise. I might ask Ms Vamos to just explain how the licensing process itself would work.

Ms Vamos—We are aiming with the issue of the licence to allow applicants to tailor the licence to reflect their specific activities, so if an applicant, for example, only provides advice and deals in general insurance products they can get authorised to do that. If they want to go further and call themselves a general broker then they seek an authorisation to do that as well.

Mr Tregillis—Senator, the provision 923B is really a restriction on use of certain words. Again, it is a question to direct to Treasury, but I think what it reflects is that in existing legislation there are restrictions on the use of some terms. I think this is not designed to add to those restricted terms but really only reflect those that are already in existing pieces of legislation, such as futures broker, insurance broker and general insurance broker. If you track through the various bits of legislation you will see they are not adding additional terms. That is our understanding of how that is intended to work but really that is more a question for Treasury, ultimately. I did raise it really as an aside.

Senator COONEY—I want to ask about these guidelines within the policy statements. There is one other thing that keeps worrying me a bit about how we are going about the policy statements. I understand everything you say and what you are doing. You deserve some considerable thanks in that you are keeping up with the changes in the legislation as we are going along, in your policy statements and you are publishing those, as I understand it, not only to the industry but also to consumer groups.

But in effect—I am not in any way criticising you—there is a root problem, that these policy statements will in fact become the law. This is what people are going to read and say, 'This is what the people who have to administer this say.' Consumers are entitled to have their parliamentarians make laws that suit them and are proper for them and the industry is entitled to have their parliamentarians do the same for them. I am wondering what sort of quality control you have got on what you are putting out. What is to say that what is getting to the consumer and to the industry is what parliament is doing through its bills, and that when the regulations come out they are the ones that operate? You are going to have some very big firms well equipped with all sorts of geniuses in this area looking at the law and wondering whether or not your policy statements are correct. What sort of quality control have you got on the policy statements? As you know, Mr Johnston, this is a fairly likely area for a bit of litigation along these lines.

Mr Johnston—I would point to the process that we are actually going through. Where we started this afternoon was to point out that these are consultative documents. These are guidelines which will eventually translate into policy statements. On the way through they are being tested, analysed and pored over by a great number of people and we will receive feedback if we are either out of line with what seems to be a sensible approach to regulation or it would certainly be pointed out to us, one would expect, by Treasury among others if we were way out of line with what the legislation provided. The process that we go through would actually give light to any inconsistencies that were there.

Senator COONEY—Treasury—I think Senator Conroy and Senator Murray would agree, but Senator Gibson might not—are not the people who in the end pass laws. Can you follow?

Mr Johnston—As we said, though, these are issued widely, and as well as issuing them and simply taking written comments back we have had so far some 30-odd meetings with various industry groups, including consumer groups, and we are in dialogue—Mr Kell might elaborate on this—with consumer groups as well.

Senator COONEY—Can I point out that this comes from a fairly practical issue, not in this area. You get a lot of people coming to not the big solicitors in town but to the solicitors who

want to do the right thing by clients who are not well endowed with money. What you get the whole time is banks and police forces saying, 'No, we can't do anything about that; it's too small,' or else 'The guidelines cover this,' or what have you. You might struggle as a legislator to get some laws changed but what I think is happening more often than it should is that the instruments that are supposed to be administering these laws do not administer. I know police forces which say, 'That is a thing that is only worth $100,000 and we cannot do anything about it.' Other people say, 'You cannot get into this area because you just have not got the funds,' so it is pretty important that parliament's will gets out, not necessarily other people's will. All I am asking is what are you doing to ensure that. It is a social issue in many ways, not an industry issue simply.

Mr Johnston—No, it is not. It would be fair to say that from the inception of the first draft of the bill we would have been in consultation with the Treasury, but we were also in consultation with the minister's office on the way through and appearing before committees such as this where we would expect that any inadequacies or errors would be pointed out to us.

Senator COONEY—All the people on the committee come from the big end of town. That is what the problem is.

Senator CONROY—I will take Senator Gibson's advice and move on. I asked this of Treasury this morning but they said ASIC would know the answer. Under the FSRB a licensee must obtain and maintain the competence needed to provide their financial services. I am talking about corporate trustees and super funds not for profit. How is competence to be determined when you have a system of representative trustees as in the corporate super funds? I am interested in what the competencies are and how you qualify for them.

Mr Adams—We have been quite aware of the issues that are related to superannuation trustees and licensing. In our paper on organisational capacity, the second PPP, we canvassed the issue of expertise both at a management and technical level, and we have attempted to try to design our minimum standards there to be flexible to accommodate varying circumstances. Amongst other things, it contemplates something like a key person, condition, so that such entities may be able to at least rely on one individual who has the technical skills. In addition to that our policy also reflects the notion that outsourcing is something that can be used and relied upon by licensees. So it may well be that such entities, if they were to seek a licence, may be able to rely on that as a vehicle to also provide them with the relevant expertise.

Senator CONROY—Let me take you through the example I went through with Treasury this morning. I appreciate that you are genuinely trying to address an issue, I am just not sure that we will get to a solution that I can live with. Most of you have probably heard me mention that I used to work for the Transport Workers Union Superannuation Fund. It is an industry fund that elects its trustees based on the SIS legislation, which does not allow the appointment of approved persons—it requires a person to be elected. Could I put it to you that it would be unlikely that any of the elected trustees from the Transport Workers Union, who are truck drivers, would probably meet the sorts of competencies that you are talking about. In the transport industry, many employers are also former truck drivers. That is just the nature of the business, that they work their way up, and they now run their own trucking business. So, again, I would put it to you that it is unlikely that any of the employer representatives who are elected to a fund, in that sense, are actually likely to have the necessary skills as an approved person—I

think he used that phrase. I think that would probably be common right across on an industry fund basis and a corporate basis. Coles Myer might by accident have somebody who meets your competencies as the Coles Myer employer rep, but I think the shop assistants who would make up the reps from the employee side would probably, unless they are share trading on the side at night, miss out as well. I just want to get your thoughts on how this trustee board could actually meet your criteria, because I cannot see my old fund or the Coles Myer corporate fund actually meeting your test.

Mr Adams—If I could make a few comments and then perhaps any of my colleagues may wish to add something. The first thing to note is that the mere fact of superannuation trustees does not necessarily mean they have to obtain a licence. The first threshold question is whether such entities as a group, if they are a group of individuals, are planning or intending to provide financial services, as defined under the legislation. Let us assume they have considered that they wish to provide financial product advice or deal themselves in the issue of the interests of their product, because there are options to them to be able to use an outside entity to provide advice to their members. They may also be able to rely on some of the exemptions which are provided for in the legislation, such as the exemption for a product issuer, where they arrange for a licensed body to perform that function for them. I think, at a threshold level, the entity has to determine what activities it wishes to undertake, and if it chooses to undertake financial services as defined under the legislation, then there are choices before it. There are exemptions for the mere operation of the superannuation scheme itself that do not require a licence.

Senator CONROY—I attended board meetings, and I am struggling to think of the sorts of issues that the board discussed, or that I went out and talked to members about, that would not constitute financial advice. I am recommending that they put more money into their super fund, and I think the super fund is probably just narrow enough to fall within our earlier discussion. So I would have to say that in the performance of my duties and my observations of the board meetings, I am probably inside the necessity for a licence. What are the minimum standards of competence that you require for most corporate and industry funds?

Mr Adams—If I could just complete my earlier answer: let us assume they need the licence or they need to be authorised, then our policy paper tries to set out what we consider to be flexible minimum standards. The organisational expertise options to them are to obtain or provide or engage people so as to satisfy the technical and managerial expertise requirements, if necessary. The other part of the picture I should allude to is that, again, in the parliamentary amendments there are intended provisions there to deal with multiple trustees in order to facilitate the licensing.

Senator CONROY—I appreciate that there is an attempt being made to cover this problem.

I am not being critical. I am still concerned, after having seen the policy papers, the original legislation, that you are probably still going to get a situation where most of the industry funds and corporate funds will not meet even the most basic of those competencies that you are seeking. If we were talking about the Merrill Lynch fund, I suspect that they might just fall into a category where they would have enough expertise on their employer and management side to qualify for your competencies, but I cannot see my truck-driving colleagues or my retail shop assistant colleagues meeting any of them.

I appreciate that you are actually trying to work through a solution, but as long as there is a competency clause that is required, even collectively, by the board, then I suspect that none of these funds will actually meet your competency criteria. So what do you envisage would happen?

Ms Vamos—I think there are a couple of issues to answer. We have had this issue raised by ASFA as well. The first point to make is that—and I do not know how long ago it was that you were a member of the TWU fund—

Senator CONROY—I am still a member of the TWU fund.

Ms Vamos—the SI(S) legislation requires and provides that the trustee carry a fair bit of responsibility, and ultimately they are responsible for the decisions they make in relation to the fund. As a result of that there has been quite a substantial push by the superannuation industry to make sure that superannuation trustees are trained.

