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AND FINANCIAL SERVICES

Reference: Oversight of the Australian Securities and Investments Commission

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**JOINT STATUTORY COMMITTEE
ON CORPORATIONS AND FINANCIAL SERVICES**

Wednesday, 25 November 2009

Members: Mr Ripoll (*Chair*), Senator Mason (*Deputy Chair*), Senators Boyce, Farrell, McLucas and Williams and Ms Grierson, Ms Owens, Mr Pearce and Mr Robert

Members in attendance: Senators Boyce and Mason and Mr Pearce, Mr Ripoll and Mr Robert

Terms of reference for the inquiry:

To inquire into and report on:

Oversight of the Australian Securities and Investments Commission

WITNESSES

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MEDCRAFT, Mr Greg, Commissioner, Australian Securities and Investments Commission 2

Committee met at 5.04 pm

CHAIRMAN (Mr Ripoll)—I declare open this public hearing of the Parliamentary Joint Committee on Corporations and Financial Services. This evening the committee is conducting a hearing into the Australian Securities and Investments Commission. Under section 243 of the Australian Securities and Investments Commission Act 2001, the corporations and financial services committee is required to oversee the functioning of ASIC. This hearing is part of that oversight.

[5.04 pm]

D'ALOISIO, Mr Tony, Chairman, Australian Securities and Investments Commission

GIBSON, Ms Belinda, Commissioner, Australian Securities and Investments Commission

MEDCRAFT, Mr Greg, Commissioner, Australian Securities and Investments Commission

CHAIRMAN—Welcome. I remind all witnesses that, in giving evidence to the committee, they are protected by parliamentary privilege. This gives special rights and immunities to people who appear before committees. People must be able to give evidence without prejudicing themselves. Any act that disadvantages a witness as a result of the evidence given to a committee may be treated by the parliament as a contempt. It is also a contempt to give false or misleading evidence to a committee. Parliament has resolved that an officer of the Commonwealth shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy. It does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken, and the committee will determine whether it will insist on an answer, having regard to the ground claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. A request to give a particular answer in camera may also be made at any other time. I thank ASIC for its submission and contribution to the inquiry into the collapse of Storm and others in the financial services industry. I invite you to make an opening statement.

Mr D'Aloisio—Thank you for those kind words. We appeared before you on 17 June, and since then we have also appeared before you in relation to the agribusiness managed investment schemes and, of course, the financial products and services review which you have just completed. The committee also tabled its six-monthly oversight report into our performance in September. This period of time has been one of intense activity for ASIC, with the continuation of major actions in matters such as Westpoint, Opes Prime and AWB; the commencement of proceedings in Centro; and the continued investigations in a number of matters, including Storm Financial. More recently, the New South Wales Supreme Court last week handed down the decision in OneTel. Our resources are being fully utilised and our people are working extremely hard. The community is really fortunate to have had such a dedicated staff through this period of intense activity.

Since we last met we have seen significant reforms to our areas of responsibility, with the announcement by the Commonwealth of the transfer next year of ASX's market supervision and surveillance responsibilities. Also, as you know, we assume responsibility for the regulation of consumer credit on 1 July 2010. We have continued with our preparations in recruitment and the development of registration and licensing systems and processes for that changeover. We have also, since we last met, announced significant changes to the regulation of credit-rating agencies which will, in substantial respect, align Australia's regulatory system with the principles enunciated by IOSCO. ASIC has also continued its extensive work in the area of market

integrity, including releasing a consultation paper on responsible handling of rumours in the market, which is so important to manage for market integrity.

Finally, as you mentioned, we note our work in the report that the committee has just handed down. We will closely analyse and report back to the committee at future meetings on the specific recommendations concerning ASIC, in particular the recommendations around more effective risk based surveillance; annual shadow shopping looking at standards of advice; capital adequacy licensing conditions for the agribusiness managed investment schemes; consultation with industry on the important issue of a professional standards body to oversee competency and conduct of financial advisers; more effective education for older, high-risk investors and those seeking advice for the first time; and the important issue of whether ASIC can give earlier advice to investors and others in relation to the progress of its investigations, particularly the ones that involve a lot of investors, individuals or financial consumers.

CHAIRMAN—There are a number of issues we want to raise tonight. Obviously we want to have a better understanding of what we are doing in terms of some market regulation issues and a range of other things. I wanted to begin, if that is okay with the rest of the committee, specifically on ASIC's investigation procedures and how ASIC actually deals with complaints that it receives and what the process is, just so that as a committee we have a fuller understanding of how the system works. I might get you to open by giving us some idea of how you see the system of complaints work, taking it from a complaint being received to the complaint being finalised, then we can go from there.

Mr D'Aloisio—If I may, I am going to take a little bit of time just to outline that process because it is an extremely important process in ASIC. It is a process that involves some 95 full-time equivalents—individuals who handle this complaints process for us—and then there will be others in ASIC who could also be involved. Just to give you a feel, in 2008-09 ASIC received some 15,300 misconduct and breach reports or complaints, which was a 17 per cent increase on previous years.

We receive complaints in a variety of ways. We get complaints electronically; we get them verbally and in writing. We get complaints from all sectors—from the public, investors, consumers, directors of small to large companies, industry participants, external administrators, accountants, auditors, representatives from members of parliament, legal aid consumer groups, referrals from state governments and our own internal ASIC officers. We get the complaints in a variety of means but from a very broad range of stakeholders. Once they are identified, all complaints that come into ASIC are referred to a central unit—ASIC's Misconduct and Breach Reporting—M&BR as we term it. Each complaint is registered in a national database and acknowledged within one business day of receipt. At this point the complaint undergoes a preliminary assessment by a senior analyst, testing the significance and priority, and then it is classified as to subject matter, key words are recorded, and it is allocated to an action officer for assessment.

Our aim is to turn that complaint around within 28 days, whether it is minor or more significant, but still to turn it over within 28 days after it has been acknowledged. Clearly, we will look at that complaint to see whether or not it involves breaches in the law and what needs to be done with it. If they are complaints that do not fall within our jurisdictions, then within our own jurisdiction we take steps to ensure that it is referred to the relevant body to then handle that

matter for the individual. We will do that preliminary assessment and then a range of processes takes place. The complaint itself may be resolved within the 95 full-time equivalents that I mentioned earlier, or it may be assessed and risk-analysed to see if it is more substantive and needs to go one of our stakeholder teams or one of our deterrence teams for action. Then it is picked up in that process and handled and, again, the aim is to get it within 28 days. In the last annual report, I think we reported that we met some 70 per cent—our target is 70 per cent—of that turnover within 28 days and we achieved that.

A couple of important changes that we made more recently were that we took the complaints system and the breach reporting system into a central form of intelligence for ASIC, and we made changes more recently as part of the restructure to introduce much more direct accountability for the complaints at the very senior levels of the organisation. In other words, if a complaint is referred to one of the stakeholder or deterrence teams, it is part of the KPIs of the senior leader of that team to get involved, assess and form a view as to whether or not there could be a smoking gun or an issue that is of broader significance than it might at first seem.

That has added a layer of responsibility at the senior level so that these matters are not pushed down in the order. That system is working well. Our leaders are taking the responsibility for dealing with the more major complaints. I think we were concerned in introducing that to make sure that the smoking gun aspect of this, which I think I may have spoken about at other committee meetings, is fully analysed. Clearly, when you look at the range of complaints and where we get them from, we also do other analysis. Just by the clusters of complaints we will look at where they are coming from, the numbers, the type of area that is involved and whether it could be alerting us to a more substantial issue, along with the actions that could be taken in resolving these complaints which would clearly be to deal with it and write back about how it is being dealt with. It could be through deterrence action, licence conditions; it might also stimulate a surveillance in relation to the activity.

