11 November 2005

Mr Owen Walsh
Committee Secretary
Senate Legal and Constitutional Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Mr Walsh

Re: Inquiry into the provisions of the Anti-Terrorism (No. 2) Bill 2005

Platinum Asset Management is a privately owned funds management business based in Sydney, managing in excess of A$16 billion. Predominantly these funds are sourced from Australian individuals and superannuation funds, although in excess of A$3 billion are sourced from offshore clients. Over 95% of these funds are invested in listed companies outside of Australia, making Platinum the largest Australian-based entity investing in offshore equity markets.

Our concerns with the provisions of the Anti-Terrorism (No. 2) Bill 2005 are twofold:

1. Major changes to basic human rights threaten to undermine the foundations of both our society and economic system. As international investors with considerable experience covering the emerging economies of Asia, Latin America, and Eastern Europe, as well as the world's major economies, it is our observation that strong basic rights enshrined in the law and the judicial system are fundamental to creating economic prosperity. Indeed the "level of trust" within societies and the correlation with economic prosperity has been an area of significant academic study in recent years. We believe there is a high risk that the provisions of the Anti-Terrorism (No. 2) Bill 2005 will, over time, damage the level of trust in Australian society.

2. There are significant practical difficulties for individuals, and financial institutions and their clients, in remaining compliant with aspects of the Bill relating to the financing of terrorism. Ultimately these issues could well impinge on the ability of Sydney to maintain its position as a major financial centre in the region.

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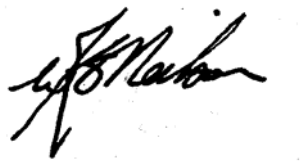
Although the above concerns may sound alarmist, one cannot foretell how the innocent remarks or actions of today may be seen in a different light tomorrow. We concur that Australia faces the real threat of terrorist acts on our shores. However, in the event of an attack(s), the subsequent confusion, fear and sense of injustice could produce an environment that sows the seed for a discordant civil order, exacerbated by poorly considered and drafted legislation.

Yours faithfully



Kerr Neilson
Managing Director

Part A – The terrorist legislation as a threat to economic prosperity

There is a significant body of literature that attests to the importance of human rights to economic prosperity. Open societies tend to have faster productivity improvements than closed societies. Rather than rehashing the case, may we suggest that you examine the extensive study on this topic produced by the Australian Productivity Commission entitled "Social Capital: Reviewing the Concept and its Policy Implications" (2003). (The document can be found at http://www.pc.gov.au/research/commres/socialcapital/index.html)

We presume other submissions will address the ways in which this legislation weakens civil rights. However, we note that the lack of full judicial oversight (a key feature of this legislation) may reduce respect for the law even when the guilty are apprehended. Preventative detention orders provide a case in point: if individuals over whom such orders are placed, do not have the same rights as those in a criminal hearing, is it not probable that family and associates of the accused will reject the action as unfair and unjust—giving rise to martyrdom? The guilty will be able to dismiss the actions as conspiracies to rob them of employment, property, and relationships. The lack of judicial oversight to the standard expected in criminal cases bears the considerable risk of injustice and raises the prospect of this country losing the very essence that it is trying to preserve. False witness and martyrdom are unattractive alternatives.

The legislative framework of this Bill could produce an environment that is potentially very unfriendly to economic performance. There are countries where those with connections and influence flaunt the law at the expense of fellow citizens. However, the cost of these weak institutions is seen in the high cost of capital and the inefficient workings of their economy. Fairness in law and the appearance of fairness (in law) is a prerequisite for a fully open capital market and for the economic benefits that competition brings.

This Bill creates the basis for unfair treatment and even if the government administers this law with total benevolence and wisdom, it will create an appearance of unfairness. This will have negative economic consequences.

The sedition rules run the risk of stifling debate on matters of national and economic importance and of reducing economic rights. Arguments put forth in good faith today can easily be characterised as seditious in a different atmosphere. Peaceful protest can similarly be characterised as a violent threat. Past protests involving a blockade of Parliament House would have been seditious under the proposed Bill. These protests were ordinary political activity. (As an aside, why is it believed that muzzling discontents will not drive activity further underground and produce even greater problems?)

Part B – Specific issues with the finance industry and the Bill

There are several provisions which appear to affect the financial industry directly – especially the new offences for *indirectly* financing terrorism.