Senator CONROY—I have been on the trustee training courses.

Ms Vamos—On one view, a lot of the requirements that we have here for licensees are no greater than that. There is a recognition of that. We also recognise, as Mark was saying, that in the operation of the fund, when it comes to delivering services that they may need to be licensed for, they can contract somebody or outsource to provide that expertise. As long as that supervision and checking is there, then they can meet their requirements.

Senator CONROY—So the simple administering of the fund would not require the licence. For what I used to do, which was go around and recommend that people invest, then, given that reading, I think I probably would need a licence or I would need to be an authorised representative of a licensee. Certainly, for what I used to do, that would be necessary.

Ms Vamos—If you are providing advice as defined, then you are likely to need a licence or authorisation—if you do not contract it out, if you provide it yourself and if you are not an authorised representative for somebody else. And you are likely to need training under 1446 as well, because that is personal advice.

ACTING CHAIRMAN—We had the corporate funds people in here on Monday and they were concerned that their cost ratio was about half that of the public funds. It was around 0.7, they were claiming. They were concerned about being caught up in more regulation and about their costs going up. Most of them, they said, were defined benefit funds, so that the trustees are in fact just administering the scheme and all the work is outsourced to whoever. Are you saying they would not be caught?

Ms Vamos—That would not change.

Senator CONROY—Would they need to be licensed? I think that is Senator Gibson's question.

Ms Vamos—That is still uncertain under the legislation. We should also make the point that, if they are providing advice at the moment, they need to be licensed, and most of them argue—the corporate funds—that they do not provide advice. If they are not providing advice, they

he corporate funds—that they do not provide advice. If they are not providing advice, they would not need a licence to provide advice.

ACTING CHAIRMAN—Okay. That is useful.

Senator CONROY—I think the keyword is 'uncertain'. I accept that a defined benefit fund can mount the argument that it does not actually do anything other than administratively taking money out of people's pay packets and storing it, and it is all done.

Mr Tregillis—I am not sure if we can provide anything more specific, but I think the sort of answer that Mark gave was that, within the framework of this legislation—which is really what you are asking—there are two things you need to consider in your example. The first one is, in terms of going forward, whether you want to be in a business such that attracts a licence. So there is a commercial decision.

Senator CONROY—I think the industry funds and the corporate funds want to stay in the business.

Mr Tregillis—Secondly, the legislation does say that, if you are providing advice, or attract the provisions, then there are certain minimum requirements. The legislation says that there are a variety of ways in which you, as an organisation—and I think the focus is on the organisation—can achieve that. You are querying how practical it is. The counterissue is to say that somebody providing advice, which you say you were probably doing, which would be attracted, should not therefore be regulated.

Senator CONROY—No, I am not saying that. I accept that the role that I used to play—which was the superannuation officer for the fund in Victoria, going around as I was—would now probably constitute the giving of financial advice.

Mr Tregillis—Then you would need to either be licensed in your own right—

Senator CONROY—I am more comfortable with that.

Mr Tregillis—which means that your fund manager would be effectively using you as a licensee. But if they did not and if you were providing advice effectively as an authorised representative, then it would have to be a licensee that they were dealing with. They either have to choose to get the licence themselves and meet the core competencies or, alternatively, decide that they really want that provided by a third-party provider. In terms of getting the competencies, all I can say is that there are a variety of ways, including contracting in that expertise, but our policy says—

Senator CONROY—They contract in now. It is not like there is a group of truck drivers and former truck drivers sitting around deciding on the asset allocations of a couple of hundred million dollars worth of truck drivers' funds. I can promise you that has not happened.

Mr Tregillis—And we had dealt with those licence conditions because, as Ms Vamos said, currently under the Corporations Law if you are providing advice—and we have in fact dealt with some of those practical issues of superannuation with exactly that structure, but on the

basis that they have a key person there who is effectively provided and provides that expertise, which is the model also in the new legislation—there is a choice of funds under this legislation.

Senator CONROY—There is a choice of watching each and every trustee at the moment—if this is passed in its current form—resign because they do not have the qualifications. That is certainly a choice; it is just not a choice that a lot of people are excited by.

Mr Tregillis—Again, just to clarify: this goes to the organisation, not each and every trustee. I make that clear. There are no requirements on each and every one. Somewhere in the organisation you have to be able to meet the various organisational expertise.

Senator CONROY—If you are saying that the board of trustees does not require any of the individuals collectively to reach or have the competencies, notwithstanding Ms Vamos saying they about equate with the SIS legislation, I am not sure that I would agree—

Ms Vamos—No, I am not saying they equate, because there is no actual requirement. I am saying in light of the education requirement—

Senator CONROY—I would not mind if you wanted to put a proposal that every trustee had to go through a training course—I would vote for you. As I have said, I have been on them and they are very good. I would happily have that as a compulsory requirement. But that is not what we are here for today. We are talking about many of the competencies. If the position is that no-one on the board of trustees needs to meet the competencies, but the organisation still needs a licence and it can outsource and bring all the people in necessary to give the advice, if that is what your interpretation is and that is what the policy paper is going towards, I am relaxed. I appreciate that you are trying to get as close to that as you humanly can without going across the line, but I am just not sure that is what you are actually intend; I am not sure that is what the legislation intends.

Mr Tregillis—Certainly you need to have the competencies. The clear statement is that the organisation, if they are in the financial advice or other business, needs to meet the competencies. I think that is clear. The question is how. I was querying whether the policy requires anybody who is a trustee; I think the concept we have got in here is a responsible officer and it clearly needs to be somebody in a decision making position. I do not think we have gone the next step and said necessarily—

Senator CONROY—Could that be the funds secretary?

Mr Tregillis—It could be the funds chief executive—it depends. They have got different names in different funds. But clearly a person in a senior decision making role responsible, for the day-to-day, is one area to consider.

Senator CONROY—But they would not necessarily have to be on the board.

Mr Adams—That is our understanding.

Mr Johnston—Because they can contract that in.

Senator CONROY—So that contracting in provision is there and that grouping. Treasury believe, from their interpretation, that the grouping provision is still that someone within the group needs to have the competencies, which is slightly different from what you are now saying to me.

Mr Tregillis—We talk about the key person in the policy proposal and the requirements for that, so that is the concept we use. It is not only in this circumstance. Even with the larger players on the board we often look to the chief executive or other people, so it is not a unique circumstance in terms of saying who has met the core competencies. The key person or key persons may not necessarily be the chairman and the board; it might be the chief executive or the head or the executive director of that particular division. That is not uncommon in the other sectors as well.

Ms Vamos—The grouping was so that we could actually issue the licence to the trustees as a group, rather than have to issue a licence to each one individually.

Senator CONROY—I appreciate that was attempting to encompass what is happening out there in the real world of superannuation. The amendment being tabled tomorrow goes to the heart of this. We understand that it is being tabled as part of the debate tomorrow.

Mr Adams—It facilitates the licensing of the trustees where they are individuals.

Senator CONROY—The definition of 'advice' used in the FSR Bill is causing quite a bit of concern for lawyers and accountants, as I am sure you are aware. A submission to the committee from the commercial law firms suggested that they understood from ASIC that they would need to be licensed, in the context of a construction contract, to warn a client about the need for insurance. Is that right?

Mr Adams—There is nothing quite as specific as that in any of the policy proposal papers.

Senator CONROY—What is your view? If you are the lawyer and you are looking over a construction contract, if you suggest to them that they may need insurance, would that constitute giving financial advice? It is certainly narrower than an asset class.

Mr Adams—Again, like anyone, they would need to perhaps walk through the kind of things that we point out as indicators in the advice and DLPPP.

Senator CONROY—Hopefully, they could do what I have done and ask you.

Mr Tregillis—We are not going to answer every question from every lawyer.

Senator CONROY—Well, the good news is that I am not a lawyer, but I am asking you.

Mr Adams—In that context, it is arguable that they are giving an opinion or recommendation in relation to a product.

Senator CONROY—I am going to agree with you and this is where I got to with Treasury this morning. If they said, 'You might need insurance,' Treasury thought, 'Maybe not,' but if they said, 'You will need insurance,' Treasury said, 'Yes.' Help me; you are my last resort.

Mr Johnston—I think we have indicated that it is at least arguable that that is the case. I do not think that is a specific example that we have contemplated thus far, to be frank. I do not think that we would want to go down the path, as I said earlier, of looking at every possible option without giving it some thought, because that is why these papers are out there—to generate that sort of input and let us consider it.

Senator CONROY—As I said, I am trying to determine a vote, unfortunately, before you finalise your position, so I do need to press you on these issues because I actually have to make a deliberative decision.

Mr Johnston—I appreciate that, Senator, but we would not want to decide issues at this table. We would want to consider them and take our own counsel.

Senator CONROY—So, when the minister says, 'Senator Conroy's holding the legislation up in the Senate,' I reply to him, 'When I get my responses from ASIC I'll agree to go forward with the bill.'