We are working hard at having a complaints system, using it as a central source of intelligence and using it to deal with the complaints as we go. Of course, you do not always pick the smoking gun and sometimes, with the benefit of hindsight, you wish you had. We are very conscious of doing that and we are pushing the system a lot harder to be able to do that. Sorry, chairman. That was a long introduction but that it is an important part of ASIC's work.

CHAIRMAN—You answered some of the questions I had in part. Obviously there are a lot of complaints—we see that—and you get a lot of statutory reports. But it seems that year on year there are more. Can you give us some understanding as to why there are more complaints?

Mr D'Aloisio—I think the 17 per cent increase on the last 12 months is related to the major collapses that we have had and the impact that the financial crisis and the market downturns have had on retail investors and consumers, so we would say that a lot of the explanation in more recent times is the crisis. We have not at this stage picked up any trend or deficiency in regulatory frame work or particular areas other than what the committee is aware of in relation to Storm and the financial advice industry, so we are not picking up other trends. Because we cover such a wide ambit, when you look at the people I mentioned earlier that the complaints could relate to—accountants, auditors, liquidators and then you move to financial advisors—with the number of intermediaries we regulate, you would expect that there would be issues.

CHAIRMAN—It poses a bit of a question as to whether regulation generally is working. Obviously markets grow, but if regulation is working year on year there should be either fewer complaints or fewer offences. The system should be able to deal with that. Is there some sort of analytical measure in mathematical terms that analyses the data and says, ‘Given growth, given the normal things that you would expect in a market, we are getting better at this’ or ‘there is no change’? Is there some statistical variance year to year which indicates a trend or some sort of pattern? Is it just numbers? How do you explain it?

Mr D’Aloisio—Whether you can come up with a metric is an interesting question.

CHAIRMAN—Are we getting better at what we are doing?

Mr D’Aloisio—I think we would say that we are getting better in the way we are handling issues, but you are saying that is not translating into a reduction of complaints and why is that.

CHAIRMAN—I am assuming it is not the same people complaining every year. The figures almost seem to be constant, but they grow each year by almost a constant amount with a bit of variation. It does not really tell me a lot. It just says things are as they are. There is no analytical data which says there is a variance: in this year the reason it varied by this much is because of external factors, or something that explains the numbers; otherwise, the numbers are a bit meaningless in that sense. They are just numbers.

Mr D’Aloisio—We run some stats. For example, there have been increases in more recent times around the insolvency area and around issues of corporate governance and so on with companies that have gone insolvent. Again that is more related to the market itself and where we are at the time. I think we will take that on board and have a look at whether we can distil anything from the numbers. The reasons people complain are many and varied—they are to do with the particular time and also a heightened awareness and education process with this thing being available and they can go to ASIC which does do things—

CHAIRMAN—These are the sort of measures. You might say that you got more complaints because you advertised more. There might be some analytical data to show that you had a quiet year with fewer complaints but since you advertised more you got more complaints.

Mr D’Aloisio—Yes. Let us take it on board and we will have a look to see if we can run some other things.

CHAIRMAN—I would be really interested to see if there was a mathematical variance year-on-year between the activities of ASIC and whether those translate to more effective regulation or whether we really do not know and therefore it is just a group of numbers that do not really tell us a great deal.

Mr D’Aloisio—It is a good question. On that theory, ultimately ASIC should become irrelevant.

CHAIRMAN—We should just get better and better at it at. You know what I am driving at.

Senator MASON—It is a necessary deterrent.

CHAIRMAN—The better we become at it in terms of informing people—certainly you would expect more people to complain and also there are more issues to complain about—you would get to some sort of equilibrium where there is a percentage within the market with which you expect problems. I leave it to you guys to figure out the mathematics.

Mr D'Aloisio—We will take that on board.

CHAIRMAN—I am sure there are people who do that sort of thing.

Ms Gibson—It would also be interesting to break it down into how many complaints are received about different matters. For Storm there were an enormous number of complaints.

CHAIRMAN—Exactly. I think one of the areas where we could really make a difference is understanding what these complaints represent. Following on from that, you get thousands of complaints, how many people do you have dedicated just to dealing with the initial complaints? Do you have a call centre?

Mr D'Aloisio—We have a call centre which handles 700,000 calls a year. Clearly there is a very significant group of dedicated people handling that. In the actual front-line complaints—

Mr PEARCE—Is that call centre in-house or outsourced?

Mr D'Aloisio—It is in Traralgon and shortly with credit we will also have a call centre in Adelaide. It is an in-house call centre.

CHAIRMAN—So the workers in the call centre are ASIC officers, they are employees of ASIC?

Mr D'Aloisio—Yes. That is the initial, then the actual—

CHAIRMAN—What are their qualifications or requirement for the job? I would like to know how the process works.

Mr D'Aloisio—The relevant employees are what we call ASIC 1-3s and then there will be more senior people who could be EL1s and EL2s. They are in the public service structure.

CHAIRMAN—Do they receive specific training, not just call centre training?

Mr D'Aloisio—There is a lot of training. For particular types of complaints they will have issues that they need to handle and they will be trained in how to handle them so that if something comes up on an issue we know there will likely be a lot of complaints about a lot of initial work will be done. They are given briefing notes. They are able to call in from where they are sitting to have a query answered and then go back online to answer the caller. There is a lot of training and development in handling the calls.

CHAIRMAN—Do you have a dedicated proprietary database system which was specifically designed for you?

Mr D'Aloisio—Yes, we do. It assigns priorities and you can see how long calls are taking and so on.

CHAIRMAN—I would love to come and see that call centre.

Mr PEARCE—You should go—I have been around it.

CHAIRMAN—Yes, I should. I am very interested in what sort of a system we have because that is integral to how we deal with things further down the line.

Mr D'Aloisio—Our target is to have 90 per cent of the calls answered within one minute and we are achieving that.

CHAIRMAN—I saw that in your report and I was going to test it—no, I am not going to test it. It is fine.

Mr D'Aloisio—Going back to your question about coming to see it, I think they would be delighted in Traralgon for the committee to come.

Mr PEARCE—I have been there.

Mr D'Aloisio—You would have been there in your prior role.

Mr PEARCE—Yes.

CHAIRMAN—We will follow up on that. I am certainly keen to see it, and understand what it delivers.

Mr D'Aloisio—That is the front-line, if you like. Sitting behind the front-line are 95 full-time equivalents that are in the misconduct and breach reporting area, the 15,000 or so complaints that I talked about earlier that are logged within a day, answered and then handled, 70 per cent within 28 days.

Outside that group, when we look at our eight deterrence teams and the stakeholder teams and when we look at their work, a lot of their work has come out of that handling. So this seems to be a side that is dealing with complaints, but in fact it is a very important central source of intelligence that leads to a lot of action being taken. Typically there are unregistered investment schemes, bannings, corporate governance issues. A lot of that from a big-picture point of view seems minor but cumulatively across Australia these things are happening every day.

CHAIRMAN—I would like to understand what the system does, so do you have some sort of document that says you collect data that is analysed and that does these things? Is that not used? Still on that, I am assuming the calls are recorded.

Mr D'Aloisio—Yes.

CHAIRMAN—That is fine. And obviously you would get emails and correspondence as well.

Mr D'Aloisio—Yes. Everything is logged.

