



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

SELECT COMMITTEE ON SUPERANNUATION

Reference: Three bills relating to choice, co-contribution and surcharge

THURSDAY, 19 SEPTEMBER 2002

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SENATE
SELECT COMMITTEE ON SUPERANNUATION
Thursday, 19 September 2002

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

Senators in attendance: Senators Chapman, Cherry, Sherry and Watson

Terms of reference for the inquiry:

On 21 August 2002 the provisions of the following bills were referred to the Select Committee on Superannuation for inquiry and report on 26 September 2002:

- Superannuation (Government Co-contribution for Low Income Earners) Bill 2002
- Superannuation Legislation Amendment Bill 2002
- Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 2002

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Subcommittee met at 3.33 p.m.

CHAIR—I declare open this fourth public hearing of the Senate Select Committee on Superannuation into the provisions of the **Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 2002**. The bill is designed to allow employees to choose where their superannuation contributions are paid. The Senate referred the bill to the committee on 21 August for inquiry and report by 26 September. However, because of the complexity of the issues, the committee has sought and been granted an extension of time to 16 October to present its report on this bill.

Today the committee will continue to hear from representatives of Treasury and the Australian Taxation Office, as a number of issues were left outstanding following the committee's earlier hearing with these officials on 11 September 2002. All the witnesses who appear before the committee are protected by parliamentary privilege with respect to the evidence that they give. This means that witnesses are given broad protection from actions arising from what they say. The Senate has power to protect them from any action which may disadvantage them on account of evidence before the committee. The committee prefers to conduct its hearing in public; however, if there are any matters that you wish to discuss with the committee in private, we will consider your request.

[3.35 p.m.]

MARKOVIC, Mr Marcus, Assistant Commissioner of Taxation, Superannuation Business Line, Australian Taxation Office

MURTAGH, Mr Stephen Brian, Assistant Commissioner of Taxation, Superannuation Business Line, Australian Taxation Office

BONEHAM, Mr Patrick Gerard, Analyst, Superannuation, Retirement and Savings Division, Department of the Treasury

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ROSSER, Mr Michael John, Manager, Consumer Protection Unit, Financial System Division, Department of the Treasury

THOMAS, Mr Trevor John, Manager, Superannuation, Retirement and Savings Division, Department of the Treasury

TIMOTHEOU, Mr Christopher George, Analyst, Department of the Treasury

WILESMITH, Mr Brett Anthony, Analyst, Consumer Protection Unit, Financial System Division, Department of the Treasury

WILKINSON, Ms Vicki, Specialist Adviser, Financial System Division, Markets Group, Department of the Treasury

CHAIR—I welcome representatives from Treasury and the Australian Taxation Office and invite you to make an opening comment.

Mr Thomas—We have nothing to open with. We are happy to take questions.

CHAIR—Thank you very much. Mr Thomas, there was a matter raised at our last private hearing about matters raised with the Australian Taxation Office which were thought to be more in the area of Treasury rather than tax, and those matters have been referred to Treasury. Obviously you will take those questions on notice.

Mr Thomas—Yes.

CHAIR—It was just an issue arising from the transfer of the personnel as to whether Treasury were the appropriate people to answer the questions. It was thought that it was

probably Treasury, but we thank the tax office people for being here, given that this is a transition issue. Thank you very much for clarifying that.

Senator SHERRY—Thank you for the response to the question on notice about the number of taxpayers who earn up to \$32,500. To clarify this, the number you have given is 4.4 million as having an assessable income up to \$32,500. My understanding from the previous evidence is that the number of estimated beneficiaries of the co-contribution proposal is about 250,000. Is that so?

Mr Markovic—That is the correct number.

Senator SHERRY—So we are looking at about five or six per cent?

Mr Markovic—That is correct. I believe those are the numbers that we quoted last time, when we did not give you formal advice.

Senator SHERRY—We did not have the number of people earning up to \$32,500 but we were talking about the number who were beneficiaries, and we were talking about figures of five to 10 per cent.

Mr Markovic—That is correct.

Senator SHERRY—We can be a bit more specific now. The other point on this issue concerns the total number of—

CHAIR—Senator Sherry, you are now discussing choice. The committee has prepared a report on the bill that you are referring to.

Senator SHERRY—Yes, but I just wanted to clarify it because I thought it was important for our report, Chair. But I have nothing more on that.

CHAIR—All right.

Senator SHERRY—Mr Thomas, on the last occasion we met we spent some time talking about fees and charges. I want to get a clarification from you in respect of the responses you gave about fees and charges. Is it your contention or understanding that entry and exit fees are part of old products or, in other words, they are not currently in the marketplace?

Mr Thomas—Certainly entry and exit fees are not confined to particular types of products or the age of products. Within the marketplace there is a full range of products that offer people choices about how those are costed and paid for. That might be by way of charges through the life of the product or it might be at entry. I think that, from evidence that has been given to the committee, the incidence of exit fees seems to be decreasing. But I think that essentially it is a matter for product providers to determine the manner in which they recoup the costs of developing and marketing those products.

Senator SHERRY—I just want us to be clear that products with entry and exit fees are still sold in the market.

Mr Thomas—Yes.

Senator SHERRY—Has any survey been carried out by the department or are you aware of any survey material which gives us an approximate number of the superannuation products that have entry and exit fees or commissions attached to them?

Mr Thomas—Not that I am aware of.

Ms Wilkinson—No, the department has not carried out any survey.

Senator SHERRY—Is the department aware of any surveys that have been carried out by other organisations on this issue?

Ms Wilkinson—I am not aware of any specifically on those issues.

Senator SHERRY—Why hasn't the department carried out any survey of the number of superannuation products that have entry and exit fees and/or commissions attached to them?

Mr Thomas—I do not think it is particularly relevant.

Senator SHERRY—The level of fees is not relevant to the debate on choice?

Mr Thomas—No, I do not know why we would need to determine exactly how many products have fees and charges attached to them.

Senator SHERRY—I might come back to that later. Turning to the proposal to educate the eight million plus Australians to, hopefully, be able to make a more informed choice, my understanding is that ASFA did a preliminary study in an attempt to identify consumer awareness to the disclosure regime and the regulations that were recently disallowed by the Senate. Are you aware of that study?

Mr Thomas—Yes.

Mr Rosser—The study that I think you are referring to is a comprehensibility study of product disclosure, statements and in particular the OMC.

Senator SHERRY—I notice that they have commented about it in the media. Are you aware of what the study contains?

Mr Rosser—Yes. We are a participant in the steering group that is involved in that study.

Senator SHERRY—I was not aware of that. What do the preliminary results of the study reveal?

Mr Rosser—The study is being conducted with a group of 20 individuals and it is looking at a template product disclosure statement that has been developed by a consultant on behalf of ASFA. The template document has put in place a preliminary OMC presentation, and the group of 20 people have looked at that and provided a series of answers to questions about specific issues relating to the OMC.

Senator SHERRY—That OMC is based on the regulations that have not been passed by the Senate; is that correct?

Mr Rosser—That is correct.

Senator SHERRY—What are the results of the 20 people who have been surveyed so far?

Mr Rosser—The results suggest that people had difficulty understanding the OMC.

Senator SHERRY—Can you give me any more detail about the level of difficulty and why they had difficulty?

Mr Rosser—It is difficult to say why they had difficulty, but it seems that there was an undue concentration on the OMC to the exclusion of other information contained in the document.

Senator SHERRY—Can you tell me how many of those people surveyed had difficulty in understanding the OMC?

Mr Rosser—I do not recall the figures, but I understand there was a distribution—some people had relative comfort in understanding the information; others did not.

Senator SHERRY—Are we looking at a majority who had difficulty or a small minority? What was the overall result?

Mr Rosser—I think it needs to be put in context. The study was undertaken by way of a presentation of a product disclosure statement to a group of people who were then asked a series of direct questions about the content of the disclosure statement. The results reflect their ability to answer precisely the questions that were asked of them. So it does not necessarily go to their ability to understand the document but rather their ability to answer specific questions about the contents of it.

Senator SHERRY—But these are the documents on which, presumably, they will be making a choice?

Mr Rosser—In fact, it is a document that has been developed by ASFA, so it may well not be.

Senator SHERRY—You must know because you are participating in the steering group on the survey.

Mr Rosser—The product disclosure statements are documents issued by individual superannuation funds and this is a document developed by ASFA, so there is nothing to say that the superannuation funds will actually use that document.

Senator SHERRY—I understand that but the purpose of it is to try and evaluate the level of consumer understanding of the regulations that were proposed to be passed by the Senate, or the documents that will be based on them. That is correct, isn't it?

Mr Rosser—That is the objective.

Senator SHERRY—That study is not concluded, is it?

Mr Rosser—No, it has only commenced.

Senator SHERRY—But preliminary results show that a number of people had difficulty.

Mr Rosser—Yes.

Senator SHERRY—Based on the preliminary results of this study that show a number of people had difficulty—which would certainly seem to me to indicate that the general populous will have difficulty—has any consideration been given to rewriting the proposed regulations that were rejected by the Senate?

Mr Rosser—I understand that Senator Campbell made a statement in the Senate during the debate that the government did not intend to introduce replacement regulations during the transitional period to the FSR.

Senator SHERRY—So, despite the fact that a preliminary survey—and I acknowledge that it is preliminary—shows that some consumers have difficulty, there is not going to be any change?