Mr Rodgers—There is a specific provision in the definition of financial product advice that contemplates lawyers doing things which might amount to giving financial advice. In effect, it says that if a lawyer gives advice in a professional capacity about a matter of law, legal interpretation or the application of the law to any fact, that is not financial advice.

Senator CONROY—No, I agree.

Mr Rodgers—The question on your example is whether that is within that exception or not.

Senator CONROY—I cannot see it.

Mr Rodgers—Clearly, if it is not within that exemption, then it is financial advice.

Senator CONROY—I tend to agree with you. I would be interested if anyone agrees with Treasury about whether they said 'you will need' or 'you might need'—whether that makes a difference to your interpretation. I do not think it does, but I would be interested if anyone does think that.

Mr Rodgers—In the policy proposal that we have issued on 'advice', we have said there are two major variables: what the character of the communication is, and the context in which it is given. We have deliberately cast it in that way, to say we want a fairly powerful tool to apply to possibly a very large number of individual circumstances, and in that circumstance you would need to understand all of the details about what had happened to come to that view.

Senator COONEY—Are you saying if a lawyer said that you ought to have insurance in this particular transaction, that would be giving financial advice? If you are saying that, then I want to return to the sort of issues I raised before.

Mr Rodgers—Not wishing to avoid the question entirely, I think the lawyer is as well placed as anybody at this table to understand whether that is caught by the legislation or not.

Senator COONEY—That is it exactly. That is right, isn't it? That is exactly it. In the context of FSRB Policy Proposal Paper No.1, in light of the answer you have just given me—and this is B19 on page 23, and you may have been through this—you say:

Licensees must comply with the obligations set out in 912A and with any other obligations set out in the Law (as amended by the Bill). This includes a requirement to comply with all licence conditions imposed by regulation or by ASIC.

Are you giving there equal weight to the conditions applied by ASIC as those applied by regulation?

Mr Rodgers—The thinking behind that expression, Senator, is that what the law gives us is the right to impose conditions on the licence when we issue it. Those conditions themselves a licensee must comply with. The law also says that if we do make a condition, the licensee must comply with that condition. So in that sense a condition imposed by us under the legislation using the power that is in the legislation is as mandatory for a licensee as compliance with a direct provision of the legislation or a regulation.

Senator COONEY—Can I just continue on this line then? Are regulations conditions that you impose that are not subject to scrutiny by the Senate or by the House of Representatives?

Mr Rodgers—That is right.

Senator COONEY—But the regulations are. I think this is an issue—

Senator CONROY—We will make the policy that they are disallowable instruments as well.

Mr Tregillis—But, Senator, just to explain the types of things that go to conditions, as an example, if somebody says that we want a licence but our expertise is in the area of—

Mr Johnston—General insurance.

Mr Tregillis—general insurance, what we do is we grant a licence, subject to quite an explicit condition, but on the basis of your application you get a licence. We are thinking through those licence conditions, but they sort of, if you like, prescribe the activities for which a person is licensed. I do not think any of the conditions would have the character of a legislative instrument of the type that you are concerned about. They really are terms of a condition that would go to something already in the law, and it is something that people ask us to do because otherwise we are constrained in saying, 'You cannot get a licence because you cannot cover the field.'

Senator COONEY—The way you write things indicates the way the mind is working, I would have thought, and what I write indicates what I am thinking. Here in this sentence you have run together regulations and licence conditions, and given them, I would have thought, equal weight in the way you have put things. That indicates a way of thinking, I would have thought, that does raise issues.

Senator Conroy is right in terms of how we are going to vote, but we are loaded up with policy statements, we have got licence conditions, we have got regulations, and we have got the laws themselves and they are open to all sorts of interpretations. What I am not quite clear about—and you might want to clarify this in writing—is why shouldn't parliament have a look at the conditions? What you will say to me is, 'The conditions really are not of the character that would interest parliament because they are probably administrative things and things like that that people have to do.' But how are we to know that that is what you have confined yourself to?

Mr Tregillis—There are couple of questions there, Senator. In terms of the sort of way in which that is written, I think the concern is that somehow we are not reflecting, if you like, the legislative intent or we are going beyond it. That really reflects 912A. It talks quite explicitly in the bill about general obligations, and it says:

A financial services licensee must:

and I will go to (b):
comply with the conditions on the licence.

So we are reflecting very clearly the legislation. Likewise it says in (i)—and there are a whole lot of other things it says:
(i) comply with all the other requirements that apply to the licensee under this Act;

We have summarised as prescribed the obligations under regulations. So the language there, in terms of stating what the obligations of a licensee are, directly reflect the current draft of the legislation. There are not something that has been, if you like, inserted in addition, and the words I think in 912A are quite accurate. In terms of the types of conditions that we impose, I am not sure, other than the reassurance we have given, that they tend to go to matters of limitations on what activities can be engaged in because that is what people have applied to do or what are their areas of expertise—a range of other licence conditions. I have got a list of the types of conditions that—

Senator COONEY—But they are yours; they are not the parliament's lists.

Mr Tregillis—No, but just to give you that reassurance in terms of looking at the types of conditions. I do not think these constitute subordinate regulation or legislation of the type that you are legitimately worried about. We could show you current licences or the propositions for you to do it.

Senator COONEY—I think that is it. We get a lot of regulatory bodies who say, 'Give us power and we will undertake to handle it responsibly,' which is probably right, but I am not sure that we can take this.

Mr Tregillis—Again, in terms of the grant of a licence and conditions, if people do not like it, there are administrative remedies available because the grant or refusal of a licence and the conditions is subject to appeal by an applicant. So there is a mechanism for somebody to say, 'Well, I don't like your decision in this case.'

Senator COONEY—That tends to be pretty expensive. But I will leave it be.

Senator CONROY—We have talked about an individual circumstance of a lawyer and where your definition is. I just want to return to the accountants. Phillips Fox define the role of an accountant, and they talk about financial evaluation, which is a stock standard normal accounting role. You are my accountant, Mr Adams, and I come to you and I say, 'Look, I have got this investment. I think it is a dog. Can you evaluate it for me?' You evaluate it. Let us pretend that you do not then say anything about the investment because you would breach, possibly, the giving of financial advice. Do you think that you would breach (b), which could reasonably be regarded as being intended to have such an influence? By doing an evaluation you are preparing an opinion.

Mr Tregillis—Can you just explain what you mean by an evaluation and an opinion?

Senator CONROY—Let us say I have got a share portfolio and I go to my accountant and I say, 'I do not think I am doing very well. Could you tell me whether you think I am doing very well?' The clear indication from that is, if I am not doing very well, I will get out of a particular asset class, so rather than saying you are going into one, I am basically asking you should I get out of one.

Mr Adams—The guidance I can point to is that in our views on the interpretation of financial product advice it is about a decision about a financial product, and we have suggested that that includes buying, selling or holding such a product, so it is possible that advice can include the notion of to sell a product.

Senator CONROY—So, according to Phillips Fox, that sort of evaluation would almost certainly fall within your guideline.

Mr Adams—Yes.

Mr Rodgers—Yes.

Senator CONROY—So I guess my next question—

Mr Rodgers—More particularly, you put forward within the definition of advice within the law; this is not created by our guideline.

Senator CONROY—I accept that. At least we have now got an interpretation of what the law says. On that basis, if we believe what Phillips Fox says, which is that this is stock standard accounting business, every single accountant would need to be licensed. If every single accountant just did that simple thing of an evaluation, they would all need to be licensed.

Mr Johnston—If anyone did that thing, they would need to be licensed. If what they were doing was recommending that someone should—

Senator CONROY—I stop short of the recommending. I am not looking at paragraph (a); I am looking at paragraph (b):

> Could reasonably be regarded as being intended to have such an influence.

I do not have to make a recommendation. That is clearly the intent of the legislation. It is about 'could reasonably be regarded'. If I give you a financial evaluation of something that looks terribly bad, surely that could reasonably be regarded as being intended to have such an influence.

Mr Rodgers—I am not sure that I follow your distinction between paragraph (a) and paragraph (b), because paragraph (b) simply refers back to paragraph (a).

Senator CONROY—Sure. I am just trying to not read out the longer one.

Mr Johnston—Paragraph (a) refers to if it was intended; and paragraph (b) says even if it was not intended, then a reasonable person would have thought it—

Senator CONROY—But it is an important difference.

Mr Tregillis—If somebody who was in the financial planning business gave that same opinion or report, I think we would regard them as providing financial advice. I use a comparable example: if some person, other than an accountant, was in that sort of fact situation, with the usual caveat of looking at all the facts, on that basis I think we would probably say that, on the propositions we have got and our understanding of the law, that would probably be caught.

Senator CONROY—In the Phillips Fox paper, under the heading 'The Role Of The Accountant,' they define a whole variety of things which probably fall outside—

Mr Tregillis—I think that is a threshold issue. We have discussed this with accounting employees over a number of years, including in terms of good advice, this concept of what a traditional accountant does. That is an interesting concept.