CHAIRMAN—And the same processes apply whether it is voicemail—

Mr D'Aloisio—Yes.

CHAIRMAN—So it is all the same system process throughout. Does the system account for patterns that emerge? Is there some sort of systemic analysis which finds patterns that you as an individual might not see? Is there some way that ASIC then turns to—

Mr D'Aloisio—It is not software that would do it. It is really based on the people doing it and the people in charge of the area looking for those patterns in complaints when they analyse it on keywords. As I said, all the keywords are put into the system. So they might do a keyword search on Storm Financial, fiduciary duty or something, and that then enables them to get that data and look at it. But we rely much more at this stage on the analytics by the analysts and the people in ASIC than on a computer system or software that we have written to extract that.

CHAIRMAN—I will come back to some of those if we have time, because I do not want to take up all of the committee's time. My thanks for that.

Senator MASON—I know Mr Robert has some questions before he goes, but I have a couple of areas to ask about. I take up where the chairman left off. On page 16 of the ASIC annual report—I suppose this question has evolved from the OneTel investigation, but I do not want to go to that at the moment—you say:

This year, in collaboration with the CDPP, we completed 39 criminal proceedings, with 34 criminals convicted, including 19 jailed.

On the face of it that seems like a very high percentage, but in those 39 criminal proceedings were there co-defendants? I notice you have 34 criminals convicted. How many co-defendants were there all up?

Mr D'Aloisio—If you go to page 18, I think, it is all set out there. There were 18 jailings and eight suspended sentences.

Senator MASON—The people who were convicted are all mentioned; you are quite right. How many co-defendants were charged?

Mr D'Aloisio—You mean how many of these were one matter as opposed to the same matter having three or four defendants?

Senator MASON—Yes.

Mr D'Aloisio—I do not have that readily here, but we can get that for you.

Senator MASON—That would be interesting, because on the face of it 34 out of 39 seems extremely high, but I suspect there are quite a few cases with several co-defendants.

Ms Gibson—Are you concerned about co-defendants where someone was not convicted?

Senator MASON—Correct.

Ms Gibson—So it is where we got up with one but—

Senator MASON—It is possible. I am not suggesting this is the case, but you could have had the 34 criminals convicted in one criminal proceeding. You see my point.

Ms Gibson—Yes.

Senator MASON—And the other 38 could have been unsuccessful.

Mr D'Aloisio—I see the point. That is not the case, but we will get you a chart setting that out.

Senator MASON—You understand where I am going? I need that information so we can make a better assessment of success.

Mr PEARCE—He is a lawyer, remember.

Senator MASON—Not a very good one! We completed 35 criminal proceedings and obtained over \$14½ million in recoveries, costs and fines, with \$13.8 million in assets frozen for investors and creditors. How many civil proceedings did you bring?

Mr D'Aloisio—There is a number on that as well. We would typically have brought well over 100 civil proceedings.

Ms Gibson—It would not be so many, I do not think.

Senator MASON—It was 35. How many of those were successful?

Ms Gibson—How many of those did we lose in that time period? We would have to come back on that.

Mr D'Aloisio—Hopefully, it was elsewhere in the report. I will have to take that on notice.

Senator MASON—The committee is trying to get a handle on the success rate. Success rates are not everything in criminal law and, as the chairman has quite rightly pointed out, there are deterrent effects and everything else. I understand that.

Mr D'Aloisio—On page 83 of the report, you will see there are other statistics, which is the fix up, criminals jailed, fundraising, recoveries, percentage of successful litigation and litigation concluded. That is and a cumulative six-year comparison. The 19 jailed relates back to page—

Senator MASON—Yes, but it does not tell me how many were prosecuted, does it? How many were successful—

Mr D'Aloisio—I agree that we have to answer that. Also, percentage of successful litigation does not break up civil and criminal, which is something you have asked about as well.

Senator MASON—Indeed, but it is something.

Mr D'Aloisio—Yes.

Senator MASON—Could you give that on notice?

Mr D'Aloisio—Yes, we will take that on notice.

Senator MASON—That would be useful. My last question relates back to margin lending. Again, just touching on Storm Financial and the committee's recent report, one of the major issues from the committee's report was that margin calls were not passed on to the client via the financial planner. You will recall that in evidence. Section 985M—amendments to the Corporations Legislation Amendment (Financial Services Modernisation) Bill—provides that a client can still elect to have a financial planner pass on margin calls. One of the concerns reflected by the committee and, indeed, in evidence from some of the witnesses, was that the same problem could occur again. I think you even said that yourself. Another issue—and I would like your comment on this—was the response time to margin calls. We heard evidence from the Commonwealth Bank that they waited for over 11 weeks to notify clients directly of margin calls. Under the corporations amendment, specifically 985M, ASIC has the power, I believe, to determine the time frame of advising a client of a margin call. Is ASIC going to provide what is regarded as a reasonable time to notify a client of a margin call?

Mr D'Aloisio—What we are doing at the moment in terms of the legislation is that we are in the process of working through the sort of guidance we would give and so on. I do not think we have made a decision on that issue at this point. It is something that we can look at. I would take it on notice and look at it further.

Senator MASON—I ask because, clearly, it was a critical issue.

Mr D'Aloisio—The key is: you want to make sure that the margin calls, if they are made, are made promptly so that the investor has the opportunity to put in cash, sell down or arrange some other form of accommodation. It is absolute critical. If the amendments do not quite get there in that way, we will need to look at what we can do by way of regulatory guide to make sure that the message gets through. Indeed, as you say, if it is through a financial adviser or through an agent of some sort, what is the responsibility on the lender to make sure that they get satisfied that those margin calls are passed on promptly.

Senator MASON—According to the Department of Parliamentary Service *Bills Digest*—which is not definitive, but a guide for parliamentarians:

ASIC may determine when the notice must be given, but if ASIC does not determine any time frame, then the notice must be given as soon as practicable.

I am interested about what time frame might be decided upon because again we would hate for, after the inquiry and after the amendments to the law, the same problem to emerge. I know you

are well aware of that and I know that the banks are. Indeed, they are voluntarily introducing their own codes of conduct to combat this. If you could give the committee some guide as to what you might be thinking of, that would assist us and make us less worried about future instances of the Storm variety.

Mr D'Aloisio—Yes, we will do that.

Senator MASON—Thank you.

Mr ROBERT—Referring to the credit reforms that come in on 1 July 2010 with specific reference to the payday lenders—that is, the cash converters who will lend you your future pay and charge you 30 per cent interest for the joy for the fortnight or the month—what work is being done with those types of lenders to prepare them for the introduction of the regime?

Mr D'Aloisio—Certainly, it has been an issue that we have been concerned about and our consumer people have worked hard to ensure that consumers are aware of their rights and that this pay lending system and the disclosures work and so on. In terms of the credit reform legislation at the moment, our preparatory work on that through the various consultations on what we are doing is really very much about getting registration, getting licensing on foot and waiting for the terms of the legislation to be finalised and then consulting with the market on regulatory guides on these sorts of issues. We have issued a regulatory consultation document, for example, on responsible lending as an initial indicator of what we would be looking at. I think a lot of this work is going to be in the first half of the next financial year.

Mr ROBERT—Without holding you to it, cognisant that you are still waiting for advice from the minister, what is it that you are looking to put out into the market prior to 1 July 2010? What is your vision of 1 July 2010 and what do you expect to have out there?