Mr Rosser—The regulations presented the OMC, and those regulations no longer stand. So whether or not people are able to understand the OMC becomes not entirely relevant anymore.

Senator SHERRY—I am talking about the proposed regulations. There is no proposal to rewrite them based on the difficulties identified by the consumers in the preliminary study?

Mr Rosser—Senator Campbell indicated in the chamber that the government did not intend to replace the regulations.

Senator SHERRY—Why did the department agree to participate in a study or survey at this point in time? Why didn't it do it sometime earlier while the consultations on the regulations were being developed?

Mr Rosser—I think you need to direct that question to ASFA. They undertook the study after the regulations were put in place.

Senator SHERRY—So the study was started before the regulations were declared or promulgated?

Mr Rosser—I am not sure about the exact commencement date, but certainly the findings happened the day after the regulations were disallowed—so after the OMC was in place.

Senator SHERRY—The department obviously drew up the regulations after consultation with industry. We have heard a lot about that. Why would you then agree to participate in a study of this nature, after you had drafted your regulations? Why not do it before?

Mr Rosser—As I said, Senator, the project was initiated by ASFA, so we participated in the time frame in which they initiated the project. In other words, if they had initiated the project earlier, we would have presumably participated earlier.

Senator SHERRY—You may or may not have. Why didn't the department initiate its own study before it concluded the writing of the regulations and they were promulgated?

Mr Rosser—We undertook a thorough and very extensive consultation process on the regulations and the disclosure model. It had been going on for some number of years.

Senator SHERRY—That is consultation with industry groups, isn't it?

Mr Rosser—And the public, and anybody who wanted to make a submission.

Senator SHERRY—Did you do a representative survey to test likely consumer understanding, though?

Mr Rosser—We did not put forward an example of the OMC and ask for people to tell us whether or not they understood it.

Senator SHERRY—I am just puzzled as to why not. It seems to me to be pretty basic.

Mr Rosser—It is not normally a part of the formulation of policy, Senator. We undertook consultation on the policy and on the regulations.

Senator SHERRY—Why would the department agree to participate in a study after it had written the regulations with ASFA? If you had got it right, why participate in a study after the event?

Mr Rosser—We were there as an observer.

Senator SHERRY—You were participating.

Mr Rosser—No, we were actually an observer in the steering committee.

Senator SHERRY—What does the observing involve? Sitting on some sort of group and overseeing the research?

Mr Rosser—That is correct.

Senator SHERRY—Who is the observer?

Mr Rosser—The individual?

Senator SHERRY—From the department.

Mr Rosser—Mr Brett Wilesmith.

Senator SHERRY—Does he talk at these observatory meetings?

Mr Rosser—Yes.

Senator SHERRY—So he does participate?

Mr Rosser—Yes, certainly.

Senator SHERRY—So he is actively involved?

Mr Rosser—He does make comments.

Senator SHERRY—So he is actively involved in the development of the work.

Mr Rosser—The work is actually being undertaken by a consultant commissioned by ASFA.

Senator SHERRY—I understand that there is a consultant doing it. But Mr Wilesmith is actually involved in the oversighting of the project.

Mr Rosser—He is certainly providing feedback on it.

Senator SHERRY—So you cannot explain to me why that work is being done now and the department is participating after the regulations were written?

Mr Rosser—I think I have already explained that, Senator: because ASFA did not initiate the project before the regulations were put in place.

Senator SHERRY—You cannot explain to me why the department did not initiate its own work of that type before the regulations were in?

CHAIR—Is this a ‘choice’ question again?

Senator SHERRY—It goes to the heart of fees and charges and their disclosure, Chair. Anyway, I have finished my questioning on that. I think we know now what is happening. There have been some critical comments by some employer organisations about the choice regime, comments which I am sure you are aware of, Mr Thomas. Have there been any further

consultations since the initial criticisms by ACCI in our Melbourne hearing approximately two weeks ago?

Mr Thomas—Yes. A number of organisations have sought discussions with the government about issues that they raised in committee hearings.

Senator SHERRY—So that includes ACCI?

Mr Thomas—Yes.

Senator SHERRY—What are the other organisations?

Mr Thomas—The Corporate Superannuation Association also appeared. I think those two are the main ones.

Senator SHERRY—Did they include the Farmers Federation or any representatives of small business organisations at all?

Mr Thomas—No. They have not sought meetings with us, Senator.

Senator SHERRY—The issue of the clearinghouse operation of choice and the way the employer pays the contributions was touched on in respect of the current operation of choice in Western Australia and previous evidence that we have received. Does the department have any survey figures on the cost of clearinghouse operations in the way in which choice operates in WA?

Mr Boneham—The figures for Westscheme, which is the only one that we are aware of, are that it is approximately \$5 per cheque—so the employer will write one cheque—and it is around \$1.50 to \$1.60 per payment to another fund.

Senator SHERRY—Is that per employee?

Mr Boneham—If five employees go to another fund, it will be \$1.50 per employee, as I understand it.

Senator SHERRY—And the employer is paying that cost?

Mr Thomas—Yes.

Senator SHERRY—Let us take a small business of 20 employees. If they were paying monthly, the employer would be absorbing a cost of approximately \$330, by my calculations.

Mr Boneham—It all depends on how many people go into the default fund. If only 10 per cent of the employees were going to another fund, it would not be \$300.

Senator SHERRY—But if they all went into different funds, it would be approximately \$320 or \$330 a year if the moneys were paid monthly, wouldn't it?

Mr Boneham—In a situation where 100 per cent of employees were doing that, yes, it could be that.

Senator SHERRY—So the employer is bearing that cost in that small business. Have you done any surveys of the employer costs in WA?

Mr Thomas—We have not done any surveys, Senator.

Senator SHERRY—So you cannot tell me any sort of mean or average additional cost that employers have had to bear?

Mr Thomas—I think that you would best get that from Westscheme and the people who have direct experience in WA.

Senator SHERRY—I am trying to identify the cost to the employer. We have a model about which claims are being made. So you have not done that survey. Have you done any surveys about the impact on the fees and charges—besides the cost to the employer—that fund members are paying in WA as a result of the choice model in operation there?

Mr Thomas—No.

Senator SHERRY—None at all?

Mr Thomas—No.

Mr Boneham—It would be very difficult to get that, because most super funds are priced on a national basis rather than on a market as small as WA.

CHAIR—I think we need to clarify with the Treasury officials that this clearinghouse method in Western Australia is not the only method which people use, so it is not necessarily the most cost-effective or the least cost-effective.

Mr Boneham—We understand that some institutions provide it free of charge as well.

Senator SHERRY—Free? For nothing? A bank doing something for nothing!

Mr Thomas—That is what they say.

Senator SHERRY—I think we had better pursue that because I cannot believe it. A bank doing something for nothing—there has to be something in it.

CHAIR—So there are alternative methods?

Mr Boneham—There is also the possibility that some software companies may provide the service in their bookware, which would be free of charge after purchasing the software.

CHAIR—Certain industry funds make special arrangements if the money goes there, which can be very cost-effective.

Senator SHERRY—In terms of the additional cost to the employer—which we know will exist—we only have that available data at this point in time?

Mr Thomas—Yes.

Senator SHERRY—You just confirmed that you have not done a survey and are not aware of any evidence of lower fees and charges.

Mr Thomas—Yes.

Senator SHERRY—Have you provided any advice to the minister, based on the Western Australian model, of any reduction in fees and charges?

Mr Thomas—Our advice to the minister is between us and the minister.

Senator SHERRY—But obviously you would not have, would you, given that you have not gathered any evidence?

Mr Thomas—As I said, advice to the minister is within government.

Senator SHERRY—How is it possible for the minister to claim that fees and charges have gone down in WA when you have provided no advice to her on that issue?

Mr Thomas—That is something you would have to ask the minister.

Senator SHERRY—We will. We will pursue that. But you have gathered no evidence about the fees and charges in WA and the choice model?

Mr Thomas—As you have, Westscheme has indicated what is happening there.

Senator SHERRY—I am not talking about the cost to the employer; I am talking about the fees and charges charged to the employee against their SG contributions.

Mr Thomas—No, we have not done any survey work et cetera.

Senator SHERRY—None at all; okay.

CHAIR—I think we have got to again answer that in relation to the particular arrangements that are in place between the employer and the super fund, because they vary quite tremendously.

Mr Thomas—Certainly.

CHAIR—Some of those costs can go down by 40 per cent if you are linked into the Internet. So we have got to define what we are talking about instead of just coming to a broad average.

Senator SHERRY—Sure, but I am interested to know whether we have actually got hard and fast evidence, as distinct from assertions, about what is happening with fees and charges and employer costs. Mr Thomas, you referred in your evidence to the ‘Portability of Superannuation Benefits’ consultation paper, which was released this morning at 11.15. The issues of portability and choice of funds legislation are complementary, aren’t they?

Mr Thomas—Yes, certainly. They affect a different part of the market, in that choice relates to new contributions and portability essentially relates to how existing contributions and accumulations can move around the system. They have different effects.

Senator SHERRY—Is there a timetable for the conclusion of the consultations and then the legislation for portability?