Senator CONROY—Just looking at the dot points that Phillips Fox has supplied, 'Business development advice, which includes strategic business planning'—it may be financial advice, but it is not the sort of financial advice I am thinking of. It may fall within your definition. I do not know and I do not want to go there. 'Business appraisals which include share evaluations'—maybe, or maybe not, I am unclear. The one that catches your eye says, 'Financial services advice.' Putting aside that we could have a long argument about what Phillips Fox mean by that; what the accountants mean by that and what you mean by that, they then say, 'Including financial evaluation.' I just wanted to pin down one point where the stock standard role of an accountant, in your view, on an interpretation of the legislation, falls within the licensing provisions.

Mr Tregillis—Stock standard as put in the Phillips Fox paper?

Senator CONROY—According to Phillips Fox. There may be a thousand accountants who would say, 'We don't do that.' I do not want to go there, I am just saying—

Mr Johnston—It does not matter whether it is stock standard or not. It is the undertaking of that activity; that is the important thing.

Senator CONROY—Okay. I have gone as far as I want to go on that one. I appreciate that we want to finish by 6.30 p.m. and we still have a page and a half. In their submissions to the committee, a number of the consumer groups expressed concern about the potential for abuse created by a licensee not being responsible for the conduct of a representative, if that representative discloses to a client that they are acting outside the authority. In your Policy Proposal Paper No. 2, page 33, you outline some activities that a licensee must monitor. What do you envisage a licensee would need to do to ensure that their representatives never act outside their authority? What else can be done to ensure that the carve-out for the liability of licensees is not abused in the way that consumer groups fear? We are wandering into the area of multiagents, which means, Ms Vamos, your time is coming!

Mr Johnston—Could you repeat your reference again please?

Senator CONROY—Policy Proposal Paper No. 2, page 33.

Mr Adams—Maybe I could give a preliminary comment and then my colleagues could add to it. It is our view that it is a key licensee obligation, as listed in one of the licensee obligations, to monitor and supervise their representatives, and that would include ensuring that they act within authority. We have that as one of the key things that a licensee must do. This is the provision that I think you are referring to. Clause 917D is one which does provide some degree of protection—and there is debate about the degree that it provides—from liability for—

Senator CONROY—I want to clarify this, because I understand that, if I am a tied agent working for AMP and I disclose to you that I am acting outside my authority, the liability is still on me, but it is also still on the insurance company; that is, it is still on AMP. Is that right? But in a multi-agent situation there seems to be an exemption of liability.

Mr Johnston—If a person discloses that they are acting outside authority—is that the situation you are contemplating?

Senator CONROY—Yes.

Mr Johnston—If the person discloses that they are acting outside authority then the licensee is not responsible under this—

Senator CONROY—Under either set of circumstances?

Mr Johnston—That is right.

Senator CONROY—The discussion I had with Treasury this morning indicated that, if I were a tied agent, then the liability would still be with AMP. It would be joint liability at the agent level as well as at the company level.

Mr Johnston—I would submit there is not any difference, in my reading of the bill, whether it is a tied agent or otherwise.

Senator CONROY—Okay. But in your view, in both circumstances the liability stops there with the company?

Mr Johnston—The bill specifically contemplates a situation where the authorised representative disclosed that they are acting outside authority.

Senator CONROY—Treasury and I had a slightly different discussion. It appeared from the discussion that I had with Treasury that the multi-agent liability was extinguished for the three. I picked an example where you have got three suites of products and three companies because you were a multi-agent company.

Mr Johnston—Subject to it being exactly the same example, because, of course, we are not privy to—

Senator CONROY—I am not trying to verbal you in any way. I will check the *Hansard*. Maybe I confused Treasury, which is entirely possible! I now want to talk about the exemption for work ordinarily done by clerks and cashiers.

Mr Johnston—Could I come back to that previous example. The point that we would probably make—and it is simply our interpretation; this is not our provision—is that on our interpretation there would still be liability attaching to an authorised representative for their actions, if there was action that needed to be taken. But the liability does not go up the line to the licensee in that case.

Senator CONROY—Help me: I am the person selling—I am the authorised representative. Liability will be on me. What is the next level above me that will have liability?

Mr Johnston—The law contemplates that, if the representative disclosed to the client that they were acting beyond their authority, the liability would not flow up to the licensee. All I am pointing out is that, if there were some adverse consequences, it may still be that the person had an action against the authorised representative themselves for that action.

Senator CONROY—As in against me?

Mr Johnston—Yes.

Senator CONROY—But not in terms of AMP if I am an AMP agent?

Mr Johnston—That is right.

Senator CONROY—Exemptions for work ordinarily done by clerks and cashiers: I now understand that term is currently used in section 94(3)(d) of the Corporations Law. Your policy statement PS 117 discusses what the tasks of clerks and cashiers are. Can you explain to the committee how you currently interpret that phrase and how you intend to administer that part of FSR?

Mr Adams—We give guidance on that in two of our papers, Policy Proposal Paper No. 1 and some further guidance in paper No. 6. The first thing, in short, is that we are basically providing similar guidance in that we suggest that that expression should be limited to administrative or mechanical tasks which do not involve a sense of informed judgment in terms of making any suggestions. The other point I would like to allude to in terms of the exclusion which is in the bill is that it is practised by the language:

> (3) To avoid doubt, a person's conduct is not the provision of a ***financial service*** if it is done in the course of work of a kind ordinarily done by clerks or cashiers.

So we consider that the advice we have given or the guidance we have given is consistent with that. For instance, there is ambiguity about there being provisions in the bill which talk about obligations which fall on someone providing something. On one interpretation 'provide' could mean the actual handing over of a document.

Senator CONROY—But you actually specify handing out an advisory services guide and explaining what is in it is routine work.

Mr Tregillis—That is in the previous policy. We have got a shorter form. We really set out the principle in the current document. You are referring I think to a list in the existing policy statement under the current law, Senator. The current policy proposal, and it is one that has been subject to some comment in the feedback, really tries to set out the principle that is consistent with those examples, which is really the functions—it is not the names—that clerks and cashiers perform, really. We set out a formulation of the underlying principle, and we have asked for comments on that.

Senator CONROY—I am trying to understand. I know there is a verbal requirement or an oral requirement in some circumstances for a basic term deposit. I think that is right—I hope that is right. You are going to give oral advice rather than hand a document over for certain products?

Mr Adams—There are certain exceptions from some of the documentary obligations in relation to advice on basic deposit products.

Senator CONROY—Yes.

Mr Adams—The statement of advice requirement is not required where certain statements are made orally, if that is what you are referring to.

Senator CONROY—I appreciate you are now saying that at the moment the advisory services guide is the old description under the old rules, and that we have got new rules and you are looking for a principle. So if I am handing documents across the table for a term deposit,

and I do not know whether that is captured as being exempt from any information, would that still be giving financial advice—if I am handing over one of the three possible ones? It may be that there are two others exempted. I am just trying to know where—

Mr Adams—I suppose my immediate reaction would be again that that will depend upon the circumstances. If someone has come forward and asked, 'Please give me the document on that', and someone hands it over, that is the sort of thing which I think would be clearly contemplated by the clerks and cashiers exemption. It is a different circumstance if someone comes in and, through a line of inquiry, someone suggests 'How about you look at this?' In that context I think we would suggest that you probably could not rely on the clerks and cashiers exemption because some form of judgment is being used to suggest that this is something relevant to you.

Senator CONROY—I agree. But if I was hanging out for the less than two-year term deposit, I am just trying to see whether or not there is a crossover there. Unfortunately I am getting a shake of the head—*Hansard* won't get it. But if I walk in at the moment, as I understand the law you as the teller will be able to point me in the direction verbally of the basic two-year term deposit and not require a financial licence. That is the whole point, isn't it? That is so the banks do not have to train their staff. I am just trying to make sure I understand.

Mr Adams—There is an exemption there for clerks and cashiers to provide certain functions and that, therefore, they would not be considered to be representatives of the licensee. In other words, they are not providing the service.

Senator COONEY—But it would have to be in respect of those functions, would it not?

Mr Adams—If it is limited to what we are suggesting are our administrative and mechanical functions, that you come within that exemption. But, going back to my example, if that employee or whatever of the institution did start to follow a line of inquiry and suggest things, we would be suggesting that is not something fixed for exemption.

Senator CONROY—I am barracking for you, don't worry. But now I am trying to understand where the crossover between clerical and cashier work is and that basic product which is designed to be exempted from all the requirements of it.

Mr Adams—I would not suggest that it is exempted from everything. There are, let us say, three mandatory pieces of documentation.

Senator CONROY—Yes, three.

Mr Adams—If someone were to seek advice in relation to basic deposit products, the obligation in relation to the financial services guide regarding the description of the service that the representatives of the institution may provide still lies. If, however, personal advice is provided, the ordinary obligation of providing a statement of advice is not required in terms of a written statement of advice. However there are certain obligations, in terms of oral statements, which must be given. In terms of the actual document about the product itself, the product disclosure statement, there is no exemption there. That would still need to be provided.