Mr D'Aloisio—You would want to ensure that at that point you have covered all the issues around licensing and registration. We are developing a full suite of regulatory guides that we think are going to be needed on such issues as responsible lending, the way conflicts are managed and training. There is a list of those. Again, we can provide the committee with a list of all the consultations we will do and the additional regulatory guides we are going to issue to ensure that there is a smooth transition to the new system.

Mr ROBERT—That will be good. I have a few more questions on PI insurance. We note the increase in PI insurance. In my personal business life, I was appalled that my PI insurance for an IT services company doubled the year after 9/11 as if somehow I was responsible for buildings falling down. I note PI insurance rising again for financial services providers. To what degree do you think that FOS, the Financial Ombudsman Service with their capacity to fine up to \$250,000 for breaches without appeal is linked with the rise of PI insurance?

Mr D'Aloisio—Our perception would be that it is not linked. The PI market is a very large market and the dynamics of what influences the availability of PI will go way beyond the financial advice industry. It cuts across directors and offices and so on and these markets will respond to market supply and demand across a whole range. There is no doubt that if you increase the liability, the amount that can be recovered, that must have some impact on premiums, but is it the reason that policies are hard to get? That is not our experience. Our

experience is that you can still get PI insurance and that the advisors are still able to get PI insurance. The scheme and the increase from \$250,000 or \$280,000 I think have not cut in as yet. It will cut in a little bit later and we will monitor it. But at this stage our position would be that that is not the issue you could blame for why the market for PI insurance is tightening.

Mr ROBERT—Are you happy to take a question on your view of how effective the FOS's capacity to award a fine of that will be on the financial services market? Or would you prefer I raise it with FOS?

Mr D'Aloisio—I think you could raise it with FOS as well. Is your thinking that the lifting to \$250,000 is to do with PI or the number of claims? Is that the concern?

Mr ROBERT—I was just getting your view on what impact it will have on the financial services market.

Mr D'Aloisio—The lifting of it?

Mr ROBERT—Yes.

Mr D'Aloisio—Traditionally, the FOS type schemes and the alternative external dispute resolution schemes that exist out there are fairly fundamental underpinnings of the financial advice industry that have been put in place. It is a trade-off between a quick, speedy resolution with a limited liability against pursuing your rights as a consumer in an unlimited liability capacity through the courts. The benefit for the financier, the lender or the licence holder is that they have actually got a capped liability. Whether the cap should be at \$150,000 or \$250,000 is always debated but they know they have got a limit, a cap. The benefit for the consumer is that it actually gives you an alternative and speedier way to get things resolved. You do not have to worry about major class actions or finding your own money and getting your own lawyer. In that sense it seems to us from our experience that it is has been a pretty good trade-off.

Last year, when we did the consultation on lifting the limit to \$280,000, we felt that the \$100,000 or \$150,000 was just too low, given the nature of the claims that were coming through. We also felt that it seemed unfair, for example, if you had invested \$200,000 instead of \$100,000 in Westpoint you would be precluded from recovering because you were above the limit. It seemed to us that having a limit of a potential claim of \$500,000, of which you could recover \$250,000 or \$280,000, was a better approach than leaving the limits that were there at that time; and also balancing up the additional cost for the licence holder on that. Clearly there would be a cost associated because you have got to pay out higher limits than you otherwise would.

We looked at it carefully. We consulted with the market. We took views across a wide range and there was very strong support for lifting it to the \$250,000 to \$280,000 mark. ASIC has maintained that position right through but it has allowed a transitional period of time for the industry to adjust to that change and move to it. Our experience is that the FOS scheme has worked well. I think at the moment there are suggestions of an industry based look at those licence holders that go out of existence or become insolvent, et cetera, and cannot pay the \$250,000 to \$280,000 and whether there should be some underpinning in those cases. FOS, and I think a related entity of FOS, is doing some work on that to see if they can deal with that issue. I

think it is consistent with the committee's own report that looked at what you need to do to support or underpin more than just relying on PI.

Our view would be that those arrangements are working very well in the market. It is one of those changes that were brought in sometime back that underpins the whole regime and it seems to be working well. People are recovering money through that mechanism, in addition to those that might go by class action or other forms of action. You are right, it does add a cost to the lender because—depending on whether they are insured or not—they are going to pay out a higher amount and if they are going to insure it that may well reflect in their premiums. But I just would not be convinced, if we can do more work, it is the reason why PI insurance may or may not be available to that whole market. There are other considerations that are at play.

Senator BOYCE—You say in your report that 45 per cent of your senior executives are women and 59 per cent of total employees are women. Have you undertaken a gender pay equity analysis of your positions?

Mr D'Aloisio—We have, but I would have to provide you with the numbers on notice.

Senator BOYCE—Could you comment on how equal your pay is?

Mr D'Aloisio—I do not want to guess at this; I would like to get the numbers out. When you look at the way that we are structured and so on, by and large pay and positions people hold would be comparable on merit. Indeed, we have an extremely merit based approach to remuneration and so on.

Senator BOYCE—You would be aware of surveys that have shown that is sometimes not in fact the case where you might have thought it would be.

Mr D'Aloisio—Yes. I will give you the specifics on that. It is very important for me to be able to support that more clearly, because we have a policy of trying to attract and retain the best. Those sorts of issues are extremely important for us.

Senator BOYCE—Have you got statistics on the people who sought to make withdrawals from the frozen mortgage funds? You have in the past provided us with the number of people who applied, how many were successful et cetera

Mr Medcraft—As you know, we extended the hardship relief a few months ago. We can come back to you with statistics on exactly what the numbers are.

Senator BOYCE—How many?

Mr Medcraft—We had a number of applications to extend the relief. In the whole frozen mortgage trust sector, we have been engaging with the managers to try and find ways to go further in getting money out to investors.

Senator BOYCE—What level of funds would currently be frozen?

Mr Medcraft—At the moment it is around \$17 million. You can break the sector into the aggressor funds, who are largely not distributing anything, and the more conservative funds, who are distributing. Every quarter they take what they have received in the quarter and offer to distribute that to the investors. They have quarterly distributions of available moneys that have come in. Other funds are distributing five per cent every quarter of the balance—

Senator BOYCE—Who is making the decision on how this happens?

Mr Medcraft—The funds themselves—the trustees and responsible entities of the funds. For example, Perpetual, who are a very large one, take the moneys they have for the quarter—that is what they may need to keep the business going—and offer that as an available distribution. They ask people if they want their money back, and then they distribute it pro rata. The industry is looking to try and get money back to the extent it can, where a fund has money coming back in.

Senator BOYCE—Have you had any involvement in how those schemes are arranged? Do they discuss them with you? Have you oversighted the way this is being done?

Mr Medcraft—We have established a task force in ASIC and we are looking at every fund that has been frozen. We are having a dialogue with them to see what steps they are taking to get back to a situation where those who want their money back will get their money back.

Senator BOYCE—Has the level of withdrawals increased or decreased, or wouldn't you know?

Mr Medcraft—We can come back to you on that.

Mr D'Aloisio—I can give you some stats that we have got. If you take what Greg said—the hardship applications themselves—as you know, these funds are frozen on the basis that they operate through the illiquid provisions of the Corporations Act. We brought in the relief or hardship measures. Some 2,786 applications were received by the trustees and 2,293 of those were granted. Some \$99 million was paid out.

Senator BOYCE—\$99 million?

Mr D'Aloisio—I am sorry, the amount applied for was \$99 million. The amount paid out was \$58 million and each applicant received somewhere in the order of \$6,000 to \$264,000.

Senator BOYCE—Over what period was that?