Mr Thomas—Certainly on consultation there is. I think submissions are to come in by 18 November this year. Obviously the government will consider those submissions and then look to make whatever changes are necessary following that. In terms of commencement, the government has indicated that it would like to commence a portability regime from 1 July 2004, which is also the proposed commencement date for the choice regime.

Senator SHERRY—And that would seem to me to be logical, because they are, as you said, complementary. Why is it, then, that we are dealing with the choice legislation without actually having the portability legislation to deal with at the same time, when they are complementary?

Mr Thomas—The portability regime would essentially be implemented by regulations. It would be amendments to the SIS regulations. There are not the heads of power necessary to effect that in the same way that there are for choice.

Senator SHERRY—But surely if we are considering choice legislation it would be useful, given that it is complementary with portability, to at least know what the regulations for portability are going to be, as they are linked together?

Mr Thomas—I think there is an indication there of what the government’s position is on portability, and that is certainly out to enable you to look at that in the same time frame as that in which you are looking at the choice legislation.

Senator SHERRY—I notice on page 4 it says:

The government would only consider regulating exit fees if this appeared necessary to ensure the effectiveness of portability.

Could that be done by regulation, or by a change in statute, if that in fact occurred?

Mr Thomas—I do not know.

Ms Wilkinson—I am not sure. We can take advice on that.

Senator SHERRY—If you could. My information is that to regulate fees would require legislative change rather than regulatory change.

Mr Thomas—I am not sure about that.

Senator SHERRY—In this discussion paper, in the application to defined benefit funds, why do public servants, for example, get choice but not portability?

Mr Thomas—It is essentially because of the unfunded nature of the public servant superannuation schemes. The government does not actually make its contribution until the person takes their benefit. The extent of the personal contribution to the public servant schemes also determines the government benefit, so it is sensible that they be linked so that that government benefit can be clearly determined at the point that payment is made.

Senator SHERRY—So the government is proposing to impose choice and portability on the private sector but not on the public sector. Do you see there is a bit of a contradiction there?

Mr Thomas—No, when you look at the rules for defined benefit schemes, there are some carve-outs.

Senator SHERRY—In the private sector?

Mr Thomas—Yes. Certainly, I am not sure that there are any unfunded defined benefit schemes in the private sector.

Senator SHERRY—I suppose it depends on the market return to the fund. They might be underfunded or overfunded.

Mr Thomas—They might be underfunded, and that is then of course addressed by the actuarial certificate to ensure that they come up to a satisfactory financial position.

Senator SHERRY—In the market conduct comments on page 21, why does it say:

Portability would increase the importance of financial advisers in the selling of superannuation.

Mr Brake—This is a point of clarification. My understanding is that we are talking about choice. It seems that these questions are directed to portability and that the committee's reference is choice. This is a consultation paper on portability. We seem to be being asked questions about portability, and my understanding is that the committee is looking at choice.

CHAIR—We are looking at choice. One of the difficulties that this committee is facing, however, is that there are certain issues raised in the legislation that we hope will be satisfied under the portability bill. Given that they are both coming at the same time, I could understand your difficulty in answering if there were no bill, rather than just answering on the basis of issues that are currently before Treasury or the government. What was your question again, Senator Sherry?

Senator SHERRY—I had just about concluded, but on this point the government has said itself that portability and choice of fund policies are complementary, and the committee is charged with looking at all aspects of choice. Portability is one aspect of choice. The government itself says in its paper that portability and choice of fund policies are complementary. I am interested to know why it is that portability would increase the importance of financial advisers in the selling of superannuation. It is claimed as a fact. How does that happen?

Mr Rosser—The issue there would be whether people who wish to take advantage of portability seek advice.

Senator SHERRY—Of course, in seeking advice they would have to pay for it, wouldn't they?

Mr Rosser—It is a valuable service, so, yes, I presume they would.

Senator SHERRY—They would pay for it through their account, a commission or one of those other types of charges that exist in the marketplace. We have touched on this in terms of choice. How can you have movement of moneys from one fund to another with exit fees?

Mr Thomas—Exit fees impact when moneys move from one fund to another, if the fees are in existence as part of the regime relating to that product. I do not understand your question, Senator.

Senator SHERRY—That is pretty obvious from the discussion paper, to which I presume you had an input.

CHAIR—It is obviously addressing the portability bill.

Mr Thomas—Yes.

Senator SHERRY—Do we have any update on the constitutionality of the proposed employer fines in the choice bill?

Mr Thomas—As I indicated at the last hearing, the government has sought advice on that from its legal experts. That advice will be with the government and they will act appropriately as a result of whatever that advice is. If their advice were that there is a constitutional problem then I would expect that the government would make amendments appropriately. If their advice were that there is no constitutional problem then the government would take that into account in whatever happened with the legislation.

Senator SHERRY—Presumably in inserting the draconian fines in the bill that we are considering that may be imposed upon a business, you would have done that on the basis that it is legal and constitutional.

Mr Thomas—Certainly that was our understanding when the legislation was being prepared.

Senator SHERRY—You are seeking some more advice on this issue, are you, and you do not have it yet?

Mr Thomas—What advice we get will go to the government and the government will consider the issue.

Senator SHERRY—I am asking whether you had that advice yet?

Mr Thomas—The advice will go to the government, Senator.

Senator SHERRY—I am sure that is where it will go. Do you have the advice yet?

Mr Thomas—I think that is between us and the government.

Senator SHERRY—I am not asking for the detail of the advice; I am asking whether you have the advice yet.

Mr Thomas—We will communicate that to the government.

Senator SHERRY—I think that is an unreasonable refusal to answer a question, frankly. I am not asking for a copy of the advice—not yet anyway.

Mr Thomas—No.

CHAIR—How we handle that issue is up to the committee.

Senator SHERRY—Going back to the consultations—have there been any amendments developed to the legislation that we are considering?

Mr Boneham—In what context?

Senator SHERRY—Have there been any amendments to the current bill?

Mr Boneham—We have provided advice to the government and it will be up to the government to determine whether there will be any amendments made to the bill.

Senator SHERRY—Have there been any amendments developed at this point in time to the bill?

Mr Thomas—That is internal advice to the government at this point.

Senator SHERRY—No, it is not.

Mr Thomas—Yes, it is.

Senator SHERRY—It is a matter of fact whether have any amendments been developed. I am not asking what the detail of the amendments is. I am asking: have any amendments been developed? I do not think that is an unreasonable question.

Mr Boneham—Amendments require the approval of the government.

Senator SHERRY—I know that. Have amendments been developed?

Mr Thomas—That means anything that is developed is dependent on a government decision and that is for the government to decide and introduce if they think it is appropriate.

Senator SHERRY—Of course, but have any amendments been developed? That is not an unreasonable question.

Mr Thomas—Any amendments are for the government to decide and they will deal with that at the appropriate time.

Senator SHERRY—I know it is for the government to decide—

CHAIR—As we know, on all matters of current legislation the government is continually seeking advice from relevant departments including the Department of Finance. Whether the government is going to act on some of those exchanges of information that take place—I do not know if that is the responsibility this committee to probe, quite frankly.

Senator SHERRY—I accept what you are saying, Chair. I do not agree with it and I will refer this issue, because I think the department is being unreasonable in its response. I am not asking for the details in any amendments that are being prepared. I am asking whether or not amendments have been prepared as a matter of fact—not the content, although I would like to know the content of the amendments that I am informed have been prepared in response to the employer objections to this legislation. I will pursue that issue in another forum, Chair. I respect your view, but I do not agree with it.

CHAIR—With respect, diligent departments could well prepare, in advance, possible amendments on a number of the issues which are put before government, and they may or may not be taken up. I think it is very dangerous to ask the department to give advice of the state of the negotiations on a number of issues.

Senator SHERRY—Given that the regulations were disallowed earlier this week in the Senate, how does that impact on the proposed operation of the choice of fund bills we are considering?

Mr Rosser—The regulations do not bring additional disclosure obligations onto superannuation funds. They dealt with the presentation of information that was required to be provided through the operations of the Corporations Act.

CHAIR—In other words, the Corporations Act is now governing disclosure—is that right?

Mr Rosser—That is quite right. The Corporations Act provides the underlying disclosure obligation and the regulations dealt with how to comply with that obligation.

Senator SHERRY—The regulations dealt with the detail, and that is no longer there.

Mr Rosser—Not quite; they dealt with the presentation of the information. They did not provide for additional information.

CHAIR—As I understand it, all current prospectuses are in compliance.

Mr Rosser—Certainly any product disclosure statement—

CHAIR—There is nothing required as a result of that disallowance in terms of any prospectuses currently out in the marketplace.

Mr Rosser—Any PDS that is in the marketplace at the moment would have presumably been in compliance with the law and would remain in compliance.

CHAIR—I just did not want any uncertainty about the validity of prospectuses that were in the marketplace at the present time in terms of the disallowance.

Senator SHERRY—Has the department done any survey of the details of fees and charges in the PDSs that are in the marketplace at the present time?

Ms Wilkinson—No.

Mr Rosser—I believe there are only two PDSs presently on issue.

Ms Wilkinson—No survey has been done of those PDSs.

Senator SHERRY—Is it intended to do any survey?

Mr Rosser—It might be worthwhile to clarify what you mean by ‘survey’?

Senator SHERRY—Of the details of fees, charges, commissions and all the other charges and fees that are in PDSs.

Mr Rosser—As to level or presentation?

Senator SHERRY—Level and presentation.