Senator CONROY—Okay. What if I walk in with, say, $5,000, just wanting to open an account, and the teller says, 'It's best for you not to go for just a passbook account; it's best for you to put it in a basic term deposit, two years, instant draw'? This is a commonly understood product, allegedly. What are the requirements on the teller?

Mr Adams—I would suggest that is not something that comes within the clerks and cashiers exemption.

Senator CONROY—I agree.

Mr Adams—In that context, if that is the first time that person has come in for such service to that institution, the financial services guide obligations would apply.

Senator CONROY—Okay. And the handing out of that would, therefore, as you say, not fall within clerks and cashiers?

Mr Adams—That is right.

Mr Rodgers—But rather than provide a written statement of advice, as normally applies to giving advice, the substitute in the legislation is for that product. The financial services guide deals with the relationship between the institution and the individual. In relation to the product, if it is within that exemption there is not an obligation on the licensee, through whoever, to give a written statement of advice, provided that they give certain oral advice.

Mr Johnston—But there is still the requirement to give the product disclosure statement.

Mr Rodgers—Absolutely.

Senator CONROY—I am afraid I have added to the confusion for myself.

Senator COONEY—I want to ask a question in that context. We are talking about people who are close to the edge in any event; people who test the limits. The question only arises if you have a person who is supposed to be just providing the services of a bank, and the bank creates a situation where the question arises as to whether or not they are a financial adviser. I would have thought that, with your licensing conditions and your regulations or your policy statements, you should say, 'The best way out of this is not to mention any products at all.' Because I think what the banks have been saying is, 'If they say this, are they financial advisers?' And you have then got to say if they are or if they are not. Why give them sympathy if they get themselves into that situation where the question arises? It is a bit like a tax avoidance scheme.

Mr Rodgers—We have been talking about the way that we read the legislation in its present form, rather than the policy underlying it.

Senator COONEY—But in the legislation in its present form, that only arises if you have people who come close to the edge.

Mr Rodgers—Historically, there has always been an issue about those who are close to the edge; those who might be caught. When you are carrying out ordinary cashier functions, if you simply take the payment and give a receipt, you might notionally be caught as dealing in the product. The historical distinction is: if all you are doing is doing your job as a cashier, then that is not enough to make you a dealer—

Senator COONEY—That is right.

Mr Rodgers—or for you to need a proper authority to carry out that function.

Senator COONEY—But then you are being tested, because if I say, 'What about this? What if this happens or what if that happens? you have to make a decision. It is a bit like whether a tax avoidance scheme is legitimate or not.

Mr Tregillis—In terms of the process, we have not done the list because we thought that in this case we would focus on the underlying principle because there are all sorts of different circumstances. We have had some comments back saying, 'That looks too restrictive,' and other comments saying, 'We would like you to be more specific in terms of particular activities.' We have not yet assessed it, but clearly that issue, as Mark Adams has said, is in the legislation for the avoidance of doubt. We have put a proposition about how it works. We are currently assessing comments, but it is designed as a narrow exemption, in our view, in the legislation. I think Senator Conroy was asking another question about what your obligations are when you walk in and how this regime works.

Senator CONROY—Sorry, I think I have ended up confusing the conversation—

Mr Tregillis—There are two issues, I think.

Senator CONROY—I know you probably think they do not, but I—

Mr Tregillis—I think they overlap in terms of where one cuts in and the other does not.

Senator CONROY—That is the point I am trying to get to, and unfortunately I have confused the conversation and we have not got there. In the situation where I walk in, I have $5,000, I want to open an account, and the teller says to me, 'A two-year term deposit at five per cent is better for you than just a passbook account with 0.1 per cent,' is that financial advice?

Mr Adams—I would suggest so. They are expressing a view about a product being better for that individual.

Senator CONROY—Have you mentioned this to the banks yet, because they think it is not? They think that they are exempt. Talking to the minister's exemption, the government's policy is to exempt basic term deposits from financial service advice. So talk me through how it is still caught. I am expecting you to actually say that the teller does not have to be licensed to give you that information.

Mr Adams—If I could give some elucidation on that, the same definition applies, in terms of what is financial product advice, whether it is a term deposit or whether it is an interest in a managed investment scheme.

Senator CONROY—What training would a teller require if they were going to say to you, 'No, you should put your money into the term deposit?'

Mr Tregillis—I will just try and backtrack so that we understand the question better. There is a threshold question. There is clearly an exemption. If you are a cashier or a clerk performing those functions, you are not caught in the legislation that is carved out.

Senator CONROY—That is what I am trying to understand. Mr Adams just seemed to indicate that there really is not that much of an exemption, which I am very pleased about. I am barracking for you!

Mr Johnston—If you start to exercise a judgment, then the definition does not apply to you, but that is nothing to do with a product in that case.

Senator COONEY—It seems to me with this whole discussion—and I know you are going to sort it all out—that, in the end, you are dealing with banks that are very well resourced to take on these great issues. This is what I am concerned about with your policy statements. You do not seem to want to go down this path, but if the banks wanted to test the limits of this, it seems to me that they are going to be able to because they are resourced probably better than you are. All I am asking at this point is: what changes, if any, ought to be made to the legislation in your view? Or are you happy enough to go on and say, 'We think this is within the legislation, this is out. This falls within the legislation. Treasury might have been different but we think it is within the legislation'? Are you happy to go along with that process?

Mr Tregillis—I think at this stage these are based on current legislation and attempt to say how we see it being administered. That is the process that we are currently in.

Senator CONROY—I appreciate that we are getting close to the end. I will try and just knock off my last few questions. Here is a slightly different example. Let's say I am a teller. Let's say it is your 21st birthday. Granny bought you some bonds years ago and has paid them in as a 21st birthday present. You have got $5,000 in your account. You walk up to the counter, and the teller—me—is standing there. The computer goes bing, flag, 'Here's a customer with $5,000 in a passbook account. Suggest to them that they should be transferring it.' So you are not a new customer but an existing customer with an existing relationship. The computer tells me that it is part of my job—part of keeping my job—to convince you to move it into a term deposit, which is in one sense better for you because it is five per cent as opposed to 0.1 per cent. Is that giving financial advice?

Mr Adams—So there is a sum of money available to be transferred into certain products.

Senator CONROY—Yes.

Mr Adams—I will go back to what I was suggesting before: when the clerk or cashier were starting to use judgment in that situation, assessing whether they needed to indicate to that

customer whether there was a range of products which they might wish to consider, or that one was even better than the other, they were getting into the area of providing advice.

Senator CONROY—I am with you. Would I need to be licensed?

Mr Adams—The individual would not necessarily—

Senator CONROY—Would an authorised representative?

Mr Adams—If they were an employee they would already come within the definition of being a representative of the institution, so they would not need an authorisation under the bill.

Senator CONROY—Would they need any training?

Mr Adams—In terms of the training obligations we do not differentiate between whether you are an authorised representative or a representative. If they were providing that financial advice to a retail client our training requirements would apply.

Mr Johnston—The more likely scenario though, in the sort of situation you have outlined, is that you would expect that the teller—as you would call them—would be more likely to refer a client to someone who is authorised and who has had the training. They would refer them perhaps to the financial planner within the bank.

Senator CONROY—I agree with you, 100 per cent—and that is what I am hoping this legislation achieves. I say that to you absolutely straight. My understanding is that the banks do not believe this to be the case and have found their way around it. They do not believe that they are required to refer someone off; that if money is being placed into a term deposit for less than two years, they do not need to have their staff trained. I am trying to understand why they think that, and why the minister seems to articulate that that is the case—as opposed to what you were saying, which I barrack for, 100 per cent.

Mr Johnston—Mr Adams is better placed to comment on the detail of these, but I think there are two issues and I wonder if they are sometimes becoming confused. One issue is, what are the exemptions that apply to clerks and cashiers? As soon as they start entering into the business of exercising judgment, and therefore giving advice, they need to be authorised and trained to do so. The other issue is about the provisions that specifically apply to those types of deposits where there is different treatment, those that are for less than two years—but I am not sure that the different treatment goes to the people concerned. The different treatment goes to the level of disclosure that is required, rather than to whether someone is authorised and trained—

Senator CONROY—The banks do not care about the disclosure: they just do not want to train their staff to give financial advice. That is the fundamental—

Mr Johnston—I am only commenting on what is in the bill, Senator. My understanding—

CHAIRMAN—You think that it is good, but I see it as a problem.

Mr Johnston—Those are two different issues

Senator CONROY—Grant is right in terms of what the minister thought the solution to Grant's problem was—which I thought was a sell-out. The minister and Grant think he has achieved one thing in the legislation—which I think is a bad thing. Your interpretation at the moment seems to lean more toward how I would prefer to see the world. I am not trying to drop you in it; I am actually just trying to understand. You should take it up in the other direction now.

CHAIRMAN—The issue is rural bank branches to some degree, but even more importantly the agencies—the newsagents and so on—having to have someone in their business trained up to the level of a financial adviser, when they are simply taking deposits, putting money on deposit.