Mr D'Aloisio—That would be since we brought that relief in, which must be now close on 12 months.

Senator BOYCE—It was October 2008.

Mr D'Aloisio—Yes. So in that period you have had \$58 million paid out.

Senator BOYCE—That is more than is currently still frozen, is it?

Mr D'Aloisio—No. The amount that is frozen is somewhere around \$17 billion to \$20 billion. There is a lot of money frozen. That is billion—what has been paid out is \$58 million. That is for hardship and it is an average of \$25,000 per applicant. Interestingly, on those figures, of the 100 per cent of the applications, 82 per cent did receive hardship relief, so you are getting a high rate of those who apply for hardship being met by the trustees as genuine hardship and the amount is paid out. In relation to redemptions—that is the second category—in other words you can get your money back through hardship, or you can get it back because the trust, as Greg said, accumulates, gets healthier, and when people apply for redemption then it is pro rata across. There has been another significant amount that has been paid out in relation to those. What is happening there is that, as the funds build up, the managers and trustees are paying them out.

Senator BOYCE—Have you got the significant amounts?

Mr D'Aloisio—We think the amount that has been withdrawn in that way is about \$2 billion.

Senator BOYCE—\$2 billion?

Mr D'Aloisio—Yes.

Senator BOYCE—So is it time for the freeze to come off?

Mr D'Aloisio—It is not our call.

Mr Medcraft—The issue is that at the moment those managers who manage those funds—we call them the 'normal' funds—want people, who do not want to be in the fund, to be in the fund.

Senator BOYCE—Exactly. There would still be some concern out there about putting your money into a fund.

Mr Medcraft—Basically, I think one of the things we have surveilled is to make sure that they are not taking any new money in, and to talk to them about that. At the end of the day, commercially what they want is for people who want out to be out, and they want investors who actually want to stay in the fund. That is why their industry association, IFSA, is looking at an industry way of streamlining the redemption process so that the monies that are available can get back to those people who do want out.

Senator BOYCE—But no-one can actually get out until the freeze is off, can they?

Mr Medcraft—No. That is what I am saying. In relation to those funds that are normal, they are frozen but in fact as they have cash available they are actually making redemptions of available cash.

Mr PEARCE—But only up to a limit.

Mr Medcraft—Up to a limit, that is right.

Senator BOYCE—There will only ever be a percentage that you get out.

Mr Medcraft—It is a percentage of your holding, but if you think about a typical mortgage trust the average life of a portfolio is two years. Basically, over time, if they are not doing any new lending that money is coming in and will go back to the investors. It just takes time for the loans to run off, because the one thing they do not want to do is try to liquidate the portfolio. One of the objectives here is that the investors get back par on their loan. That the investors do not lose principal is a very important concern of the industry. To the extent they do get money in, the large funds are either giving back everything they get in the quarter or, alternatively, giving back a fixed percentage of their holding. If you think about it, five per cent is equivalent to 20 per cent per annum, which roughly equates to the life of the portfolio if it is a five-year loan. So they are basically trying to run it down in line with the life of the portfolio. We are in constant dialogue and looking at areas where we can provide relief where a manager wants to do something more in terms of providing distribution.

Senator BOYCE—How do you mean providing relief?

Mr Medcraft—We have had applications to try to facilitate the distribution, so rather than, every quarter, putting in a notice that you want your money back, one of the options is to give notice 12 months in advance that every quarter that money is available you would like to get part of your deposit back. That will make it easier administratively.

Mr D'Aloisio—The issue here is that if the market gets confident and retail investors come back to the mortgage trust sector they will provide the necessary additional inflow of funds to enable others to redeem and so on.

Senator BOYCE—But it is highly unlikely that that is going to be—

Mr D'Aloisio—We are not seeing evidence of that, no.

Senator BOYCE—And there would be some serious concerns and trepidation, one imagines, about initially getting into this market, because of the recent experience.

Mr D'Aloisio—I think it is a fair comment. When you move into the unlisted areas of mortgage trust, property trust, management investment schemes and so on, the experience of the last couple of years is such that retail investors are going to be quite wary, with or without financial advice, to go back into those areas. It is something that we have to monitor. I think it is important for the markets long term that we have these alternative forms of investment, but it is going to take time for them to come back.

Mr PEARCE—Mr D'Aloisio, you have recently taken on an international role through an IOSCO committee, have you not? I wonder if you could share with us what that role is.

Mr D'Aloisio—Yes. As the committee may know, ASIC works through IOSCO and we are a significant contributor to the IOSCO work. We are on the technical committee, we are on the main executive committee and we have chairs at the securitisation and credit default swaps taskforce. That has been part of our strategy. Because of a lot of the changes going on internationally at the moment, we and the government feel that the Australian organisation should be well represented where they can on these bodies; hence our involvement. As part of that involvement, the opportunity arose for the joint forum. The joint forum is a technical body

that sits between the Basel committee, the Financial Stability Board and IOSCO to look at the overlap and cumulative impact issues of insurance, securities and investments regulation and prudential regulation. The chair of the joint forum alternates between IOSCO, the Financial Stability Board and the international insurance body. It was IOSCO's turn to nominate a chair, we were approached to nominate and, with the government's support, we did nominate, so I took on the role of chair of the joint forum.

The joint forum will meet three times a year. Its first meeting will be in Melbourne in February. The chairman is able to have one of the three in the home jurisdiction, and that will be the first one that I will be chairing in February in Melbourne. The other two will be in June and in November. So we see it as an important part of the work that we are doing internationally in putting our position on these regulatory issues. The joint forum's role will essentially be around where there are overlaps or gaps that can occur between the other three bodies. For example, the cumulative impact on securitisation regulation, to look at that and to look at overlaps in the way that the other bodies are handling it. Our mandates will come directly from the three parent bodies, so basically they will set the agenda with us.

Mr PEARCE—I congratulate you on that; it is a great credit to you that you were approached for that.

Mr D'Aloisio—Thank you.

Mr PEARCE—You mention in your annual report that ASIC is a member of the Council of Financial Regulators.

Mr D'Aloisio—Yes.

Mr PEARCE—How often does that council meet?

Mr D'Aloisio—It meets formally, has an agenda of meeting quarterly. The Council of Financial Regulators is ASIC, APRA, RBA and Treasury. It meets quarterly, but in addition it will meet in between as necessary.

Mr PEARCE—Has it been meeting in between?

Mr D'Aloisio—It did at the time of the government guarantee and so on. It met more than it is meeting at the moment. At the moment it is meeting regularly quarterly.

Mr PEARCE—Also in your annual report you talk about your relationship with the responsible minister. You say in your report that ASIC exchanged letters of intent with the former government on expectations of ASIC. I am familiar with those letters of intent, obviously. Has there been any change to those letters of intent, or are there any negotiations going on about a change in those letters of intent?

Mr D'Aloisio—No, the letters of intent have not changed. It is probably more of a question to direct to Treasury more than ASIC.

Mr PEARCE—But the intent has not changed?

Mr D'Aloisio—No. It has not come back to us, but I would encourage you to direct that more to Treasury.

Mr PEARCE—As you know, in our report that we tabled on Monday night, recommendation 9 says:

The committee recommends that ASIC immediately begin consultation with the financial services industry on the establishment of an independent, industry-based professional standards board ...

How many meetings have you had on that since Monday night?

Mr D'Aloisio—We have got up and running.