Mr Rosser—No such survey has been done or is contemplated.

Senator SHERRY—Mr Thomas, how does that fit in with your comments about monitoring ongoing fees and charges?

Mr Thomas—As I indicated last time, as part of negotiations which led to the terms of the current bill the government indicated that it would monitor fees and charges. I think—you might correct me—it indicated specifically the first 12 months after the introduction of choice and that that would include exit fees.

Senator SHERRY—How can you determine whether the fees and charges go up or down if you do not know what the fees and charges are before choice comes in and you only know what they are afterwards?

Mr Thomas—Choice does not come in for another 18 months—

Senator SHERRY—Just to clarify that, is it intended to do a survey of fees and charges currently in the marketplace before and after the operation of the choice bill in 18 months?

Mr Thomas—I think we would be getting advice from the appropriate industry bodies and those sorts of things particularly as to how to do determine what movement has occurred. PDSs are just starting in the marketplace.

Mr Rosser—In relation to PDSs, those documents would be readily available in the event that such a survey is undertaken and, clearly, past ones would be available.

Mr Thomas—We can look at those, yes.

Senator SHERRY—But I just wonder how this squares with the agreement with the Democrats; this is now Senator Cherry's area, I suppose. There is some sort of agreement to monitor fees and charges, and what I find difficult—

CHAIR—Is there?

Senator SHERRY—Apparently the department said there is.

CHAIR—Okay.

Senator SHERRY—I have not said there is; they actually put it on the table.

CHAIR—You have to be careful about putting words to Senator Sherry's undertaking because there seem to be some doubts about it.

Senator SHERRY—If there is a doubt, I do not know where the department got this idea that there was some sort of agreement on this issue. But that is what you told me last time, Mr Thomas.

Mr Thomas—Yes.

Senator SHERRY—Okay. So in this monitoring surely it is logical, if we are going to track fees and charges as a consequence of the impact of any choice legislation, that the department

itself, rather than relying on the industry surveys, independently monitors and obtains information on the level of fees and charges both before and after the introduction of choice.

Mr Thomas—As Mr Rosser said, PDSs that are in existence before choice commences and PDSs that are in existence after choice commences will be freely available. That can be fairly readily known.

Senator SHERRY—I understand that they can be freely available—I had a stack of them here on the last occasion. They have to be freely available: the law provides it. Why isn't the department proposing to do that?

Mr Thomas—Choice is a long way off yet.

Senator SHERRY—Does the department propose to do that?

Mr Thomas—We will look at the situation as it needs to be done. If the government gives a commitment, the government will honour its commitment.

Senator SHERRY—At the end of the day, you can tell me if your political masters have said, 'No, we're not going to do it,' or have not said, 'Yes, we are going to do it.' Just tell me.

Mr Thomas—If the government gives a commitment, the government will do what it says.

Senator SHERRY—There is no commitment from the government on that approach yet?

Mr Thomas—You will have to wait and see what the government says.

Senator SHERRY—To date there is no commitment from the government to do it in that way, is there?

Mr Thomas—The government has not indicated in which way it would do it, no. The government has not made a decision on that issue yet.

Senator SHERRY—If your political masters do not want you to do it, or have not said, 'Do it,' or 'Don't do it,' just tell me and I will accept it. You are under their control.

Mr Thomas—They have not indicated at this point in time how they want that to be done.

Senator SHERRY—We know that the department has not carried out surveys of the level of fees and charges. There may or may not be a survey carried out and that may or may not be before and/or after the choice legislation is introduced. How can claims be made that fees and charges will go down? Do you know of such claims?

Mr Thomas—I think a number of people have said that to the committee. The expectation is that when there is greater competition in the marketplace that has a natural tendency to occur—that, with the extra choice, people competing for that business will lead to that occurring. In addition, of course, there are also the electronic commerce improvements, which also tend to re-

duce the unit cost. Those factors, together with competition, should lead to some downward pressure on fees and charges.

Senator SHERRY—I like ‘should’ and ‘tendency’. You are not going to guarantee it, are you?

Mr Thomas—You just look at history.

Senator SHERRY—But would you agree that the only way to determine whether that in fact happens would be to test the level of fees and charges through a survey prior to the introduction of the choice and after the choice legislation is passed?

Mr Thomas—Again, the use of the word ‘survey’ suggests some great, magnificent plan.

Senator SHERRY—No it doesn’t. If you were to determine whether fees and charges will go up or down, isn’t it logical that you would examine—

Mr Thomas—Obviously you would have to test how things have changed.

Senator SHERRY—Yes, that is right—before and after.

Mr Thomas—Yes.

Senator SHERRY—But there are no plans by the department to do that at the moment?

Mr Thomas—Not at the moment. Choice is a long way off, as I said.

CHAIR—I think one of the banks, talking about some of their products, said that costs had gone down as a result of competition.

Mr Thomas—I think a number of witnesses said that to the committee.

Senator SHERRY—Yes, but that was not in respect of super; that was in respect of bank fees and charges.

CHAIR—It was not in respect of super, but it is a general assertion that if you increase the amount of competition and the number of players, other things being equal, costs do tend to come down.

Senator SHERRY—We would all hope that happens in the capitalist market, but I wonder why the Bankers Association could not tell me whether or not super fees and charges were going to go down and had to go back to the banks to find out.

CHAIR—They are looking into the future.

Senator SHERRY—We know they are looking to the future, Chair.

CHAIR—They are looking into the future but they gave an answer in relation to their experience with products that they currently have on the market.

Senator SHERRY—A little earlier we touched on fees and charges on some products in some areas at least coming down, and there seem to be surveys that indicate that happening with superannuation. Are you aware of that?

Ms Wilkinson—Are you talking about market surveys?

Senator SHERRY—Yes, the IFSA survey, and AFSA have done a survey.

Ms Wilkinson—I do not have detailed knowledge of it, but I do understand that there have been some surveys.

Senator SHERRY—In some areas they came down. Are you aware of why that has occurred in the past?

Ms Wilkinson—No. I must say I am not across the detail of those surveys, so I am not sure what they are asserting.

Senator SHERRY—Okay.

Ms Wilkinson—You might want to ask them.

Senator SHERRY—Coming back to you, Mr Thomas, in the context of the issue of the natural tendency of competitiveness which has been operating in the past in this area and knowing that some fees have come down in some areas, would that be because of the large economies of scale for funds that were introduced in the late 1980s? Do you think that had an impact?

Mr Thomas—Certainly; I am sure economies of scale do work to help reduce fees and charges. That is quite logical.

Senator SHERRY—How does an individual who buys a product particularly through an agent obtain an economy of scale?

Mr Thomas—A number of agents do rebate fees and charges. A number of factors would determine the extent to which the adviser was prepared to do that.

Senator SHERRY—And they are the sorts of products that are at the more expensive end of the market, aren't they?

Mr Thomas—Yes. It will depend on the level of service that the adviser was giving in relation to whatever products the person was purchasing.

CHAIR—I have some drafting problems with the choice bill currently before the parliament. I refer to section 32G(3):

(3) A fund cannot become a chosen fund for an employee under this section if, immediately before the employee gave the written notice to the employer, either:

(a) a defined benefit superannuation scheme of which the employee was a defined benefits member was a chosen fund for the employee; or

(b) there was no chosen fund for the employee and the default fund for the employee was a defined benefit superannuation scheme ...

I have read a lot of bills and acts. I would read that to say that, if an employer provided a defined benefit fund, then a member could not opt out in terms of the choice provisions because of section 32G(3).

Mr Boneham—The purpose of division 4—

CHAIR—I just want you to read that section.

Mr Boneham—As for the purpose of 32G, division 4, which includes 32F, provides two options for an employee to choose a new fund. One is that they can request the standard choice form under 32F, which is a formal choice process, and 32G is where they can just go up to their employer and say, ‘I want it to go to fund A,’ and the employer says, ‘Okay, I’ll let it go to fund A.’ The purpose of 32G(3) is that a person who is a member of a defined benefit fund cannot do that.

CHAIR—Why?

Mr Boneham—Because it ensures that they get the information relating to defined benefit funds before they make a choice.

CHAIR—No, it does not say that at all.

Mr Boneham—That is the intention.

CHAIR—There might be another provision that says that.

Mr Boneham—If you go through the formal choice process, which is 32F—because they have now been pushed out of 32G; you have to go through 32F—you see 32F then requires them to receive a standard choice form, and the information under the standard choice form relates to default funds.

CHAIR—I am a senator but say I pick up the act and read it as an employer. I read section 32G at ‘a chosen fund’, which says it cannot be a chosen fund if you have a defined benefit fund and the person was a member of that defined benefit fund at the time.

Mr Boneham—It says ‘under this section’ so a fund can be a chosen fund under 32F.

CHAIR—I am just reading section 32G.

Mr Boneham—32G says a fund cannot become a chosen fund for an employee ‘under this section if’—and that only refers to 32G. So that means the only way a fund can become a chosen fund for an employee is if they use 32F.

CHAIR—It does not say that.

Mr Thomas—Yes, that is the effect. The purpose is that where an employee—

CHAIR—I know the purpose and I know all the rules.

Mr Thomas—It works.