Mr Tregillis—Again, there are differential levels of training—

CHAIRMAN—We made a recommendation that that should be exempt, and the minister came back and said, 'I'm not dealing with it in the way you recommended, I'm doing it another way, and it still fixes the problem.' As I understand, you are saying that what Senator Conroy wants still stands—which is not what I want, and not what the government have said they will agree to.

Mr Adams—I will allude to a couple of things: there may be some comfort for you in that, with respect to the clerks and cashiers, when we refer to our guidance—which has a history in our past policy statements—there are certain functions which we suggest certainly fall within that area, and the mere receipt and depositing of money is not necessarily beyond that exemption. They could well be within the terms of the exemption. It is when they provide other services in addition to that—suggesting or influencing decisions about what product to choose and so on—that it becomes more of an issue.

Mr Tregillis—There are a couple of other things. There is a section on referral conduit. Again, just to track through your example, there are a bundle of issues. It is really why we have set it out. You do have to say: are they providing financial product advice? And we think that applies across all financial products—

Senator CONROY—Including the term deposits.

Mr Tregillis—So you go 'character, context'. While we are giving you answers, we have actually set out here the thinking that the bank should go through, which is intended to influence. Once you have decided whether or not it is financial advice and needs to be authorised, there is then the issues that Mr Adams went through about the conduct provisions and how to state the advice and those things—they do differ between products. Thirdly, you asked the question of relevant training issues. Clearly we recognise—and the policy recognises—that if you are providing advice about a limited range of products such as those, then none of our policies require you to be trained up to be a full financial planner. We have the concept of tier 1 and tier 2 training. Tier 1 training is clearly at a more basic level—

Senator CONROY—Is tier 1 training anything greater than banks currently provide for their staff?

Mr Tregillis—I think it is greater than banks currently provide.

Senator CONROY—So you would envisage that every single teller in every single bank—Ms Vamos is shaking her head there—has to have at least tier 1 to do their job?

Ms Vamos—They have tier 2.

Mr Tregillis—Sorry, I got my tiers wrong.

Ms Vamos—They have the more limited training for tier 2.

Senator CONROY—But every single teller will be required to have a limited—

Ms Vamos—If they are providing advice. If they are acting merely as a clerk, then no.

Mr Tregillis—Again, many banks—the one I go to effectively has a referral service. So I do go and talk to a teller, but they actually refer me on to a proper authority—

Senator CONROY—I absolutely agree that the decent thing for a bank to do is to refer you if they want to sell you a product. Believe it or not, I am backing for you 100 per cent.

Mr Tregillis—Just to be clear, we are not suggesting that every single teller performing teller functions has to be trained or licensed.

Senator CONROY—But I guess you probably have a narrower definition of teller function. So it is possible to work in a bank and not have to do either tier?

Mr Johnston—Yes.

Senator CONROY—But as soon as I reach under the counter, get the term deposit form and pass it across to you—

Mr Johnston—No, because we did say there were examples where someone might specifically go and request a product. As soon as you start exercising a judgment as to—

CHAIRMAN—But giving information does not require—

Mr Johnston—If it is merely passing on information, that is not.

CHAIRMAN—So you could give out the term deposit form—

Senator CONROY—No, he has to solicit it himself. The customer must solicit it.

CHAIRMAN—If he is just giving information on your options and gives you three or four different—

Senator CONROY—That is okay, that is not the teller exercising any judgment. But if I am the customer and I do not ask for it, I just walk in and say that I want to put $5,000 into this account. Then as soon as you say, 'Sir, have you considered?', that is financial advice. You are exercising judgment on behalf of the customer.

Mr Tregillis—Again, what is the character of that communication? That is why we have set it out in the test: is it necessary where the communication involves a statement of opinion or recommendation; in that case, the bank has to consider if people are engaging in that whether they are forming an opinion, is it in the context that it could be intended to influence; is it subject to one of the exemptions? That is the process that we think applies in these circumstances that banks would go through. We can have all sorts of fact circumstances, but that is really the way in which we think the law sets these out. Once you fall within that, there are different obligations that attach in terms of basic banking products. There are other circumstances that we set out in the policy where, for example, you are acting really as a conduit and you are just referring somebody—all of those types of things do not attach these obligations. That is the way in which we read the law.

Senator CONROY—Grant's concern, which was in the first of our reports and which we dissented to, concerned the pharmacist in rural Queensland—

CHAIRMAN—South Australia.

Senator CONROY—Rural South Australia who would have to get some form of training for the 15-year-old teller who works on a Friday night. Other than just taking a deposit—even I am not barracking for taking deposits being seen as giving financial advice—that person in your view will require some minimum level of training if they do anything other than take a deposit or if somebody walks in and says, 'Give me a brochure on X.'

Mr Johnston—Senator, I think rather than tackle it from the side of doing anything other than taking a deposit, it is better to think of it from the point of view of if they are engaging in giving financial advice, regardless of who they are, then they need to be licensed or authorised to do so. As Mr Tregillis said, we have set out some steps that people should go through to contemplate whether or not they seem to come under the definition.

Senator CONROY—No, I appreciate that. But now say I walk into a bank branch—this is what happens in the real world—as a teller, the computer instructs me, and if I ignore the computer, I start to get warnings from the boss. The computer tells me that there is $5,000 in this person's account and that they should move it into a different account—it has happened to me personally over the last 12 months—and that is giving financial advice. That would require training because it is giving financial advice if, as a teller, I solicit to move your funds from one fund to another. Even if it is from a passbook account into a term deposit, that is giving financial advice.

Mr Adams—So when you say 'solicit', you are suggesting they are asking questions about it—

Senator CONROY—The computer flags. This is what happens in banks—

Mr Johnston—Yes, but are you suggesting that someone then contacts you and says, 'I advise that you should do this'? I am not quite sure what the intervening step is.

Senator CONROY—No, I walk up to the counter and I may be just going in to do a deposit. But, as the teller, the computer says to me that you have $5,000 in a particular type of account—I am now the teller; I am very flexible—and the teller is instructed by the computer to try to shift the funds into a different account. That is what happens in banks. That is the training they are currently given. If they do not meet 'referrals'—there is a broad definition of referrals because it includes getting the shift of product; it does not mean referring you off to somebody; it is about changing a product's status, if you like. If I as a bank clerk ignore that instruction, I am going to be disciplined by the bank. That is what currently happens. If I then say to you, 'Mr Adams, have you considered putting your $5,000 into a term deposit?' Am I giving you financial advice and will I require some form of training?

Mr Adams—If I can proffer two answers to that. At first glance, I would be suggesting that you are getting into that warm area of providing advice because you are coming back to them and raising the question.

Senator CONROY—The warm area, Grant.

CHAIRMAN—Not quite there.

Mr Adams—The reason I hesitated at the warm is that we have explored in the paper the notion of a mere conduit in terms of the provision of the advice. So the question mark I would have in that factual circumstance is that through the system it may be that someone else is actually prompting that the advice be brought, and the teller or whatever is keeping to a script.

Senator CONROY—The computer system automatically instructs the teller.

Mr Adams—So it sounds as though the line—'have you thought about'—has been prompted by someone else to that clerk.

Senator CONROY—It is on the computer screen; it says, 'Follow the prompts on the computer screen.'

Mr Adams—All I am suggesting is that we have discussed processes within organisations by which people within the organisation could have been the provider and someone else is just the vehicle by which it is given.

Senator CONROY—You are going to have to help me more here.

CHAIRMAN—If I can just intervene: I know some of the witnesses have to catch a 7.15 flight.

Senator CONROY—Sorry, I did not realise. I do not want to trap you in Canberra on a Wednesday night.

Mr Johnston—Some people do not have joy of getting that plane, Senator.

Senator CONROY—Who has to catch the plane? You said you were not catching it?

Mr Johnston—No, I am not.

CHAIRMAN—Three are, three are not; is that right?

Mr Tregillis—I have a later plane. I can stay for a short period.

Senator CONROY—For those who have to catch it, thank you.

Mr Tregillis—Can I understand how long we will be in the nature of the questions.

CHAIRMAN—Is there a later plane?

Mr Tregillis—I am on the Melbourne one, which is later. The rest are Sydney.

Senator CONROY—There is no later Sydney plane, I am conscious of that. Mr Adams is probably the person I want to keep talking to more than anything and I know that if he does not leave in the next five minutes he will miss the plane. I do not want to do that to him. I know Grant's interest is probably—

Mr Johnston—We can take some of your questions on notice.

Senator CONROY—I want to get to what the conduit is, and that is something that Mr Adams is the most likely one to offer advice.

Mr Adams—I am happy to stay.

Senator CONROY—Seriously if you do not get out of the building, because it will take you 10 minutes to get a taxi, you will miss your plane and I do not want you to do that.

