Chapter 3

Issues

Evidence to the Committee

3.1 The committee received a total of four submissions on this bill. Submissions focussed on:

- whistleblower protection;
- breach reporting;
- Review of decisions in relation to prudential standards;;
- APRA's exemption powers;
- APRA's power to make discretionary decisions;
- Court enforceable undertakings; and
- Responsible officers and responsible persons.

Whistleblower protection

3.2 The bill introduces a consistent framework of protection for whistleblowers across the prudential Acts. IFSA supports the extension of the whistleblower provisions but considers that they should be aligned with the relevant existing requirements under the Corporations Act. Part 9.4AAA of the Corporations Act gives protection to whistleblowers who have reasonable grounds to suspect that the information they disclose indicates a contravention of the Corporations legislation. IFSA states that this is objective test and allows a company to determine with some certainty whether such protection will apply.[1]

3.3 By contrast, IFSA submits that the proposed equivalent provisions in the bill purport to attract the same level of protection to a person who discloses information to one of the named persons (eg APRA, the auditor, the actuary, a director or senior manager) but the two tests to be met introduce subjectivity into the prudential Acts. These tests are:

- the information concerns misconduct, or an improper state of affairs or circumstances in relation to the regulated entity; and
- the discloser considers that the information may assist [the person to whom the disclosure is made] to perform the person's functions or duties in relation to the regulated entity.

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1 IFSA, *Submission 1*, p. 2.

3.4 IFSA argues that these tests create serious unintended consequences and recommends that:

- the provisions be aligned with the Corporations Act requirements;
- should be an objective test;
- should relate only to significant and materially damaging conduct; and
- should relate only to a potential breach of the legislation in which it appears.[2]

3.5 IFSA also maintained that the bill provides the Parliament with the opportunity to improve the drafting of the existing whistleblower provisions in the Corporations Act and recommends that a change be made both to these proposals and the Corporations Act to allow the organisation a reasonable discretion to disclose certain information for the fair and reasonable purposes of investigating the issues, provided due care is taken to protect the identity of the discloser.[3]

3.6 The ABA expressed general support for the proposed protections for whistleblowers in the prudential Acts. However, the ABA considered that the amendment creates some uncertainty in the operation and application of the provisions and poses some practical problems relating to the disclosure of information and subsequent response by recipients of the confidential information. Like IFSA, the ABA sought an amendment to the bill to ensure that the relevant whistleblower provisions are aligned between the Corporations Act and the prudential Acts.[4] A late submission from the Law Council supported the ABA view.[5]

3.7 The Chartered Secretaries Australia (CSA) submission also addressed aspects of the whistleblower provisions. CSA noted that in the bill, the recipients for the company include a director or senior manager or person authorised to receive disclosures. It noted that as it will depend on the facts whether a company secretary comes within the definition of senior manager, disclosure to a company secretary may result in the whistleblower not being protected.

3.8 CSA expressed the view that the failure to expressly include company secretaries in the relevant classes of persons is 'odd', given that their position within a company, and governance role, may make them likely recipients for disclosures.

3.9 The CSA made a number of recommendations, as follows:

- the provisions being inserted to the prudential Acts in relation to whistleblowing be amended to provide for a company secretary to

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2 IFSA, *Submission 1*, p. 2.

3 IFSA, *Submission 1*, p. 3.

4 ABA, *Submission* 2 (supplementary), p. 3.

5 Law Council of Australia, *Submission 4*.

discuss a disclosure with other senior officers for the purpose of investigating or remedying the matters raised, provided that the recipient does not disclose without the whistleblower's consent the identity of the whistleblower or information that is reasonably likely to lead to the identification of the whistleblower;

- a similar amendment be made to Part 9.4AAA of the Corporations Act;
- the Bill be redrafted to clarify that the recipients for the company authorised to receive disclosures include the company secretary.[6]

Breach reporting

3.10 IFSA maintained that as drafted, the provisions have the potential to result in uncertainty and confusion as to which if any breaches need to be separately reported to ASIC.

3.11 IFSA also raised an issue in relation to the timing of breach reports. It noted that the Bill amends the Corporations Act so that the current period of 5 business days within which to report a breach to ASIC under section 912D is extended to 10 business days. IFSA maintained however that the actual commencement time/date of the obligation to report is unclear and recommended that the time for the obligation to report commence from the date on which the breach is first notified to the most senior decision maker responsible for such matters and determined to be material.[7]

3.12 The Australian Bankers Association (ABA) welcomed the simplification and clarification of some operational matters, but said that others required clarification and further regulatory guidance. The ABA sought a number of changes in the bill in relation to breach reporting in its submission, including:

- new breach reporting provisions to come into effect from 1 July 2008 to allow both regulators and entities to implement new procedures and update systems;
- the definition of what breaches that are reportable obligations to be consistent across statutes, the requirement to report 'likely breaches' to be removed from the Corporations Act;
- breach reporting across the prudential statutes to be made consistent, and the requirement tor report breaches in the Banking Act to apply only to the bank, not subsidiaries;
- breach reporting duplication of reporting may still be an issue, and accordingly, the auditor or actuary should be required to inform the regulated entity of a breach report in addition to APRA; and

6 Chartered Secretaries Australia, *Submission 3*.

7 IFSA, *Submission 1*, pp 3-4.

- documents produced for the purposes of complying with the regulations to be confidential.