Mr PEARCE—On a serious note, I think this is a very important recommendation. I am interested in whether or not you have—obviously this is a report to the government and I understand all of the procedures, but my question is a sincere one. You have obviously thought about this beforehand; this has been on the possible agenda for some time. Could you share with the committee if you have any thoughts about what that model structure might look like? Would it, for example, duplicate something like the accounting profession has with their industry based standards board?

Mr D'Aloisio—At the moment it is not an issue. As you said, the report was Monday night, but clearly we have had some discussions beforehand. Conceptually it is a very good idea, but in order to answer your question better we do need to take it on board and do the work that I said earlier in relation to the recommendations. We need to look at the feasibility of it, who is going to fund it, the costs, who goes on it, what is the relationship between that board and ASIC's role. There is a lot of value in the proposal, conceptually it is a very good proposal, but we have to do a lot of work and we have to look at the money side and budgeting, and that is going to take us a bit of time.

Mr PEARCE—Is there an existing sort of industry based oversight structure in another profession in Australia that you think is a good model?

Mr D'Aloisio—As part of the work that we need to do, we have to look very carefully at not only the Australian standards boards that exist in other professions, whether they are counting or in legal and other professions, but also internationally in this area as well. As you know, there are a lot of standard setters, a lot of boards that set standards on training requirements. The key is to come up with a structure and a set of training requirements that are going to be flexible enough to deal with the range of intermediaries that we are talking about. You have your financial planners, mortgage brokers—there are a lot of people to the markets that are subject to training requirements.

I think the key is to come up with a standard setting board that is going to be flexible enough to set the standards for the different organisations' intermediaries. What we would like to do is take it on board, do the work, do the comparative analysis, develop the proposal and, as I said in my opening remarks, quite genuinely come back to the committee and give you our views on how we think it should be rolled out.

Mr PEARCE—I want to move to the introduction of the new national consumer credit laws that are coming in. As you know, they are due to be implemented on 1 July next year. ASIC has significant new responsibilities under this new regime, and I am wondering if you could share with the committee how you are tracking. Obviously this new legislation is requiring you to structure new groups and new units within the commission that have not existed before. Could you share with us how that is going? I understand and appreciate that it is a lot of work for you to do to implement this, but these are important reforms. I hasten to say that these are reforms that got bipartisan support, so our side of politics concurs with them. I am asking this in the spirit of goodwill in trying to work out in Australia's consumers' interests if all things are on track for a 1 July start.

Mr D'Aloisio—In a nutshell, we are going to be ready for the changeover. We have been funded for the changeover and we have been working on it over a period of time. As you know, we will assume responsibility on 1 July 2010. The existing market participants have to register with ASIC between 1 April and 30 June 2010 and then apply for their formal licence between 1 July and 31 December 2010. All new entrants to the market will require a licence from 1 July 2010. A lot of the work that we have been doing with our task force that has been established and dedicated to this area has really been to be ready with the licensing and registration requirements. We are also dealing with very much with the states to ensure that there is a smooth transition from each agency of a state to ASIC. We have put in place a phased recruitment program for some 200 new people. That has been implemented and we are starting to fill those positions. For example, today we announced the new head of the stakeholder team in credit who has been recruited. In the registration and licensing work that we are doing, we are also streamlining and trying to deal with the issues in a speedier, quicker way. For example, instead of asking 150 questions in relation to some of the licences, we are asking 75. So we are very much concentrating on reducing the paperwork commensurate with investor protection and consumer protection.

We have concluded, as I said earlier, a number of draft regulatory guides that we are publishing progressively, and we will be publishing those from Christmas on, including registration and licensing kits. We are also managing to ensure that we are going to be ready with deterrence actions and complaints handling actions that are going to be needed from 1 July with the people who we are bringing on. We are also expanding the complaints area to handle it, and we have had a very specific focus on ensuring that we are Australia-wide. Unlike a lot of other activities, for example, in the financial markets, which may be more Sydney-Melbourne concentrated, the issue of credit is of course a totally Australia-wide and regional one, whether it is outback Australia or wherever. So we are very conscious of that and we are spreading our resources in each of the states and territories that we operate in.

We do not think that at this stage we need to operate regional offices as such. We will be relying on technology and communicating electronically with as many places as we can. If the need arises for regional representation in this area we would look at that and go to government if we need additional support. I think from where we are, Mr Pearce, we can assure the committee that we are going to be ready from 1 July. We have dedicated teams that are working on it. The funding is in place. The recruitment program is working. The various licensing kits and so on that are going to be needed are there. We are communicating with the market and we want to do it in a seamless way.

Mr PEARCE—I have one final question. Mr Robert talked about PI insurance. I want to come back to that point if I can, Mr D'Aloisio. This is an area that I am really worried about from a couple of different perspectives. Firstly, it is compulsory. You require PI insurance. It is an ASIC requirement.

Mr D'Aloisio—Yes, it is. The fact of the matter is that out there in advisor land it is proving really difficult to get, and I am sure you are hearing this. I was with a group of advisors yesterday in Sydney and this issue ranked within their top two or three major issues in how they can continue to run their business and provide advice to people.

Mr PEARCE—You are obviously aware of all of this. Do you think there is a way forward on it? Because it really is a very significant issue that is going to unravel at some point unless there is some significant shift. Do you agree?

Mr D'Aloisio—Our information at the moment, if I can separate two issues, when you look at the degree of difficulty with which you get your PI is that there is an availability of PI in the market and there is the availability for you specifically based on your own record and history, so part of the issue for us at the moment is to try to differentiate those. Our information on the research we have done at the moment is that it is still possible for PI to be obtained by AFS licence holders in basic cover on the limits we have set. We are not seeing a difficulty. We did see a difficulty in relation to not being able to get run-off insurance and we have come in with modifications and we are consulting on modifying that and removing it because there is no point insisting on a requirement that the market will not meet, because the market will not meet it.

I agree with you that there is, no doubt, lifting of premiums to do both with the market and with the issues of increased liability. But we are not at the point where we are going to say to government that we really have to move away from the PI insurance system or make it voluntary. The difficulty with making it voluntary is that clearly if it is voluntary you will get some who will use it and some who will not. Then we have the issues of it not being available. That then throws up the issue of alternatives. I mentioned earlier the alternative of the FOS related scheme in relation to looking at underpinning those that go out of existence and who may not have PI insurance. That is an industry response that we are looking at and, if we can assist the industry with that, we will. There is, as you have referred to in your most recent report, the issue of statutory compensation and statutory schemes. As you would appreciate, that is a government issue; it is not an ASIC issue.

CHAIRMAN—It is different to PI as well.

Mr D'Aloisio—It is different to PI and you have looked at that as a committee and made your own conclusion. ASIC is not pushing the statutory scheme. In answer to your question, on balance we think it is still working. It is fair to say we are nervous about it as well, but we do not have evidence or a feeling at the moment that we should move away from it and remove that important underpinning that we have.

CHAIRMAN—Mr D'Aloisio, going back to some process issues about how complaints are dealt and particular field officers—and I am assuming you have a number of field officers—is there a specific category of person who is employed as a field officer working for ASIC?

Mr D'Aloisio—I will get some advice on that.

CHAIRMAN—That is okay. I do not know either.

Mr D'Aloisio—We do have analysts within that figure of 95 that I gave you earlier who are full-time equivalents. In that group we have analysts, largely lawyers, who would be ASIC level three and above, right up to senior executive leaders or senior leaders. They do the analysis of the complaints and the issues and what needs to be handled.