Mr Adams—If I could leave with perhaps a couple of words on it: I did not want to muddy the waters by that; I just wanted to express that in the document we do raise this concept of a mere conduit, which focuses on the question as to who is actually providing the advice. So it may well be in the context that you are raising that the clerks' and cashiers' exemption is one thing to consider. But the other thing to consider is who in the organisation is actually providing the advice. We have a worked example in the paper in a different situation, in a travel agent situation, and we do allude to the fact that someone else in the organisation may be the provider rather than the front desk person. That is all.

Senator CONROY—But if I say, 'Have you considered moving it from the passbook into the term deposit?'

Mr Adams—I think we suggest that that is advice. The question is: who is providing it?

Mr Johnston—It may still be that someone else has provided the advice and the teller is passing the advice on.

Senator CONROY—Thank you very much.

Mr Tregillis—Again just to stress, although we have given that answer, you do actually have to go back and work through—it is always the character and context. I suppose we are giving you a quick answer, but it really does depend on the context and the form of words—it is an interesting one and I would like to think about it a bit more.

Senator CONROY—I do not know what else you could call it but 'soliciting', to be honest.

Mr Tregillis—Clearly if you took the next step and said, 'Look, we suggest, given what we know about your circumstances, here is a product that you should get into.' But the issue I was raising on products is whether or not that recommendation is intended to influence would depend on the facts. I think we have given you a quick view on the basis of your quick facts circumstance.

Senator CONROY—But this is the most standard thing that happens in a bank. It happens automatically because the computer requires it automatically.

CHAIRMAN—It never happens to me. It must be because I do not have any money.

Mr Tregillis—I tend to use automatic tellers. My automatic teller does not have that function.

Senator CONROY— I sold a house, and I happened to have a lot of money in my passbook account because I was in about a month's period of grace. I got an amount of phone calls unsolicited, but every time I went in to a teller—and I am still stupid enough to actually like human contact so I go into my bank branch—they actually had to try to sell me every single time a different product by saying, 'Have you considered?' I would say, 'I have just sold a house. I really don't want to be hassled at the bank branch.' I am just trying to understand whether that automatic requirement of the bank—it is in there in their employee requirements—is tendering advice. I am just concerned now at this concept of a conduit. But I will not bore you all with that because I do want to move on and I do not want to hold you up.

Mr Tregillis—Just in terms of filling it out, we have had a number of submissions from the banks, amongst a range of other parties. I know there are some issues about the cashiers and clerks but I could not tell you off the top of my head whether they have raised any issues or examples along the lines you have, so I just cannot answer whether or not that is something that they have said, 'You need to consider this.'

Senator CONROY—From my understanding of what the minister thinks he has achieved, what Senator Chapman thinks he has achieved and what the banks think they achieve, they think if I say to you, 'Look, here is a brochure, have you thought about a term deposit?' there is no training required. That falls into their definition in their heads of clerical duties and two-year term deposit exemption. They do not think they are going to have to train their staff.

Mr Johnston—I think we would have to look at what comments they are giving back to us in the submission because, as we have said, this is a guide and a document that is there for consultation. We will look at what they come back with and formulate an opinion.

Mr Tregillis—Again, the facts differ. 'Here is a brochure about products,' whether that is factual information acting as a clerk because giving out a brochure is one of the activities.

Senator CONROY—But in terms of inducing me to make a financial decision or intending to have such an influence—

Mr Tregillis—That is why I have said it depends exactly on the formal facts and circumstances.

Senator CONROY—Okay, I have my stock standard term deposit brochure, the computer screen goes ping, ping, flag, flag, and says you have to try to get this person, so the teller goes, 'Sir, have you considered this?' or—

Mr Tregillis—I do not think *Hansard* —

Mr Johnston—*Hansard* will not pick up that aspect of it.

Senator CONROY—I do not think there is any difference in any of the examples and I could run through 27 or more variations on how they attempt to communicate to you so that they keep their job. I understand that if you walk in to me, Mr Tregillis, and ask for it that that is cashier work, no question.

Mr Johnston—It is one of the reasons why we have treated these as guidance documents. We really do not want to end up going through 27 examples and, at the end of the day, we do not want to come up with a situation that leads to some artificial practice either. So we are trying to give guidance on what we think are the basic principles. We will take feedback from a number of people in relation to the basic principles that we enunciate and come to a view. I do not mean just your examples but if we were to simply deal with example by example in the feedback that we get we may end up with some artificiality in the result.

Senator CONROY—Just moving on from banks, I notice there is an amendment restoring the requirement for a licensee to act 'efficiently, honestly and fairly'—thank you.

Mr Johnston—Yes.

Senator CONROY—It is, however, still expressed 'to be only to the extent that it is reasonably practical to do so'. How will you administer that particular qualification? It is a beauty.

Mr Johnston—That is a difficult question.

Senator CONROY—It is a ludicrous piece of legislation.

Mr Johnston—We were pleased to see that 'efficiently, honestly and fairly' were back in—

Senator CONROY—That makes four of us.

Mr Johnston—and to be frank we were advocating that that should be the case. We are aware of the preamble that is there. Maybe if we talk about what 'efficiently, honestly and fairly' means. Some of the law that is around in the securities regime, where this term has been for quite a while, indicates that the three have to be considered together.

Senator CONROY—Yes, and that is the discussion I had with Treasury today. At the moment you have to meet all three. Treasury believe that the definition of 'practical' means you only have to pass one test because the other two could be impractical but, as long as you pass the efficient test, you do not necessarily have to be honest or fair.

Mr Johnston—It would be difficult for us to contemplate a situation where we would tolerate anyone saying that it was not practical for them to act honestly. It would be difficult for us to contemplate that.

Senator CONROY—I am very pleased to hear you say that. I am sure even Senator Chapman would agree.

CHAIRMAN—Indeed.

Senator CONROY—Why would you then bother putting this preamble in?

Mr Johnston—We did not put it in, of course.

Senator CONROY—Sorry, I did not mean you; why would anyone put this preamble in?

Mr Tregillis—Again, that is a question for Treasury. You asked the question in terms of administration. We think in terms of a court—what work it does. But the way we would approach a licence hearing or a court would always look at those facts—if there is a minor non-systematic thing, we do not action—and the circumstances—

Senator CONROY—We got to a discussion of courts. Look, I may have been a fraction unfair to Treasury, because they said it is always a balance and that a court will always seek a balance. My view was that a court will always to seek to balance the three. But with this qualification, the threshold obviously ratchets down, and the balance becomes a lower threshold balance. Don't worry, I will be removing this—hopefully Andrew will be supporting me—so that you will not ever have to worry about it. But my concern is: how will you find this balance?

Mr Johnston—At the moment we have to find a balance the way that it has tended to work in the securities industry—so we do that anyway because they are not mutually exclusive. But, in terms of how we would interpret it, we would find it difficult to contemplate that 'honestly' could be qualified in some way.

Senator CONROY—'Fairly' is a very well-defined legal concept, and my concern is that trying to find a balance between the three is a race to the bottom.

Mr Johnston—That is an issue that we face at the moment. I do not think that we have come under criticism from many quarters in relation to how we apply the test as it is there just now—

Senator CONROY—No, but the test is 'efficiently, honestly and fairly' now. This will clearly, if it is there, allow a different level, a different standard.

Mr Johnston—But we make a judgment at the moment—as I say, we treat 'honestly' somewhat differently—as to what the surrounding circumstances are when we take action against someone and administrative action in relation to the two other legs, because we do have to balance them up. So the qualification probably does not concern us overly in terms of when it gets to a court, because a court may well read that into it anyway. We do apply some judgment, obviously, as to whether there has been harm caused to someone before we proceed against a person under the test as it stands just now. Just going back to what I said before, we would find it difficult to contemplate that we would qualify 'honestly'.

Senator CONROY—But you would be prepared to qualify 'fairly', is that what you are suggesting, by leaving 'fairly' out of qualifying 'honestly'?

Mr Johnston—It is not so much a case of qualifying, but we do take the surrounding circumstances into account even now when we look at something—

Senator CONROY—Sure, I accept that no-one is unhappy with the way that you interpret it now. We have an established practice that everyone understands. There are some new words, though, that allow a different interpretation; otherwise why are they there? But we could run around that one all night.

Mr Tregillis—I think that one is a question ultimately for Treasury, that is a policy question. I think we have tried to answer how we would approach it if the legislation went forward in that form.

Senator CONROY—Sure, and hopefully you will never have to. I would like to go over the disclosure of commission. I would not have liked Mr Tregillis to come all this way without—

Mr Tregillis—I knew we should have caught that Sydney plane.

Senator CONROY—asking if there has been any change in ASIC's policies since we last spoke: 'The requirement to disclose the quantum of permission received by a providing entity in a statement of advice is only required if the payment of such commission might reasonably be expected to be, or have been capable of, influencing the advice.' In what circumstances do you see the payment of commission not influencing advice?

Mr Johnston—The first thing to say is that, when we spoke about this a couple of weeks ago, we made it clear that we did not have a policy yet.

Senator CONROY—How is your thinking on it going?

Mr Johnston—We did talk about the fact that it was arguable that in some cases there would be risk cases for disclosure.