3.13 The ABA also expressed the view that regulatory guidance will be necessary to clarify the intention of the law in relation to a number of aspects of the new breach reporting requirements. The detail of the ABA's concerns in this regard is elaborated in its submission.[8]

Review of decisions in relation to prudential standards

3.14 IFSA noted that the proposed amendment (Items 56-59) extends APRA's ability to make prudential standards to a single entity or groups, and sought a change to the provision so that it would be a reviewable decision.[9]

APRA's exemption powers

3.15 The ABA sought an amendment to the Bill so that it does not apply to the authority to carry on a banking business; and for APRA to be required to publicly disclose its determination, in relation to a person or class of persons.

3.16 The ABA also noted that the depositor protection and policy holder protection policy is still being resolved and expressed the view that any changes to the prudential framework should therefore not be made until these outstanding matters are resolved.[10]

APRA's power to make discretionary decisions

3.17 The ABA maintained that APRA should not be granted a broad discretionary power to approve, impose, adjust or exclude specific prudential requirements in relation to a particular regulated entity.

3.18 The ABA said that if the Government wished to persist with this amendment, APRA should be required to publicly disclose on a quarterly basis the interpretations of its discretionary decisions for that period, including an explanation of the grounds for its prudential decisions, especially where APRA has exercised its discretion.[11]

Court enforceable undertakings

3.19 The ABA considered that further consultation on this issue was needed. They said that if the Government decides to proceed with this amendment, APRA should be required:

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8 ABA, *Submission 2*, p. 3.

9 IFSA, *Submission 1*, p. 4.

10 ABA, *Submission 2*, p. 5.

11 ABA, *Submission 2*, pp 5-6.

> …to work with regulated entities and industry representatives in relation to how APRA will use its new powers, especially how APRA envisages accepting enforceable undertakings and working with regulated entities cooperatively to develop mutually agreed solutions to an enforcement issue.[12]

Responsible officers and responsible persons

3.20 The ABA noted that the Bill does not contain amendments to align the regime in the prudential Acts with that of the Corporations Act and expressed the view that the three regimes should be harmonised as much as possible to reduce unnecessary duplication and differences.[13]

Treasury response

3.21 Several of the issues raised in submissions related to variations in provisions from those in the Corporations Act. Treasury officers advised the committee that wherever appropriate, the requirements for entities operating under the prudential acts are harmonised with the Corporations Act, but there are necessarily some differences. Officers explained that this is because there are differences between the objectives for prudential regulation and for consumer protection and accordingly, differences between the regulatory approaches adopted. Treasury representatives said that the whistleblower provisions are an example of this.[14]

3.22 Responding to IFSA's concerns about the whistle blowing provisions, officers said that the first principle Treasury had sought to apply is to make it as easy as possible for potential whistleblowers to convey information to the regulator or to senior managers and be confident that they will be covered by the whistleblower provisions if the disclosure is made in good faith. Mr Legg of Treasury also noted that the prudential regulator, unlike the market conduct regulator, needs to be able to identify problems fairly early, before they come to a head:

> They are not just identifying issues that might lead to a breach of the law but addressing problems in the way that risk management operations operate within a regulated entity—problems which may just be concerns about management practices. The prudential regulator needs to be able to identify those issues and have information brought to him fairly early in the process. The thinking behind the difference here is to facilitate that difference in the underlying process of prudential regulation relative to market conduct regulation.[15]

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12 ABA, *Submission 2*, p. 6.

13 ABA, *Submission 2*, p. 7.

14 *Committee Hansard* , 27 July 2007, p. 43.

15 *Committee Hansard* , 27 July 2007, p. 44.

3.23 In relation to the issue raised by Chartered Secretaries Australia, Treasury advised that it was possible that whistleblower disclosures could be made to company secretaries if they were included as responsible office holders or senior managers with prudential responsibility within the regulated entity.[16]

3.24 Officers indicated that Treasury is open to further consideration of the ABA's concerns about breach reporting, Officers said, however, that it would be necessary to give full consideration to suggestions for further amendments to ensure that the impact of any new proposals were properly considered and that accordingly it would not be possible to consider the ABA's requested amendments in the context of the current bill.[17]

3.25 Responding to questions about an apparent lack of certainty about the intended operation of some provisions, for example when the clock might start ticking in relation to breach reporting, officers indicated that further guidelines would be provided after the legislation is enacted.[18]

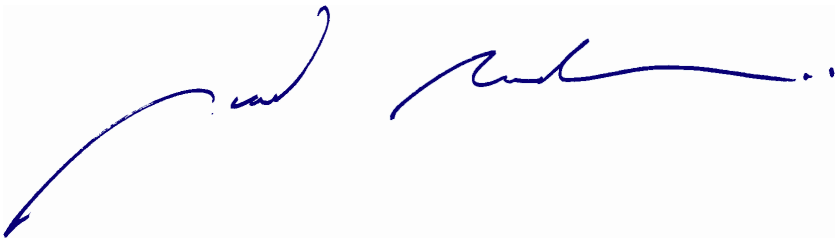
Committee comments

3.26 The committee is satisfied that there are sound reasons for the differences in approach between corporations law and the amendments resulting from this bill, such as in relation to the whistleblower provisions. The committee also accepts that it is important that prudential regulators receive adequate warning of breaches to maximise the possibility of a timely intervention before problems become serious.

3.27 The committee nonetheless considers that it would be desirable to evaluate the operation of the new provisions after an adequate period, to ensure they are operating as intended. The committee notes Treasury's expressed willingness to continue dialogue with the industry in relation to possible future regulatory changes, if needed.

Recommendation 1

3.28 The committee recommends that the bill be passed



Senator the Hon. Michael Ronaldson

Chair

16 *Committee Hansard* , 27 July 2007, pp 44-5.

17 *Committee Hansard* , 27 July 2007, p. 43.

18 *Committee Hansard* , 27 July 2007, pp 43-4.