CHAIR—If I am an employer and I read this section, I should be entitled to rely on it, ‘unless ...’ or ‘subject to’ some provision. But there is nothing like that here. If an ordinary employer—not a lawyer—reads this through and comes to us and asks, ‘I have a defined benefit fund; do I have to comply?’—the provision should be able to stand alone. I know there are other provisions that have the potential to overrule this, but it does not say that here. That is what worries me. I think there is probably a need for—

Mr Thomas—I do not really see what your point is, I am afraid.

CHAIR—We are speaking about tens of thousands of ordinary employers who are entitled to pick up an act of parliament—

Mr Boneham—We imagine most employers will be getting their information from documents provided by the ATO rather than from the legislation.

CHAIR—At the end of the day, the lawyers will go back to the legislation.

Mr Boneham—If the lawyers go back to the legislation, they will read it in the context of division 4.

Mr Thomas—The information campaign will clearly spell out what the obligations are on a defined benefit fund for an employer.

CHAIR—But what does the act spell out? This is my problem. What you are providing should be supported by this act. I have read a lot of income tax legislation over the years, and usually it says ‘refer to’ this or ‘subject to the provisions of’ some other section. In this case I believe the provisions should ask, ‘Is it is not fully funded?’ or ‘Are the benefits not fully vested?’ and all those sorts of things. You have to go to a lot of other provisions to draw the sorts of conclusions that you are alluding to. I believe that this provision should be able to stand on its own. If an employer suddenly believes he does not have to provide it because he has a good defined benefit fund for his employers, and he reads this, he will think he is safe. I know the tax office is producing lots of information.

Mr Boneham—The section has to be read in the entire context of the bill. The entire context of the bill works so that the chosen fund will be in 32F. This is not an exclusion; the exclusions are set out in 32C and 32V.

CHAIR—But this provision should be able to stand on its own. If this is not entirely the case, there should be provisions there. I am seeking drafting clarification.

Mr Thomas—We take advice on how the legislation is drafted from OPC. They say that this gives effect to the intent. The explanatory memorandum then clarifies what the legal terms are saying. We can talk to the drafter again, but it works as far the drafter's are concerned.

CHAIR—There is a section of the act that is quite specific; however, there is no indication that it is going to be overridden by other provisions. This is what I am worried about. I do not mind it being overridden by other provisions, but tell us that in this section so that we do not read it and come to a wrong conclusion. I understand all the other provisions that nullify this point, but you have to understand it in the context of the whole of the bill. If this were income tax legislation, we would be—

Mr Thomas—Fortunately, it is a bit smaller than the income tax legislation.

CHAIR—I know; but you can see the problem and the sort of potential it has for people who just want to try to understand what the clauses are all about.

Mr Thomas—I hear what you are saying.

Senator CHERRY—Has the government done any work on the extent to which choice is currently provided in award clauses, in certified agreement clauses or in unregulated, award-free areas?

Mr Thomas—We have not done any surveys or the like. We understand that quite a number of awards do provide for more than one fund as a repository of contributions. Some awards also provide for a choice for the employee. But, no, we have not done any surveys or the like to determine exactly how many provide for that.

Senator CHERRY—I know that a different department would hold that information, but would you be able to get that information at all?

Mr Thomas—We could certainly seek advice from the Department of Employment and Workplace Relations.

Senator CHERRY—I would appreciate it. My second question is on the issue of the education program. Presumably you have been quizzed on this earlier and, if you have, I will pick up the *Hansard* later.

Mr Thomas—We haven't on the education program.

Senator CHERRY—Okay. What are you planning?

Mr Murtagh—At this stage we are planning to design a campaign, and we will be taking advice from various consultants on the design of such a campaign. We have broadly costed a campaign to provide elements of research, evaluation and monitoring; we will be producing targeted products; we will be undertaking some fairly deliberate marketing and education activities in some markets using TV, radio, press advertising and the like; and we will be providing for strategic media management PR and advertorial work.

Senator CHERRY—Does that include, or does the government intend to include, funding for ongoing consumer advisory activities in any of this?

Mr Murtagh—Yes; there is seed funding provided for a consumer information centre.

Senator CHERRY—How much is that?

Mr Murtagh—It is \$2 million.

Senator CHERRY—But no ongoing funding for that?

Mr Murtagh—Not in the current proposal.

Senator CHERRY—My next question is on the estimate of employer costs. Presumably Senator Sherry has gone through this one in extensive detail. Did you go through with him the issue of how you came to that figure of \$27 million?

Mr Thomas—Yes, we did. We talked about the estimate that was prepared in the tax office, which was an average cost over employers, having regard to the breadth that choice would cover. We covered that at the last hearings.

Senator CHERRY—I shan't ask questions on it again. Whilst I acknowledge Mr Brake's intervention, I notice at that it says at least four times in the paper entitled *Portability of Superannuation Benefits* that it is linked back to the choice legislation. On page 16 of that paper, you indicate on exit fees:

that the Government will reserve the right to regulate exit fees. The Government would only consider regulating exit fees if there was evidence that exit fee arrangements were being structured for the purpose of preventing portability from operating as intended.

In the absence of the surveying you were talking about with Senator Sherry, how would you know that was coming up?

Mr Thomas—I would expect that the government would be getting considerable public comment and complaint if people were finding that exit fees were so prevalent and so prohibitive that they were a significant deterrent to the portability regime operating as intended.

Senator CHERRY—I know you are talking about reserving the right to regulate exit fees, but how would you regulate exit fees? Would you say that an exit fee cannot exceed the cost of processing an exit, for example?

Mr Thomas—We have not given a lot of consideration to that yet, that I am aware of. That would depend to an extent on the nature of the problems, if they were to arise, then an examination of those and a determination of what the most appropriate solution would be.

Senator CHERRY—It depends on the size of the mailbag and what is in the mailbag from the public, essentially?

Mr Thomas—Well, the nature of how the fee is calculated. Generally speaking, you would expect that most exit fees reflected the actual costs of processing. That is generally something that is not too objectionable, provided it does properly reflect that cost. But if they are there to act as a real deterrent to people consolidating their accounts and benefiting then from lower fees and charges through consolidation et cetera—which is clearly one of the benefits of portability—that is something the government would be concerned about.

Senator CHERRY—Those are all the questions I have at this stage.

CHAIR—I would like to return to that previous issue. The memorandum refers to issues that are not written in the bill itself. I go back to my income tax experience as a shadow parliamentary secretary, when it was quite clear in a couple of cases that came forward that explanatory memorandums cannot be relied upon in a court in circumstances where there is not enough clarity in the bill. While the explanatory memorandum may try and make the linkage, the provision that I was referring to, subsection (3), should be able to stand alone in terms of its clarity, meaning and intent.

Mr Boneham—We believe it does.

CHAIR—I will not press that any further. ASFA and others have given evidence that the ATO and Treasury will have to work closely with industry in developing an education campaign. Has Treasury, or even the ATO, had any meaningful consultation with industry on this? When is it likely to start? Obviously, you would want the bill to go through first.

Mr Thomas—Yes, Senator.

CHAIR—Have there been any preliminary discussions?

Mr Thomas—Not on the shape of the education campaign, as I understand it.

Mr Murtagh—That is correct: not yet.

Mr Thomas—Clearly, the education campaign would have to start a considerable time before choice commences. So, once the legislation is passed, Treasury and the ATO would seek to engage in those consultations. The government is also committed to having a group that advises the minister on how that campaign progresses. That would help to track the messages and see what the impact of those messages is and to modify the campaign as necessary to ensure that it was achieving the intent.

Senator CHERRY—I thought the advisory group was going to help formulate how the campaign would actually be commenced, as well?

Mr Thomas—It would be involved right through the process. Certainly they would be giving advice on the nature of the messages, on whom it should be targeted at, and on what stage in the process that message needs to be given at. Then they would track just what the impact of that message was.

CHAIR—If things go according to plan, the **Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 2002** will be passed before Christmas. But today we have been given notice of another bill; Senator Coonan advised us. In a sense the two will be parallel bills, won't they, because they will have the same commencement date and they interact with each other in terms of finetuning and putting some flesh on the transfer protocols, as it were? Will your education campaign start after that other bill is passed or immediately the choice bill is passed?

Mr Thomas—I think it is clear from the discussion paper that has been issued today that while choice and portability are complementary they are not dependent on each other. So one could proceed without the other. Certainly there are advantages for people in both policies proceeding.

CHAIR—There could be some grey areas, though, in one without the other.

Mr Thomas—No; I think it is a fairly clear division in that choice relates to new contributions that are being made and new employees, and portability relates to existing accumulations within superannuation funds. So there is a difference. The government's indication that it wants the same starting date for both reinforces its view that they are complementary. It would be the intention that the messages that are given in the lead-up to 1 July 2004 would cover the spectrum. They have to cover not only what people need to consider when they look at where new contributions should be made, but also what factors to consider in determining whether they need to move their existing superannuation accumulation into another fund.

CHAIR—So we could have portability without choice?

Mr Thomas—Yes.

CHAIR—I do not think very many people would appreciate the difference and I am pleased you highlighted it—that is, that choice really only applies to new contributions and that the portability bill will relate to existing accounts.

Mr Thomas—We do need both measures to ensure that people can join their moneys together and avoid the fees and charges that go from multiple accounts.

CHAIR—Absolutely.

Mr Thomas—Now, with investment choice in place, if people feel they need diversification there are opportunities for them to achieve that.