CHAIRMAN—Can I give it to you as a question on notice for you get to back to the committee with. I am wanting to understand the number of field officers you have—those who go out to the companies, seek further information and look at specifically what happens after a complaint is received and ASIC has made a determination that it warrants further assessment. I am really after that specific detail. What I would also like to know—and you can answer this now or take it on notice—

Mr D'Aloisio—I will take it on notice.

CHAIRMAN—is the process by which they work. Do they work to a set process? Do they got through and analyse specific things based on specific criteria or do they make judgment calls in terms of what they see? How flexible are they in how they approach a particular organisation? If you can answer that now, that would be great. If not, I am happy for you to take it on notice.

Mr D'Aloisio—I will take it on notice and give you a more specific answer, but the answer is that there is likely to be both a public answer and a confidential answer, because there are a number of processes we would want to protect.

CHAIRMAN—I understand that. That is satisfactory. Following on from that, once something is assessed to be of a nature that warrants further investigation and some sort of in-field examination takes place, is there an understood process that has attached to it timelines and systems that are communicated? Do people at the other end understand that what is happening to them for what reasons and that there will be a process and a time frame; that it is not something that is just indefinite?

Mr D'Aloisio—As I said earlier, the objective is certainly to make sure that we have acknowledged it and told the complainant what is happening within a day and to have resolved it within 28 days. That means that within that 28 days there would be, in a lot of cases, a lot of other communication that would occur in terms of getting additional facts and material so that the complainant is aware that the issue is being handled. There is a process that would go through sign-offs and reviews. We can explain all of that.

CHAIRMAN—The reason I raised that specific issue about the time frame to finalise a process or have it understood is that I have received a number of complaints—I am sure others do as well—on some very serious matters. We are not talking about small complaints. We are talking about substantial matters involving large issues; I will not go into specifics. Pursuing those seemed very complex in terms of getting any response about when the next meeting would be, if at all. It seemed to work as a process up to a point and then there was a non-determinant

period, whether it was a favourable response or a non-favourable response—without any action at all. I have a number of specific cases, and some of them have dragged on for many months.

Mr D'Aloisio—That is with us?

CHAIRMAN—Yes.

Mr D'Aloisio—We had better look at all of those.

Ms Gibson—Is that a question about the open-endedness vis a vis ASIC and the complainant or ASIC and the person being investigated?

CHAIRMAN—Yes, the complainant, particularly in relation to some that I have had. It is only a few, but it seems to me that if the few represent others then there is a significant problem in that on significant issues the party who is the subject of the complaint could abscond, could leave the country and could do a range of things if action is not taken. There just seemed to be no process at that point to be able to deal with it. It just seemed to be in limbo until the decision was made, but there was no forthcoming decision. I am wondering if there are processes. If there are, I am happy enough to accept that. I am just alerting you to the fact that there are a number of cases that have been brought to my attention.

Mr D'Aloisio—We need to take that on board. It is highly unusual though. If it is a matter where, say, for example, we are talking about potential complaints around unregistered managed investment schemes or managed investment schemes that have problems, very early on our people are alert to that. They are alert to the fact that the money could disappear if there is any money in accounts. They have procedures. They will take orders to get passports, go to court, freeze funds and do those things, so the systems are there for those actions to be taken quickly and we can point to examples. I think that what you are getting at is that the complainant is not hearing from us.

CHAIRMAN—Yes.

Mr D'Aloisio—Therefore they are not aware of what actions are or are not being taken.

CHAIRMAN—The understood process of that: this is what will happen and when it will happen.

Mr D'Aloisio—Yes.

CHAIRMAN—Be it one way or the other, in making a determination on the outcome, you are saying that there is a process and that it is understood, but often the breakdown of that communication is that people at the other end do not understand what will happen and when it will happen. Could you get back to me on that?

Mr D'Aloisio—We can do that. We will do some sampling to show you what happens and so on.

CHAIRMAN—I am satisfied enough to this point anyway in that particular area. I want to come back to you on some insolvency issues but I might let some others put a couple of other questions to you before I begin on that.

Senator MASON—In the OneTel case I think it is fair to say that the publicity was not all good. It has been reported that it cost the taxpayer \$35 million. Is that right?

Mr D'Aloisio—We will in the normal course go through costs. As you know, the issue of costs and the award of costs against ASIC is clearly a matter of some seriousness and we want to look at it. My preference would be to not just try to bandy figures around at the moment, but in due course we will account for what our costs of that case are and also what the costs are that have been awarded against us. You should bear in mind that we are reviewing the judgment. As yet we have not made a decision as to whether there will be an appeal or not. The case is to go back to court this Friday for a further directions hearing, so you would appreciate that it is still early in the process for us to be making any judgments. On the issue of how we are funded and how major cases are funded, I can say a number of things which are also on the public record and in our report.

Senator MASON—I just want to ask some questions about this. Justice Austin wrote in his verdict that ASIC had failed to prove any aspect of its pleaded case. That is a pretty serious failure for both you and the prosecution services. I think you said on the public record that ASIC has learnt a lot from the case.

Mr D'Aloisio—What I said was that clearly when a judge makes comments of that nature you will have a good look and assessment, and that is the position. As I said, we are still analysing the case. What I can say is that ASIC's case was taken bona fide based on decisions on it having reasonable prospects. In terms of public interest, this sort of case brought into focus the duties of directors and officers leading up to a potential insolvency of a company, so it had important public interest aspects. Along the way a number of defendants settled. It is a 3,000-page judgment and a hearing that took place over two years. On any analysis on any view ASIC must have run a reasonable case.

Senator MASON—Yes, but to not prove any aspect of its pleaded case is a pretty serious indictment on ASIC.

Mr D'Aloisio—As I say, I think we need to analyse the judgment and form a view as to whether or not we will appeal. We take any criticism from any judge seriously, and we will look at that. But, in the overall case, its presentation over the period that it occurred in and the decisions that were made, the ASIC team that ran this all worked very hard to try to bring about a result. In the end, it is important for ASIC that it continue to run the hard cases. It must take the hard cases on.

Senator MASON—Sure.

Mr D'Aloisio—It is not an issue of winning or losing. Clearly, if you take the cases on, because you are spending public money you would hope to win them. But, if you do not, it is still important. There are important public policy and public interest issues. When we are talking about directors and significant collapses that involve huge losses, the regulator has to take the

hard calls and the hard cases and run them. We will learn from this case. We learned from other cases. We learn from cases that we win. But it is important that this thing be kept in perspective and certainly, in the short term, the opportunity for us to fully assess this judgment—

Senator MASON—So far as the parliament—or certainly this committee—is concerned, with broader powers, an expanded mandate and greater funding being given to ASIC, parliament is really concerned that both ASIC and, indeed, the prosecution authorities are obviously up to the mark. When I read Justice Austin’s comments, I thought that was cause for pause. Nonetheless, I suppose we have not heard the end of it, but I know the committee will be watching closely.

Mr D’Aloisio—We will. Indeed, as you have said, in the way that we operate we are not backwards in saying that where we learn the lessons we will go with it. But I think it is just too early to be forming those conclusions. As I say, it is a 3,000-page judgment. It is a hearing that took place over a lengthy period of time. ASIC must have had a reasonable case.

Senator MASON—It would have been good if you could have proved some part of it.

Senator BOYCE—Were ASIC and the legal team confident throughout the time of the case that you had a good case?

Mr D’Aloisio—The analysis that is going on at the moment relates to the judgment, so we have not done the full post mortem, but clearly ASIC acts on advice from senior counsel, its own judgment and its own advice. I would have expected—I will go back and look at it as part of the post mortem—and you would have expected that, at all steps along the line, the issue of ASIC having reasonable prospects would have been the position and would have been reinforced with advice it would have received as it ran the case.