The new offence of financing a terrorist (cl 103.2) allows a person to be imprisoned for life if the person indirectly makes funds available to another person, or indirectly collects funds for another, and the person is reckless as to the whether the other person will use the funds for terrorism. In Federal law, a person is reckless if he or she 'is aware of a substantial risk' that the funds will be used for terrorism, and 'having regard to the circumstances known to him or her, it is unjustifiable to take the risk' (s 5.4, Criminal Code). A person need not intend that the funds be used for terrorism, nor must a person have knowledge that the funds will be used for terrorism. The offence is committed even if a terrorist act does not occur or the funds will not be used for a specific terrorist act (cl 103.2(2)).

This proposed offence extends criminal liability too far. It makes it impossible for any person to know the scope of their legal liabilities with any certainty. Terrorists may obtain financing from a range of sources, including legitimate financial intermediating institutions such as banks, and employ a variety of deceptive means to secure funding. This offence would require every Australian to vigilantly consider where their money might end up before investing in stocks, depositing money with a bank, or even giving money as a birthday present or a donation to a charity.

As an organisation which accepts money directly and *indirectly* from foreigners and regularly invests money in foreign activities this alarms us. *We are simply not in a position for a great proportion of the time to know who are the underlying investors in our funds or to what use the money will be put. Visibility is limited to public documents*. In many cases it is illegal for us to rely on due diligence beyond public documents (insider trading rules can work this way).

Extending the funding of terrorism provisions to the indirect funding is simply too broad. Financial intermediation is the indirect provision of finance. We all do it – whenever we go to a bank or a financial planner.

Essentially the provision criminalises (with a penalty of life imprisonment) ordinary financial market activities. Examples are included in Attachment A.

These are not the only provisions in this Bill that affect the finance sector. It is simply inappropriate to rush through legislation with widespread industry effects, without consultation with industry.

ATTACHMENT A – EXAMPLES OF ORDINARY ACTIVITIES POTENTIALLY CRIMINALISED BY THIS BILL

Indirectly collecting funds on behalf of another person

The Bill makes criminal (punishable by life imprisonment) *indirectly collecting funds on behalf of another person* and *being reckless as to whether those funds will be used for terrorist activities*. The offence occurs even if no terrorist act occurs. This would seem to apply to most financial activity. For example:

> Most fund managers invest money on behalf of parties whom they cannot identify. The typical process is that financial planners meet clients and suggest suitable investments. The client's moneys are aggregated in a *master trust* which then places that money with an asset manager to manage. The fund manager does not "own the client relationship" and generally will not know who the underlying client is. This is certainly the arrangement within Australia and applies in other countries from which we receive funds to manage. As the fund manager in many instances cannot identify the ultimate client, how can they possibly meet with this proposed legislation? The fund manager would be dependent upon the diligence of the client adviser/master trust administrator.
>
> Even if we assume that the large Australian institutions that manage master trusts are fulfilling their legislative duties, how do we operate internationally? Our business generates considerable export earnings for Australia. This legislation would leave us with doubt and potentially open to prosecution.
>
> This is not a speculative point. There was an occasion when on a marketing trip to the USA we were asked to manage funds for a wealthy family. On the hearsay that this family was highly sympathetic to the IRA we declined to follow up their interest. (This was clearly an ethical issue at the time but in today's environment, rather more poignant.)

The problem extends to ordinary Australians.

> Suppose a fund manager invests in an initial public offering (IPO) of shares in which cash ultimately flowed to a vendor who was (or even might be) a supporter of terrorism. The deal is a standard IPO organised through an investment bank. If the fund manager were reckless about the character of the vendor they may be caught under the proposed laws (even if a terrorist act does not occur).
>
> However, not only is the fund manager caught – but all the fund manager's clients are caught if they invest money with a fund manager who has failed to correctly monitor the seller of assets they buy. The clients (ordinary Australians) would be indirectly financing terrorism.

Indirectly providing funds that facilitate a terrorist activity

As a fund manager we invest money in businesses which we do not control (and where we cannot influence management policies). The Bill makes it very difficult to ascertain what we can legitimately invest in. For example:

> We might invest in a urea (nitrogen fertiliser) plant. As urea *can be used in explosives,* most governments place regulatory controls on access to the product. There remains, however, a risk that urea finds its way into terrorist hands. Does this rule make investing in urea production illegal even when we check that controls are in place to ensure that access to urea is restricted?
>
> Would we be justified if *ex-post* it turned out that the company could not account for several tons of fertiliser and that fertiliser had been used in terrorism?

A urea plant is an obvious candidate for specific attention. However, the wording of the Bill is very broad. It only requires that the funds provided can "facilitate" a terrorist act. Mobile phones have played an integral part in terrorist acts. Surely the drafting, as proposed, does not wish to impose upon us a restriction regarding investing in telephone companies?