CHAIR—The tax office will essentially have carriage of the education campaign, so is it your intention to do comprehension testing of documents like PDSs as part of any such campaign?

Mr Murtagh—We would take advice here but I would suggest that in tracking the campaign and its effectiveness that may be one test that we might use. That tracking mechanism has not been designed yet.

CHAIR—It would be desirable to do comprehension testing of the documents, wouldn't it?

Mr Murtagh—I believe it would be useful but the mechanism has not been designed yet.

CHAIR—There are a number of organisations—and just to name a few: MTAA, ACCI, ASFA and maybe even IFSA—who have expressed quite strong concern at the inclusion of the criminal penalties in the choice bill. The question is: have Treasury considered and noted this concern in the evidence to our committee and have you engaged with industry bodies on this matter?

Mr Thomas—Yes. We have noted the views of a number of organisations about that and, as I indicated earlier, some of those bodies have sought discussions with us directly. The penalty regime has been among the issues they have wanted to discuss. The government is also interested in those views and would note them.

CHAIR—What is the maximum penalty that a large organisation might be up for?

Mr Boneham—It is hard to say because the penalty regime is at the discretion of the court.

CHAIR—Yes, but what is the maximum to which the court could go?

Mr Boneham—Firstly, it all depends on whether the tax office decides to take any action; so there could be no penalty at all. If it were for one individual the maximum would be \$6,500.

CHAIR—It could be higher than that, couldn't it?

Mr Boneham—It could be higher. It all depends on how many employees they are in breach for.

CHAIR—If you had a big company, the number of individual people multiplied by the penalty would be substantially higher than that, wouldn't it?

Mr Thomas—We would not expect that the maximum penalty would be applied; certainly not for a first offence.

CHAIR—I am just trying to work it out. You have given me the lowest case—zero. What is the maximum it could be?

Mr Boneham—As I said, it would depend on the numbers of employees they are in breach for.

Mr Thomas—There are a range of factors that would have to be gone through before you reached that position.

CHAIR—Let us take a figure—say, 10,000 employees. What is the maximum penalty that could apply for 10,000 employees? We are talking about a big company.

Mr Boneham—The maximum fine is \$6,500 per breach.

CHAIR—Per breach—per employee?

Mr Boneham—Per breach, yes.

CHAIR—So, if they were technically in breach for every employee, that would be 10,000 times \$6,000—am I right? I am relying on you.

Mr Boneham—We would be relying on the courts at the moment to tell us.

CHAIR—But people are saying, ‘It’s excessive,’ ‘It’s outrageous,’ et cetera. We have got to tease out what it could be.

Mr Thomas—The point we are making is that it is highly unlikely that that could happen.

CHAIR—I know it is highly unlikely, but the provisions are there.

Mr Thomas—First of all, the tax office would have to decide that it wished to pursue the matter because it was pointless educating the employer—they clearly were not going to do the right thing and there was no point trying to bring them along. Once that had occurred, the court would have to determine whether it was appropriate to apply the maximum penalty.

CHAIR—Absolutely. But what are the parameters? That is all I am asking—on the basis of 10,000 employees.

Mr Boneham—There is also the other option which the tax office has—

CHAIR—You have given me a figure of \$6,000 per breach.

Mr Boneham—\$6,600.

CHAIR—Could the maximum, theoretically, be \$6,600 times 10,000?

Mr Boneham—Yes, if they had breached for all 10,000 employees.

Mr Thomas—Theoretically, if every one of those employees you spoke about had a chosen fund that the employer had not made the contribution to—

Mr Boneham—The tax office also has the option of issuing a contravention notice, which is set at a maximum of \$1,320. That is not per breach; in that situation, with 10,000 employees, the maximum penalty would be \$1,320.

CHAIR—But if the court got upset with the lawyers carrying on a bit, it could be over \$66 million—is that right?

Mr Boneham—Obviously the court would not impose a penalty of \$66 million.

CHAIR—But we have to work out the reality of the penalty. To me, it would be a bit unfair if a little fellow got caught with the maximum penalty simply because he has three or four employees, yet for the big fellow they said, ‘Oh no, we couldn’t impose a fine of a million dollars or more.’ Can you see what I am getting at—inequity in penalty arrangements?

Mr Thomas—The reason the penalty regime in this bill has changed from the previous bill is that there is flexibility in how both the tax office and the courts can apply the penalties. In the other regime, it was totally inflexible.

CHAIR—I am not arguing that you have to up the penalty. I am trying to work out just how far this penalty can go.

Mr Boneham—It is the same as the old penalty in that, with 10,000 employees on average weekly earnings, the penalty would have been \$1 million and there would have been no discretion on the part of the tax office at all to decide—

CHAIR—If you go down that track.

Mr Boneham—That was the old penalty.

Mr Thomas—That was the previous penalty regime.

Mr Boneham—There was no discretion.

Mr Thomas—If the previous penalty regime were in this bill, a penalty of that size would be imposed with no possibility of remission.

Mr Boneham—And in the situation where it was not found for five years the penalty would rise to \$5 million.

CHAIR—But, again, we are looking at a new bill. It is our responsibility to make sure the penalty regime is adequate but, at the same time, we have to make sure it is fair. You say you believe it was very harsh previously; I am saying there is the potential for this new regime to be outrageously harsh.

Mr Thomas—But very unlikely.

CHAIR—It is very unlikely, but there is still a possibility.

Mr Boneham—It is unlikely that this new penalty regime would impose as great penalties as the old one would have.

CHAIR—I can understand why employer groups are a bit worried about this.

Mr Boneham—The old penalty would have been just as concerning for them.

CHAIR—That might be. I am not arguing the case, but if that is a worry maybe we should be looking at that. It appears that, with the moves to the new regime, we have the potential to have a penalty regime far in excess of what the other one was, despite the fact that the other one was also unfair.

Mr Thomas—The benefit, as I have already mentioned, is the flexibility that the new regime gives.

CHAIR—Coming back to my last query, what sort of discussions have taken place with industry bodies that have expressed concern to you about the potential for this legislation? You are saying, 'It mightn't happen.' But have there been any negotiations? Have industry bodies been knocking on your door?

Mr Thomas—In relation to what issue?

CHAIR—Penalties.

Mr Thomas—Yes, certainly. As I indicated, industry bodies have spoken to us about the penalty regime, and we have indicated to them that the reason the government has moved from the old regime to the new one is the flexibility that it gives. They understand that now.

CHAIR—My next question covers life insurance. Most fund members have access to comprehensive, competitive life insurance through their funds. Our committee has been given evidence that such group arrangements may well be in jeopardy if choice was introduced. I remind you of the 75 per cent rule: if less than 75 per cent of the work force is not within the scheme, you cannot get the benefits of the low value, no medical examination and cheap insurance coverage. It has been suggested that these arrangements could well be in jeopardy. Many people, particularly in their early years, feel that these benefits are more valuable than the amount accumulated in their fund. This is particularly so for people in the construction industry. If there is an exodus out of the fund, insurance could be at risk. Have you considered this issue? Has it been discussed with you?

Mr Thomas—We have noted that in the evidence that has been given to the committee. Certainly, we have heard, too, that in Western Australia some default funds do cover new employees for insurance in the event of death until they choose a new fund. That seems to be divorced from a 75 per cent rule of that type you have talked about.

CHAIR—But, if under choice, there is a migration—

Mr Thomas—The insurance market will develop and change. Evidence from Western Australia suggests that that happens. The particular fund that I am thinking about—Westscheme—is not a single employer scheme of the like where a workplace would have a certain percentage of people as members in order to provide that death cover from inception, but that scheme does provide that sort of arrangement for people who have not selected against them as the default fund. Our expectation is that large default funds—again with the economies that come from that—may well give insurance players the comfort they need to be able to offer that cover from inception.

CHAIR—It is quite possible that choice might really take off. If it takes off and you lose this 75 per cent coverage of your work force, have you considered the impact of that? What are employers' responsibilities?

Mr Thomas—A lot depends on the nature of the cover and services that the default fund provides. When it comes to making a choice, people will make a judgment as to what is in their interests. Certainly the factors that they would take into account, you would expect, are the nature of insurance cover that is available, when that would commence and the risks that are associated with changing their fund.

CHAIR—I am indicating that there is the potential for very high risk. Who is going to carry that? I know the employee will carry the consequence because the insurance company could well say, 'You are in breach of the conditions.'

Mr Thomas—The benefit of the default regime, as it is proposed in the legislation, is that there is a requirement for a minimum level of death insurance within a default fund.

CHAIR—That was my next question: what do you expect the minimum prescribed insurance requirement will be?

Mr Thomas—That is something which will come from negotiation and consultation with industry, after the legislation is passed.

CHAIR—So we do not know.

Mr Thomas—We do not know what that would be.

CHAIR—Wouldn't there be a possibility that older and less healthy people would tend to gravitate to a fund that provides the greatest sickness and disability cover, which would therefore push costs up for that particular fund?

Mr Thomas—There would be a lot of factors which would bear on that. I think it would depend on what other arrangements the individuals had in place for death or disability cover. Insurance companies would obviously price the product according to the risk that they see with it.

CHAIR—I do not expect you to respond, but the reason I am asking this question is that I think a lot of insurance companies make quotes on the basis of knowing the membership risk—which, say, in construction is high whereas in clerical it could be low—as well as the number of

members. Choice has the potential to make both the risks and the numbers more uncertain. Anecdotally, I feel that it would have the potential to lift the insurance premium. Do you intend to release a standard choice form?