Senator BOYCE—Considered and reconsidered? That would be the formula?

Mr D’Aloisio—Talking generally about cases and the way they are run normally, and certainly with our direct experience in running cases, that is what you would do. You constantly reassess where you are and if cases need to be settled—as you see for some of our statistics—then they will be settled. If cases need to be taken right through, they will be taken right through. So it is just part and parcel of litigation.

Senator BOYCE—Who takes the decision to proceed with a case in the first place?

Mr D’Aloisio—The decision to run cases is the commission’s. We will delegate decisions around the more minor cases, but major cases such as this are commission decision cases, and they are assessed on a range of criteria, as you would expect from a public body. We assess them against reasonable prospects of success, the public interest aspects of the case, the particular market conduct that you are seeking to deal with or—for example, where you might want to recover money for retail investors—whether that is something that you should be taking on in the public interest. So there are a range of criteria that the commission would use, but it is the commission that is responsible for the running of these cases, for whether they are won or lost and for the comments that are made by the judge. As I am chairman of ASIC, the responsibility is with me.

CHAIRMAN—Mr D’Aloisio, I turn your attention to the issue of insolvency matters, insolvency practitioners and the issue that has been raised in the media recently—which has obviously been an issue for some time—of so-called phoenix companies. To begin with, could you give us some comments on the work that ASIC does in that field, particularly the phoenix company areas and also the number of company directors that specifically reappear time after time in companies that become insolvent and leave creditors.

Mr D’Aloisio—That is a big question and I need to give you a fuller briefing. We are extremely active in the issue of phoenix companies, where a company dies and is resurrected in another form. We think the recent Somerville decision in New South Wales, where we not only took on directors but also took on the adviser in relation to phoenix schemes, is a very significant case and has sent a very clear message about this area. We also work on areas where directors or individuals appear in two or more failed companies. We look at bannings and have over recent times—and even before my time—put significant bannings in place.

CHAIRMAN—Do you have significant powers in that particular area? There seem to be data and evidence that point to the fact that where companies do fail one or more of those directors have failed on a number of occasions in the past.

Mr D’Aloisio—For example in 2008-09, we banned 44 such directors that had appeared in two or more companies under section 206 of the Corporations Act. We are very alive to that issue, stopping the companies from coming back indirectly through bannings, as we did in the Somerville case, and through our surveillance processes undertaken by our insolvency team. I should say we have an insolvency group and a number of retail investor groups in ASIC that spend a considerable amount of their time on these sorts of issues.

CHAIRMAN—Can you tell me what powers you have for dealing with directors that reappear time after time?

Mr D’Aloisio—Under section 206 we can ban them and that is what we have been doing. We can sue them for breach of directors’ duties under section 180 or criminal offences under section 184. There is a range of—

CHAIRMAN—I am referring to some data from research that has been carried out recently showing that, where a company has a director or directors that have been involved in insolvent companies, they are eight times more likely themselves to become insolvent. This is a pretty stark statistic. There are a number of people who currently are directors of companies who have a high record—

Mr D’Aloisio—We need to go back to the conceptual framework that we are dealing with here. The conceptual framework is basically that failure is not an offence.

CHAIRMAN—I completely agree with you. It is completely legitimate.

Mr D’Aloisio—In our system bankruptcy is not an offence and being a director of a company that fails is not an offence for obvious reasons and I am sorry to state the obvious. The interventions that the legislation has in place goes to misconduct and the potential for that to recur is dealt with by bannings.

CHAIRMAN—I suppose the question I am asking is not around that. I accept what you are saying. My question around that is, (a) do you have a program which identifies individuals that fall into this category, and (b) do you increase surveillance on those particular individuals that reappear because they are much more likely perhaps to reappear, as statistics and research demonstrate? Also, although it is not an offence to fail, perhaps some of these individuals do deliberately carry too much with the intent of not carrying out their duties as directors. My concern is where there are individuals that reappear on the books time and time again because they specifically have intent to do these things.

Mr PEARCE—Mr D'Aloisio, ASIC were given extra funding by the previous government to implement a new program, weren't you? This pot of money was so that ASIC could go back and identify directors who had been down this line and who had deliberately structured their affairs to put a company into—

CHAIRMAN—That is what our concern is.

Mr D'Aloisio—There are a range of tools that we use through the Assetless Administration Fund. We identify people through the court proceedings I talked about earlier and through the disqualification where you have been involved in two or more companies that have failed. We do directors insolvent training programs and other surveillances. We use a range of tools to deal with those individuals that might have a propensity to fail more than once. Again, rather than stay with this general answer I am quite happy to take it back with us and give you the specifics of what we have actually done. It is an area, certainly at the commission level where we see the reports, where we think our people are doing a very good job in minimising that recurrence that you are concerned with through a range of initiatives. I think we will explain it to you in more detail.

CHAIRMAN—That would be helpful. Before I ask a further question on insolvency, is there a red flag zone that pops up for ASIC in that area when somebody fails, say, five or more times in a short period of time, which would indicate that something is wrong?

Senator MASON—Something to orchestrate, isn't it?

CHAIRMAN—Something that would appear, at least on the surface.

Mr D'Aloisio—If you have a look at the annual report there on page 47 you have the improved director banning targeted at the bottom of the page:

... a new electronic tool to sweep its registers to detect director candidates for disqualification under s206F of the Corporations Act.

That goes to the issue of where you have been a director of two or more insolvent companies. We are trying to make sure we are getting that information. There is a flag that comes up and says 'Have a look at this person, they have appeared in more than two, so have a look and see'. And that might then lead to a banning.

CHAIRMAN—And then time and effort is dedicated to specifically looking at those? Okay, that is satisfactory.

Mr D'Aloisio—Yes. We will give you the wider briefing as well.

CHAIRMAN—That would be great. Finally, on the insolvency issue and about the practitioners themselves, I am wondering whether you receive complaints about the actual process of insolvencies and whether that is flagged as an issue on its own.

Mr D'Aloisio—In relation to the practitioners themselves?

CHAIRMAN—Yes.

Mr D'Aloisio—Yes, we do receive complaints through our normal complaints system and also through the various reports and we will act on those. At the moment we are doing an exercise on assessing the significance of complaints that we receive in this area; whether there is a trend or not, or whether they are still quite isolated. They seem to us at the moment to be quite isolated. They do not seem to have a pattern. The commission met yesterday and we looked at a range of new initiatives that we endorsed. This initiative around looking more closely at complaints relating to insolvency practitioners about remuneration, independence and so on is something that we are putting resources into. We will be doing a lot more work on that in the short term.

That is really a function of the fact that we are conscious that the market has changed and there are more insolvencies. This is an area now for ASIC that is going to be a priority in the next two or three years because of the climate that we have gone through. The commission discussion yesterday was very much about taking a fresh look at this area and trying to be a bit ahead rather than waiting for more complaints and to really try to the analysis ahead of time.

CHAIRMAN—Thank you very much. By raising it with you tonight, the committee has flagged its concern that this will be an issue as well and we will be looking at those matters in the future. I will also make you aware, if you are not already, that the Senate has a reference for I think the Senate economics committee to do an inquiry specifically on insolvency, generally, phoenix companies and practitioners.

Mr D'Aloisio—We will clearly cooperate fully.

CHAIRMAN—You will be dealing with that anyway. I thank the commission very much.

Committee adjourned at 6.39 pm