Senator CONROY—Vanilla and bells and whistles have been discussed at length today in another committee.

Mr Johnston—I do not think that we have progressed far beyond that in our thinking at the moment.

Senator CONROY—Can I ask in what circumstances do you see the payment of commission not influencing advice? The whole point of standing in front of someone and selling them a product is you are seeking to receive a commission. That is what you are doing it for: you are not doing it for good will; you are not doing it for the good of the person's health; you are seeking to receive a commission—that is the whole motivation of the capitalist system.

Mr Johnston—Rather than again try to contemplate a number of different scenarios, a case was put to us last time and we conceded that it was arguable that you could get to that result. But we did not say that that was the result that we would get to.

Senator CONROY—I am actually doing the exact reverse this time to try to avoid an argument about bells and whistles because we could debate vanilla products and bells and whistles and whether you get a different level of commission for a bell and whistle on a vanilla product of a car because it depends how much you want to insure it for—so a whole variety of things can happen. What I am putting to you is the most fundamental principle, that I am only selling you this product and I am only knocking on your door, phoning you up or walking up to you—I am not being critical of the fact that people are doing this; it is what the world is about—and I am only doing it to get a commission. The whole purpose of my giving you this advice and selling you this product is to gain a commission.

Mr Johnston—I suspect that position is arguable as well. But we are put in the position of having to interpret those words. We have to assume that those words are there for a reason because they are in that part of the bill and there are other parts of the bill in relation to disclosure of commissions where those words do not appear. So it did exercise our mind. In the example that was put to Ms Vamos in the discussion that she was having, it was something that we had to consider because those words are there to be interpreted. Have we thought about whether there are any circumstances and what they are where that would generally apply? No, we have not at this stage. We probably should clarify, without wanting to go through a blow-by-blow description, what happened.

Senator CONROY—I was actually going to invite Ms Vamos to speak for herself as opposed to having perhaps been verballed by a witness. So over to Ms Vamos.

Ms Vamos—Just a couple of things: at the Tower conference, Senator Ferguson did speak next day. I was not there so I do not know what was said. I spoke on the first afternoon and I was the last speaker before drinks so I did not even get to finish my slides.

Senator CONROY—I know the feeling.

Ms Vamos—I only had one question on commission disclosure. It was not on this issue at all; it was on stepped and level premiums and whether we were going to issue any policy on what length of time they would have to disclose a commission.

Senator CONROY—Did your presentation cover this issue at all?

Ms Vamos—No. We had a general discussion—

Senator CONROY—So you were sadly verballed by a witness. Perhaps it was Senator Ferguson that sadly verballed you.

CHAIRMAN—By a witness.

Ms Vamos—Senator Ferguson was not at my session either.

Senator CONROY—No, but he may have spoke on behalf of ASIC and given an interpretation—

Mr Johnston—We cannot comment on that.

Senator CONROY—No, you cannot comment and I am not asking you to.

Mr Johnston—Are we still under privilege?

Senator CONROY—Yes, we are still under privilege. We still have a quorum so we are okay.

CHAIRMAN—The Senate has adjourned so you are okay.

Senator CONROY—We are completely okay.

CHAIRMAN—There is no requirement to have leave of the Senate for the committee to have hearings when the Senate is not sitting. We can do that. The Senate is not sitting now so we are okay.

Senator CONROY—Can I see what your interpretation is because Senator Ferguson claims, according to the witness, that the view of Treasury/ASIC was that if an agent was a tied agent, by definition they were an employee and therefore they would not be motivated by commission and therefore did not need to disclose commission.

Ms Vamos—As far as I know, we have never discussed or expressed this view. It has been expressed to us as a result of the wording of the legislation, and we have been asked to think about it. But we have not formed policy on this at all.

Senator CONROY—Okay. Do you have a view? I appreciate you do not have a final policy position but I unfortunately will need to vote on this before I see your final view.

Mr Johnston—Our position is in relation to disclosure, and your disclosures obligations are the same whether you are an employee, an authorised representative or a licensee. We are not quite sure that there is any relevance. We certainly have not come to a view that someone who is a tied agent is deemed to be an employee. There may be some discussion around that for tax purposes to which we have not been privy but that is certainly not an interpretation that we have expressed under FSRB.

Senator CONROY—So it may not be one you have expressed. Now I am asking you to give me your early stage view. I am not trying to make your life difficult, Mr Johnston or Ms Vamos; I am unfortunately going to have to vote on this before you finalise your view. This is a really important issue and the Senate will be asked and the parliament will be asked to make a decision on this before we know what your thinking is, which makes it very hard for us to actually make a decision about how we want to vote. I appreciate that this is not your fault and, maybe if we get very lucky, the legislation will be passed after you have released your final position.

Ms Vamos—It is not relevant, as you say.

Mr Johnston—There is nothing in this piece of legislation that we would interpret in FSRB at the moment that indicates that a tied agent is an employee.

Senator CONROY—So it does not matter whether the person is tied or a multi agent as to whether or not that would affect whether they have to disclose—

Ms Vamos—That is right.

Senator CONROY—This concept of because they were tied to one company therefore they are not motivated by commissions—

Mr Johnston—Senator, I am drawing the distinction between—

Senator CONROY—Yes, but I am doing a bit of shorthanding the employee question—

Mr Johnston—That does not matter—

Senator CONROY—I am not trying to put a legal definition on 'employee', I am just using it for simplicity for the sake of the discussion.

Mr Johnston—But others may read something else into that. If we were to say that it could be the case that they were an employee. But that is not our intention—

Senator CONROY—Let us drop the word 'employee', let us just stick with the word 'tied agent'. Is it ASIC's view, or potential view, or you are in a position to indicate that, if you are a

tied agent, therefore this question of 'might reasonably be expected to have or been capable of influencing' is not relevant?

Mr Johnston—We would be of the same view that we were last time; that is, it has been put to us in that situation that was referred to last time. We have conceded that that is arguable. We have not come to a position on it. If you go back to our initial submission on the exposure draft, going back some way, ASIC's position on this has been that we believe there should be full disclosure of commissions by everyone. That has always been our position.

Senator CONROY—Do you believe that the bill contains any carve-outs?

Mr Johnston—There is a carve-out, for want of a better term. The product disclosure statement, as I understand it, requires disclosure of fees, et cetera, in terms of the product provider but it does not require disclosure where the return to the consumer or the investor is concerned. Therefore, the product disclosure statement is treating it in one way. Different words, again, are used in relation to the statement of advice which talks about the words that you used in terms of 'influencing the advice that is given'. So there are two different tests—

Mr Tregillis—It is a general test though, Senator—

Senator CONROY—Can I avoid having to worry about the FSG, the statement of advice and anything else. Can I simply put to you the following proposition: if I am seeking to buy a risk product, is there any circumstance—it does not matter whom I am buying it from—that I will not have the commission disclosed to me?

Mr Johnston—Senator, we have not concluded our position on it. As we said last time, it is arguable that that is the case.

Senator CONROY—So it is possible—please, I have to vote on this.

Mr Johnston—It is possible, yes.

Mr Tregillis—It is possible. Just as a matter of logic, if a circumstance can be clearly delineated where the commission does not or is not intended to influence, then there is a matter of the way in which it is drafted applying to that. What we have not turned our minds to is all the fact circumstances. But, as a logical answer, if somebody could put a proposition that there is no way, shape or form that the commission could influence the outcome, then under the way in which the legislation is drafted—

Senator CONROY—Do you envisage that there are any such circumstances?

Mr Tregillis—As I say, the one that has been put to us is the one that we have responded to. Our answer is that that is an arguable proposition, but we do not have a concluded view on it. I do not think we can actually add to that in terms of clarity really.

Senator CONROY—You are my last hope, honestly. I have to vote on this. The minister would like me to vote on it tomorrow—but we won't.

Mr Johnston—We have not come to a concluded view—

Senator CONROY—There are thousands of people out there hanging on your view. I am sure I will be revisiting and possibly will need to come back to you again to try to clarify these issues. I have two more questions. The bill contains a prohibition on cold calling arising from an unsolicited meeting with another person, how will you interpret the words 'unsolicited meeting'?

Mr Johnston—We are without Mr Kell.

Senator CONROY—If you would take that on notice. Again, just for Hansard because this is for Peter as well: there are some groups that have called for there also to be restrictions on cold calling by the telephone; for example, permitting it only during certain hours. Do you have a view on that suggestion that there should be a restriction on the number of hours?

Mr Johnston—We will take that on notice.

Senator CONROY—What is your knowledge of how cold calling is now conducted? I limit that to Australian firms because I appreciate that overseas firms—such as Filipino marketing scams that go on and all that sort of stuff—phone you at any hour of the night or day. I am just talking about Australian product and Australian firms. Thank you, Mr Johnston. And thank you, Ms Vamos, for coming up from Melbourne. I am sure we will be in touch.

CHAIRMAN—Thank you all for your attendance.

Committee adjourned at 6.57 p.m.