Mr Thomas—That is correct. A standard choice form will be developed in consultation with interested parties—industry and consumers. That would be available well before the choice regime commences.

CHAIR—Have you also done any testing of how an employer, as well as the superannuation fund, will manage the various administrative arrangements to make sure that both are confident that employers can fulfil their obligations without risking the severe penalties under the bill?

Mr Thomas—Could you repeat the start of your question? I missed the start.

CHAIR—Essentially, I am asking a question on testing. Have you done any testing of how an employer and a superannuation fund will manage the administrative arrangements in such a way as to be confident the employers can fulfil their obligations without risking the severe penalties in the bill? I am coming back to my problem with penalties again.

Mr Thomas—Certainly, we would be looking at that issue during the campaign that the tax office will be running. Part of that exercise will be sending the right messages to employers and employees to ensure that they understand what their obligations are—a simple process of steps that they need to go through to ensure that they meet their obligations and hence are not subject to the penalties that are contained in the bill.

CHAIR—If we have a situation where an employer failed to abide by the terms of the choice process and as a consequence an employee felt that he suffered detriment, who would compensate the employee?

Mr Boneham—The last provision in the bill, section 32ZA, says that an employer is not liable for damages—

CHAIR—He is not?

Mr Boneham—if he abides by the provisions of the act. In that case, he has not abided by the provisions of the act. Whether it would be compensatable under common law in that event—

CHAIR—Which means?

Mr Boneham—They would have to go to court and see if they can get compensation.

CHAIR—Who would?

Mr Boneham—The employee would obviously be suing the employer.

CHAIR—He would be suing the employer?

Mr Boneham—You would believe so.

CHAIR—So there is compensation, plus a penalty for avoidance. Is that right?

Mr Boneham—Once again, it is not definite that a failure to comply will raise a penalty. In the case of an honest mistake, you would believe that the employer will not receive any penalties.

CHAIR—Section 32ZA says:

Employers not liable for damages

An employer is not liable to compensate any person for loss or damage arising from anything done by the employer in complying with this Part.

Which part is it referring to?

Mr Boneham—The part in relation to the choice of fund obligations. Part 3A is about the choice of fund requirements, and it starts on page 8 of the bill.

CHAIR—He has done his best to comply and you say it goes to court, and then you tell us that it is an action between the employer and the employee, despite section 32ZA.

Mr Boneham—If he has complied with the act, he is not liable for damages.

CHAIR—It might be an inadvertent—

Mr Thomas—That is a matter that the court would take into account, you would expect.

CHAIR—In which case, he would then be liable.

Mr Thomas—If he has not complied with the law, there would be consequences for that. But if things that he has done are consistent with complying with the law, that section specifically provides that he is not liable for the things that he has done consistent with that part.

CHAIR—What is he likely to do to give rise to section 32ZA?

Mr Boneham—Offer choice and pay to any chosen fund or a default fund if there is no choice.

CHAIR—Say that again?

Mr Boneham—He has offered choice of fund by providing the standard choice form to his employees on time.

CHAIR—And they have exercised choice?

Mr Boneham—They have exercised choice and he pays to that chosen fund. In the event that the employee has chosen a fund and the employer does not pay to that fund, section 32ZA would not apply.

CHAIR—Okay. So we have a situation where a person, say, comes out of a defined benefit fund and goes into the fund of the choice of the employee. The fund goes belly-up and he comes back and says, ‘Well, I was unhappy with the reasons you gave me.’

Mr Thomas—Who says that?

CHAIR—The employee. He has to find a reason to sue the employer, so he says, ‘I’ve gone into a brummy fund, but I am told by my lawyer that you should have given me certain undertakings or requirements.’ What are the sorts of undertakings that should be given by the employer to the employee when that employee is going to exercise a choice and exit the fund?

Mr Thomas—If an employer, for example, provides advice to the employee about what fund they should go into instead of the default fund, then that is not something that is covered by 32ZA.

CHAIR—No, I am saying that a person has picked the wrong fund and he is looking for reasons to sue the employer, so he comes back to the employer and says, ‘If the information that you gave me that is required under the act before I leave a defined benefit fund was clearer or more comprehensible, then I wouldn’t have made this error.’ These are the sorts of things that people say.

Mr Boneham—The type of information must be provided in that case would be prescribed under regulation. If the employer has provided the information in compliance with the regulations, then section 32ZA would apply to them and they will not be liable for damages.

CHAIR—So you are now telling me that the sort of information is going to be in the regulations. What do you envisage the nature of that information to be?

Mr Boneham—It is information like the difference between a defined benefit fund and an accumulation fund, information on the type of benefit provided by that fund. We are also going to consultation on this, but it is information like the level of contributions which may be paid into the defined benefit fund as opposed to contributions which may be paid into the chosen fund.

CHAIR—Employers are really going to need a pretty standard sort of form.

Mr Boneham—This information will be provided by the defined benefit fund itself. The employers will request that from the fund.

CHAIR—It is the employer who has to provide the information?

Mr Boneham—The employer will provide the information but there will be a requirement that the fund provides it to the employer on request.

CHAIR—Will this be in the regulations?

Mr Boneham—This will be in the regulations.

CHAIR—So in the regulations the fund will be under a statutory obligation to provide the employer with a standard form outlining the various issues that must be communicated to the employee before the employee can exercise his choice?

Mr Boneham—Correct.

CHAIR—That is not easy. Okay, the employer is not liable under those circumstances. Coming back to interpretation—obviously you will disagree with me again on this one—section 32K(5)(b) says:

... the award does not provide that the employee may choose the fund to which contributions are made or provides that the employer must agree to any such choice ...

I might be wrong, but does this provision exclude an award fund that permits an employee to choose a fund that cannot be a default fund?

Mr Boneham—That is the purpose of that provision. It stops the situation where the award nominates, let us say, two funds and allows choice and the employer can then choose. If that provision was not there, the employer could technically choose a fund which was only chosen by one employee.

CHAIR—So the provision does exclude an award fund that permits an employee to choose a fund and that cannot be a default fund?

Mr Boneham—No, in that case they would fall through into the majority fund.

Mr Thomas—It does not of itself make it a default fund at the first test. The first test is: is it an award fund for that employee? But if that award fund provides the employee with a choice of funds within the award, then you move through to the second testing level, which is the majority fund. Because the employee can exercise that choice at the first level, it cannot become a default fund.

CHAIR—I run into the problem that I believe, really, to get your interpretation you have got to go elsewhere.

Mr Boneham—Section 5 says:

(5)A fund is a Commonwealth or Territory industrial award fund for an employee if:

- (a) a Commonwealth industrial award or a Territory industrial award requires the employer to make contributions to a fund on behalf of the employee; and
- (b) the award does not provide that the employee may choose the fund ...

So if it does provide an employee with choice of fund, then it does not fit the definition; it falls out straightaway.

CHAIR—That is where it does not fit the definition. That is the purpose of (b).

Mr Thomas—So it does not become a default fund.

CHAIR—In other words, that cannot be a default fund?

Mr Thomas—At that first test. This is a definition of Commonwealth or territory industrial award funds.

CHAIR—All right; that stands alone. So it does exclude on the first test. Where is the automatic linkage to give the movement from the first test to the second test, which I would have thought should have been in 32K(5)?

Mr Thomas—It is in section 32K(2).

Mr Boneham—Section 32K(2)(a) mentions ‘the selected Commonwealth or Territory industrial award’, so you would have to go to the definition of Commonwealth or territory industrial award in 32K(5).

Mr Thomas—There is a reference there to ‘see subsections (5) and (6)’.

Mr Boneham—So, if you have looked at (5) and (6) and it says it does not meet (5), then the ‘or’ would seem to automatically lead to the ‘employer’s selected majority fund’ in paragraph (b).

Senator CHERRY—If there are two funds mentioned in the award clause, does that automatically flick to the majority fund as well?

Mr Thomas—No; the only time it flicks to the majority is where there is specific employee choice provided in the award itself.

Senator CHERRY—But, as the chair said, if there were two funds plus choice, then it would flick out to the majority test.

Mr Thomas—Correct. So if there were 10 funds mentioned in there, the employer could choose one of those funds to be the default fund.

CHAIR—It also excludes awards which allow a choice but only with the approval of the employer.

Mr Boneham—That was put in after consultation with industry. They suggested that some awards currently have a provision which says you can exercise choice but only if your employer agrees to your choice, so it was to capture those award funds as well.

CHAIR—In their evidence to the committee, the ACCI have outlined that they believe there are certain problems associated with defined benefits scheme super funds which, according to their representations to the committee, should be such as to exclude them from the choice

regime. There are difficulties for them if you are exercising a choice regime where you are on a contribution holiday and what gets transferred. That is problem No. 1. Problem No. 2, which I have already raised, is the nature of the advice on the consequences of leaving. You have answered that. Depending on the numbers who leave, it could also raise the whole question of the viability of the defined benefits scheme. What is the employer contribution? Is it more, or less, than the superannuation guarantee? It is a bit of a grey area. It is clear when the actuaries do their evaluation, but on the way through during the three years there could be a number of grey areas.

So how do you advise us about the special problems of exercising choice in terms of an employer who is currently operating a defined benefits scheme in the following situations: there is a contribution holiday, the fund is substantially in surplus but there is no contribution holiday or the fund is in a market situation where it can no longer be a defined benefits fund because the actuarial reserve figure in terms of vested benefits is less than 100 per cent? In that case, it can no longer be a defined benefits fund. I am raising a whole lot of problems that could occur with choice in a volatile market such as we have at the moment. Can you help us?

Mr Thomas—To put it into context, the government's overriding principle is that an employer contributing to a defined benefits scheme should not have to pay superannuation guarantee twice for the one employee. Consequently, employers will be excluded from having to offer choice where they are deemed to have already met their superannuation guarantee obligations to a defined benefits fund because, for example, they are on a contributions holiday. However, contributions to a defined benefits scheme are not deemed to be exempt from choice simply because the scheme is in surplus; other conditions need to be met. That is why section 32V(2) is included in the choice bill. It sets out the conditions that a defined benefits scheme must meet for contributions to the scheme to be deemed to comply with choice. Those conditions are essentially that an actuarial certificate must state that the assets of the scheme are and will continue to be equal to or greater than 110 per cent of either the scheme's accrued actuarial liabilities or the scheme's vested benefits, whichever is greater, and an actuarial certificate must state that the employer is not required to make contributions to the fund for the quarter.

These are new actuarial certification requirements and, as with all actuarial certification, it will be up to the individual actuary to make a judgment on whether a scheme meets the relevant requirements, taking into account relevant factors such as market conditions and expected changes in scheme membership. The costs involved in assessing whether a particular scheme meets the relevant requirements would vary depending on the financial position of the scheme. For example, it would be less costly to assess a scheme whose assets are far in excess of the requirements. These costs will of course be voluntary and will only be incurred if the defined benefits scheme seeks to be exempted from choice. An actuarial certificate stating that the defined benefits scheme has and is expected to have a sufficient surplus to provide 110 per cent coverage of the scheme's relevant liabilities would only be valid for a maximum of 15 months after it is issued. In essence, this requires virtually annual certification.

The SI(S) regulations may specify conditions relating to the certificate, stating that the employer is not required to make contributions. Any regulations will be determined in consultation with interested parties. It is important to note that there is no need for a scheme's position to be retested during the maximum 15-month period for which an actuarial certificate

has been provided, even if there is a downturn in investment markets, as the actuary would have taken investment market factors into account in preparing the certificate. However, it would always be open to the employer or the actuary to initiate a review during this period if they had concerns. Once the legislation is passed, the government would be consulting further with the Institute of Actuaries with a view to the issuing of a guidance note on these new certification requirements.

CHAIR—So we are going from a situation where an actuary's certificate is given every three years to one where it is likely to be given annually? Is that right?

Mr Thomas—If they wanted to take advantage of these provisions, yes. The actuarial certificate would have a maximum life of 15 months.

CHAIR—So if it has got a life of only 15 months, they are obliged to do it basically annually, aren't they?

Mr Thomas—Yes.

CHAIR—That is point 1. Point 2: how could you expect an actuary to envisage a situation such as we have at present where there is such market volatility and such downward movement on Wall Street?

Mr Thomas—That is what actuaries are there for: to take account of what has happened and what is likely to happen. If an actuary has concerns at any point in time, it is open to them or the employer to revisit the issue and determine whether it still meets the conditions in the legislation to enable an exemption from choice. There is also that buffer of 110 per cent.

CHAIR—They are becoming very vulnerable to the whims of the market, aren't they?

Mr Thomas—They are always subject to what the market does, because it is the employer that bears the risk in defined benefit funds. The actuary certifies the level of contributions that they make over that three-year life at present, and he takes account of what the risks are, the nature of the membership et cetera.

CHAIR—What has been the experience of employers choosing super funds under the superannuation guarantee since 1992? Have any significant issues or problems come to your attention?

Mr Thomas—Mr Murtagh, do you want to answer that in terms of enforcement of super guarantee?

Mr Murtagh—I have not prepared for that question.

CHAIR—Would you like to take it on notice?

Mr Murtagh—I would have to take it on notice, yes.

CHAIR—What is the rationale for including industrial relations issues in the default fund model, given that these were not included in the superannuation guarantee legislation?

Mr Thomas—I do not accept that there are industrial relations issues in the choice of fund legislation. I do not quite understand what you mean by that.

CHAIR—Some outworkings of the workplace relations system can override the choice arrangements, but others cannot. For example, Australian workplace agreements and certified agreements can, whereas awards cannot. That is the basis of my question.

Mr Thomas—It is quite clear why there is an exemption for certified agreements and AWAs. If superannuation is covered in the process of entering into those agreements between employers and employees, the parties have exercised a choice in relation to that matter. That is why it is included within the individual or collective agreement.

CHAIR—To clarify what was said earlier about the penalty regime for choosing an incorrect fund under the default arrangements, these are per employee—

Mr Thomas—Per breach.

CHAIR—They are per breach, and it is a strict liability offence.

Mr Thomas—Yes.

CHAIR—What would happen in terms of breach if, for example, a third party such as an award fund made a complaint? I know the tax office have a discretion about prosecuting for breach in relation to default fund rules, but what would happen if a third party were to lodge a complaint? Would the ATO have to prosecute?

Mr Thomas—I do not think a third party would have standing in such a matter.

CHAIR—They might say they have standing if they have got some coverage in terms of an award.

Mr Thomas—The affairs that are being regulated are those between an employer and an employee; I do not see the relevance of a third party in the issue.

Mr Boneham—The bills says that, if there are two funds nominated in the award, the employer can choose either of those funds.

CHAIR—Yes, but what if you have one as the default fund but you have some employees in one of the other industrial awards?

Mr Boneham—If they are existing employees that fund will remain their default fund.

CHAIR—We are running out of time, so I will ask you to take this question on notice: what happens if the employer-selected majority fund is not a suitable fund but an employee does not

exercise choice? Can anybody tell her or him what happens if the employer-selected majority fund ceases to be suitable, ceases to perform or loses its insurance as a result of changes? If not, is there any way a more suitable fund can be chosen? This seems to be quite a critical issue.

Mr Boneham—It certainly is a problem if they lose insurance.

CHAIR—Could you take that on notice, please? I have a time problem.

Senator CHERRY—I have a couple of quick questions. There has been a lot of discussion in this hearing about disclosure of fees and charges. Are you looking at any standards for how to disclose the relevant interest rate or rates of return?

Mr Rosser—On the superannuation funds?

Senator CHERRY—That is right: are you looking at any standards in terms of disclosure materials that are provided to people—the PDSs and so forth?

Mr Rosser—Not in addition to the regulations that were disallowed on the 16th. The underlying obligation remains in the law. As for the presentation, that is ultimately a matter for each individual superannuation fund. I think there are also two issues here. One is the disclosure contained in the product disclosure statement, the at-entry document, and the other is the disclosure made in the annual member statement. Was that what you wanted to know?

Senator CHERRY—When a member is faced by a standard choice form, what will be disclosed to them for the purposes of determining what interest rate is payable on that fund?

Mr Rosser—Going from memory, I understand that the rate of return or the crediting rate from the fund is one of the matters that would be in the annual member statement.

Senator CHERRY—Could you check that and get back to us?

Mr Rosser—Certainly.

Senator CHERRY—Particularly in the absence of the regs that were disallowed on Monday and how that affects it.

Mr Rosser—I can certainly clarify that the regulations were in relation to product disclosure statements, so they did not deal at all with annual member statements.

Senator CHERRY—My other question refers back to the portability paper. Presumably, if we are going to move to portability it will obviously involve funds carrying a lot more cash. Has there been any assessment of the impact that that may have on long-term returns from funds?

Mr Brake—Briefly, a lot of funds would already have quite a few liquid assets which are relatively easy to sell—obviously including cash but also other assets which are highly marketable, such as shares and so on. That includes, for example, a number of other non-

superannuation mutual type funds where already, typically, you can get your money out of those funds at very short notice.

Senator CHERRY—But wouldn't it be the case, if you move to portability or even to choice—which obviously carries with it more emphasis on portability—that funds would be expected to carry more liquid assets? Wouldn't that then have an impact on returns?

Mr Brake—I do not know if we have done any specific analysis on that.

Senator CHERRY—Could you check that and get back to us?

Mr Brake—Yes.

Senator CHERRY—My last question is: is there a concern at all about the impact on economic growth of a choice regime, particularly the emphasis it would have on short-term rates of return and how that may be advertised? Have you considered the broader economic impact of a choice regime in terms of investment here in Australia?

Mr Thomas—I am not sure that would have any particular impact.

Senator CHERRY—If funds become more short-term so as to have that highest possible rate of return, then that would suggest there would be less investment in patient capital, venture capital et cetera.

Mr Thomas—Certainly, return will be an important element in people's decisions as to whether or not to stay with their fund or move to another fund, but it would be one factor. I think there would be many other factors that people would take into account, like the other services, the level of insurance—if that is what they need—costs and everything else. Return would be a factor but I am not sure it would be an overriding factor. People would look at the totality of the offerings of the super fund.

CHAIR—It being 5.30 p.m. we have to close the meeting. Thank you very much to all of the witnesses for appearing before the committee.

Subcommittee adjourned at 5.30 p.m.